



Swansea University
Prifysgol Abertawe



Cronfa - Swansea University Open Access Repository

This is an author produced version of a paper published in:
Journal of International Maritime Law

Cronfa URL for this paper:
<http://cronfa.swan.ac.uk/Record/cronfa38536>

Paper:

Baughen, S. (in press). Demurrage time bars.. *Journal of International Maritime Law*

This item is brought to you by Swansea University. Any person downloading material is agreeing to abide by the terms of the repository licence. Copies of full text items may be used or reproduced in any format or medium, without prior permission for personal research or study, educational or non-commercial purposes only. The copyright for any work remains with the original author unless otherwise specified. The full-text must not be sold in any format or medium without the formal permission of the copyright holder.

Permission for multiple reproductions should be obtained from the original author.

Authors are personally responsible for adhering to copyright and publisher restrictions when uploading content to the repository.

<http://www.swansea.ac.uk/library/researchsupport/ris-support/>

Demurrage time bars

Simon Baughen. Professor Shipping Law. Institute of International Shipping and Trade Law, Swansea University.

Demurrage time bars are a commonplace in tanker charterparties. Such clauses require owners to submit their demurrage claim, together with supporting documents, within a specified time (usually 90 days) following completion of final discharge. If this is not done charterers' liability is to be extinguished. The commercial intention behind such clauses is to enable demurrage claims to be investigated and, if possible, resolved while the facts are still fresh. Over the last ten years the construction of such clauses has become before the courts on a number of occasions, with approaches varying from a requirement of strict compliance to "a requirement of clarity sufficient to achieve certainty". Getting the presentation of the demurrage claim wrong, or failure to present the correct documents will have disastrous effects for owners. This article reviews the operation of the demurrage timebar clause in the light of these decisions with the aim of providing guidance to owners; and to charterers.

Most tanker charterparties now require owners to present charterers with their demurrage claims, together supporting documentation, within a specified period of time of completion of discharge. If this is not done, the charterers' liability for demurrage is extinguished. For example, cl.15(3) of Pt II of Shellvoy 6 provides that: "Owners shall notify Charterers within 60 days after completion of discharge if demurrage has been incurred and any demurrage claim shall be fully and correctly documented, and received by Charterers, within 90 days after completion of discharge. If Owners fail to give notice of or to submit any such claim with documentation, as required herein, within the limits aforesaid, Charterers' liability for such demurrage shall be extinguished." Many such clauses extend the presentation requirements to other claims¹, such as those for detention. The clause is in the nature of a

¹ See, for example, the very wide provisions in the various BPVoy forms, most recently BPVoy 5, cl.39 which provides:

39.1 Any claim Owners may have against Charterers under this Charter must be presented to Charterers in writing with a) the basis of the claim under the Charter being identified and b) all supporting documentation substantiating each and every part of the claim.

39.2 Claims against Charterers will be extinguished and the Charterers shall be discharged and released from liability unless presented in full compliance with the requirements of Clause 39.1, in the case of claims for demurrage, deviation or detention, within 90 days of completion of discharge, or, in the case of any other claim, within 180 days of completion of discharge.

limitation clause² and is not connected with the process of commencing arbitration.³ Accordingly, in *The Oltenia* it was held that s.27 of the Arbitration Act 1950 did not empower the court to extend the time limits provided in the charter for presentation of a demurrage claim.⁴ It is, therefore, crucial to owners that they comply with the requirements of the clause and submit their demurrage claim and the required documentation within the time specified.

The classic statement of the purpose and effect of such a clause is that of Bingham J in *The Oltenia*:

The commercial intention underlying this clause seems to me plainly to have been to ensure that claims were made by the owners within a short period of final discharge so that the claims could be investigated and if possible resolved while the facts were still fresh (cf. *Metalimex Foreign Trade Corporation v. Eugenie Maritime Co. Ltd.*, [1962] 1 Lloyd's Rep. 378 at p. 386, per Mr. Justice McNair). This object could only be

The time bar for 'any other claim' is not all-encompassing and in *Odjell Seachem A/S v Continentale des Petroles et D'Investissements (The Bow Cedar)*, [2004] EWHC 2929 (Comm); [2005] 1 Lloyd's Rep 275, was held not to cover owners' damages claims against charterers following their repudiation of the charter, as there would be no 'completion of discharge' to start time running.

² *Waterfront Shipping Co Ltd v Trafigura AG (The Sabrewing)* [2007] EWHC 2482 (Comm); [2008] 1 Lloyd's Rep 286, per Gloster J [15]. In case of ambiguity the *contra proferentem* principle will be applied in favour of owners, as was the case in *Pera Shipping Corporation v Petroship SA (The Pera)* [1985] 2 Lloyd's Rep. 103.

³ The time limit for commencing arbitration will be six years from the date at which the cause of action accrues. In *Lips Maritime Corp v President of India (The Lips)* [1988] A.C. 395, at 422-3, Lord Brandon stated: "In the absence of any provision to the contrary in the charter the charterer's liability for demurrage accrues *de die in diem* from the moment when, after the lay days have expired, the detention of the ship by him begins ..." If demurrage accrues on a day to day basis, each day would have the accrual of a separate cause of action. However, it is likely that the six year time bar under the Limitation Act would start to run from the completion of discharge. See, *Glencore Energy (UK) Ltd v Sonol Israel Ltd (The Team Anmaj)* [2011] EWHC 2756 (Comm) [6]; 2011 2 Lloyd's Rep 697.

⁴ *Babanaft International Co SA v Avant Petroleum Inc (The Oltenia)* [1982] 1 Lloyd's Rep. 448 (QB); 1982] 2 Lloyd's Rep 99 (CA). The court rejected owners' argument argued that the effect of the clause was to bar claims after 90 days if its conditions were not fulfilled, that if the claim was barred, there would be nothing left to arbitrate and therefore the clause limited the time for the commencement of arbitration proceedings; and also that presenting a claim with all available supporting documents itself be regarded as a step to commence arbitration proceedings. The power to grant extensions of time in arbitrations is now to be found in s.12 of the Arbitration Act 1996 which is more restricted than s.27. Similar reasoning would apply to the court's discretion to extend time under s.33 of the Limitation Act 1980.

achieved if the charterers were put in possession of the factual material which they required in order to satisfy themselves whether the claims were well-founded or not. I cannot regard the expression "all available supporting documents" as in any way ambiguous: documents supporting the owners' claim on liability would of course be included, but so would a document relating to quantum only, just as a doctor's bill would be a document supporting a claim for damages for personal injury. The owners would not, as a matter of common sense, be debarred from making factual corrections to claims presented in time (as they have done to the claim in par. 12 (A)), nor from putting a different legal label on a claim previously presented, but the owners are in my view shut out from enforcing a claim the substance of which and the supporting documents of which (subject always to de minimis exceptions) have not been presented in time.⁵

Almost every subsequent decision on demurrage timebars has taken this statement as the starting point of its analysis. However, the conclusions reached by the judges have differed markedly. In this paper, I shall examine the operation of demurrage time bar clauses by looking at their constituent elements: the claim; the documentation required; the presentation required; the problems with composite claims. I shall also examine whether such clauses are brought into other related contracts, such as contracts of sale, and contracts contained in or evidenced by bills of lading, incorporating the provisions of the charterparty. I shall conclude by considering the possible role of estoppel in mitigating the effect of these clauses.

(i) The claim

The first requirement is that owners must present their demurrage claim within the stipulated time.⁶ The claim may subsequently varied, provided that its substance has been presented within time. The quantum of a demurrage claim that is presented in time may subsequently be increased after the expiry of the submission deadline. In *Mosvolds Rederi A/S v Food Corp of India (The Arras and The Hoegh Rover) (no.2)*⁷ the charter provided for arbitration proceedings and claims were to be made within one year of discharge. The owners claimed

⁵ [1982] 1 Lloyd's Rep 448, 453 col 1. Aff'd [1982] 2 Lloyd's Rep 99.

⁶ Additionally, cl.15(3) of Shellvoy 5 requires notification in general terms within 60 days as to whether demurrage has been incurred.

⁷ *Mosvolds Rederi A/S v Food Corp of India (The Arras and The Hoegh Rover) (no.2)* [1989] 1 Lloyd's Rep.

demurrage and commenced arbitration in 1975, within the one year period. However, the hearing did not take place until 1987 by which time there had been the decision in *The King Theras*⁸ which had set out a revised method of calculating demurrage under the charterparties in question. Owners increased the quantum of their claims to reflect this. The revised claims were not new claims, but reformulated claims and Evans J. held that they fell within the scope of the arbitrators' jurisdiction in respect of the original dispute. Similarly, in *London Arbitration 18/91* a demurrage claim was not barred where a fully supported claim was presented in time but was subsequently revised.⁹ The claim was the same, incurred in the same circumstances, but its calculation had been revised. The original claim had - erroneously in the tribunal's view - given the charterers credit for half of considerable periods of fog, as well as berthing and pilotage allowances to which the charterers were not entitled because the ship was on demurrage. There was no new cause of action, and no new "claim". Nor could owners be said to have been estopped from revising their calculations after the deadline for submission of the claim. There had been no prejudice or alteration of the charterers' position. The charterers had been given full supporting documentation within time, and when they had to be regarded as being as capable as the owners of correctly interpreting the charter provisions and thus having the chance of being aware, from an early stage, of just how much demurrage the owners were entitled to, whether or not they were claiming it at that stage.

By contrast, the revised claim presented by the cif seller to their buyer in *The Harriette N*¹⁰ went beyond a mere reformulation of the original claim. Statoil, the seller, presented a demurrage claim to their buyer LD in the sum of US\$137,694.50, along with supporting documents. Statoil, however, had seriously underclaimed for demurrage because they had erroneously thought that discharging had been completed, and therefore that laytime had ended, on 13 October 2006 instead of 24 October 2006. Their buyer knew of this mistake, but decided not to alert Statoil. The parties settled the demurrage due at \$103,527.84, and then, when Statoil realised their mistake, in February 2007, they claimed US\$549,360.96, together with supporting documents. The following month there followed a telephone conversation between the parties during which Statoil argued that they had orally agreed that LD would pay \$539,360.96 demurrage, less the sum already settled, something

⁸ *Mosvolds Rederi A/S v Food Corp of India (The King Theras)*[1984] 1 Lloyd's Rep 1 (CA).

⁹ *London Arbitration 18/91* (1991) 308 LMLN 4

¹⁰ *Statoil ASA v Louis Dreyfus Energy Service LP (The Harriette N)* [2008] EWHC 2257 (Comm); [2008] 2 Lloyd's Rep 685.

which LD denied. J Aikens J held that the charterparty demurrage time bar was not incorporated into the sale contract and that the second demurrage settlement was valid and superceded the first. Aikens J went on to hold that had there not been such an agreement, and had the 90 day demurrage time bar clause been incorporated into the sale contract, the February 2007 claim would have been barred.¹¹ Aikens J rejected the argument that the February 2007 claim was simply a reformulation of the demurrage claim initially advanced, because: “[t]he time bar provision refers to "any claim", which is very broad. It is, in my view, impossible to restrict the width of that wording so as to permit a "reformulated" claim, which is four times the size of the original, to be admitted over 90 days after completion of discharge.”¹²

The question of whether a claim was a reformulated version of a claim submitted within time, or a new claim submitted out of time came before the Court of Appeal in *The Abqaiq*.¹³ The case involved a charter for a voyage from Freeport, Bahamas, to Singapore on BPVoy 4 form. As well as the usual laytime and demurrage provisions the charter contained the Vitol Interim Port clause, which provides: "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. The reasonable, estimated costs will be payable as an on account payment together with freight, followed by final invoice plus all supporting documents as soon as possible but not later than ninety (90) days after completion of this voyage."

This caused some confusion as to how time used at Freeport was to be calculated, with knock-on effects on the calculation of laytime and demurrage at Singapore. The vessel initially loaded at Freeport by ship to ship transfer and from shore tanks, following which, at 0136 11 Feb 2008 ,hoses were disconnected and the vessel left the berth to drift off Freeport pending arrival of another vessel from which she would load further cargo. The vessel reberthed at 0300 17 Feb and carried on loading until disconnection of hoses at 1312 on 18

¹¹ Aikens J held that the first settlement had been valid, notwithstanding LD's knowledge of Statoil's mistake, but that it had been superseded by the later oral agreement.

¹² [115].

¹³ *National Shipping Co of Saudi Arabia v BP Oil Supply Co (The Abqaiq)* [2011] EWCA Civ 1127; [2012] 1 Lloyd's Rep. 18. [2010] EWHC 3043 (Comm);

Feb. Owners claimed the entire period from 11-18 Feb fell under the Vitol Clause as a second berthing, and that charterers should pay for the whole of this time at the demurrage rate, together with cost of bunkers consumed during this period.

After completion of discharge owners issued two invoices to charterers. The first, on 31 March, was a “supplementary” invoice for “Time consumed for 2nd berthing at Freeport” from February 11–18 and for bunkers consumed in that period, and was accompanied by relevant documentation. Owners made no reference to the Vitol Interim Port clause in either the invoice, the supporting documentation, or their covering email. The charterer’s employee who received the invoice regarded the claim as a demurrage claim and forwarded the documentation to the charterer’s demurrage group for review. The second, on 2nd April, was a demurrage invoice for 4.5833 days, “Combine All ports”. This was based on a cessation of laytime at Freeport on 11 February and its resumption at Singapore at which time there was three days, four hours, 24 minutes unused laytime on arrival. In June 2008 an amended demurrage invoice for 4.5375 hours “Combine All ports” was later agreed and paid by the charterers. Owners pressed for settlement of the supplementary invoice and were told that it represented a claim for demurrage, and that the demurrage claim had already been settled under the amended demurrage invoice.

Owners subsequently abandoned the claim under the supplementary invoice based on the Vitol Interim Ports clause and commenced arbitration, reformulating their demurrage claim to reflect this. With laytime continuing to run at Freeport after 11 February, the total claim for demurrage now amounted to 4.3 days at Freeport and 7.8292 days at, Singapore, taking account of the fact that the vessel was already on demurrage at arrival there.¹⁴ From this owners deducted the amount already paid by charterers under the amended demurrage invoice. The amended demurrage claim was presented well outside the 90 day limit specified in the charter.

Field J found that owners’ revised demurrage claim was a different claim from that initially presented.

¹⁴ Owners also claimed the cost of bunkers used at Freeport between 0330 11 February and 0300 17 February under clause 5.2 or clause 5.3.

the claim made in the Time and Bunkers Invoice is not to be regarded as substantially the same claim as the demurrage claim now advanced. On the contrary, the Time and Bunkers Invoice deliberately advanced a claim not for demurrage, but for additional freight under the Vitol Interim Ports Clause. Thus: (i) the claim was in respect of the period of 7.445 days between 03.30 on 11 February 2008 and 18 February 2008 at the loadport, with no reference being made to the running of laytime or to when laytime was alleged to have expired; (ii) the documents sent with the claim were not demurrage-type documents; (iii) the invoiced sum includes an element for bunkers, whereas there is no liability for bunkers under a demurrage claim; (iv) the trigger points for the start and the end of the claimed period (ie vessel line away) are the trigger points under the Interim Port Clause and not the trigger points for a demurrage claim (under clause 7.3.3 laytime and demurrage run until the disconnection of hoses).

The Court of Appeal overruled Field J.'s finding that the demurrage claim was barred by cl. 20. Owners were not debarred from putting a different legal label on part of the claim, the substance of which was presented in time. Charterers appreciated that, properly analysed, the detention claim at the demurrage rate put forward by the supplementary invoice, ignoring the bunker element, was a claim for demurrage. The proper approach to the time bar clause was a requirement of clarity sufficient to achieve certainty rather than a requirement of strict compliance which, if applied inflexibly, could lead to uncommercial results. Tomlinson LJ concluded:

Drawing the threads together, in my judgment the charterers had received from the owners within the 90-day period, in the shape of the two invoices of 31 March and 2 April, a claim in writing for either damages for detention measured at the demurrage rate or straightforward demurrage in respect of the periods spent at Freeport and Singapore after 01.36 on 11 February 2008, subject only to the claim being properly drawn up in accordance with the charterparty provisions and by reference to the events recorded in the demurrage reports. The claim was wrongly drawn up because it scored the laytime unused as at 01.36 on 11 February 2008 at Singapore rather than at Freeport, but that did not prevent the charterers from appreciating, as in fact they did, that the owners had a valid claim for demurrage in respect of the substantial period beyond her laytime for which the vessel was detained at the two ports. The owners are

not debarred from now putting a different legal label on part of the claim, the substance of which was presented in time.¹⁵

The limits of reframing a demurrage claim outside the time bar period are shown in *The Eagle Valencia* where owners submitted a demurrage claim based on laytime starting with NOR given on 15 January. After the 90 days charterers advised that the NOR was invalid. Owners then pointed to a second NOR they had sent on 16 January and argued that although this had not been presented with the claim, charterers had already received the document and had it in their possession. The insuperable difficulty for owners was that they had not made any assertion within the 90 days of the alternative that time began to run on 16 January and had not presented the document necessary to support that claim. Walker J, whose decision on this point was upheld in the Court of Appeal, stated:

“It is fundamental to any demurrage claim that the stage when time started to run for the purposes of the claim is clearly identified. The documentation submitted to charterers clearly identified a claim that time started to run at Escravos six hours after the original NOR was tendered. There was no hint whatever that owners had a claim that time started to run six hours after one or other of the emails of 16 January 2007. It follows that owners are barred from asserting any such claim now.”¹⁶

By contrast, in *The Abqaiq* the charterers had regarded owners’ claim under the Vitol clause as a demurrage claim and had received the necessary supporting documentation within the 90 day limit.

(ii) Supporting documents

¹⁵ [65].

¹⁶ *AET Inc Ltd v Arcadia Petroleum Ltd (The Eagle Valencia)* [2009] EWHC 2337 (Comm); [2010] 1 Lloyd’s Rep. 593. (CA) [2010] EWCA Civ 713; [2010] 2 Lloyd’s Rep 257. Walker J had found that the first NOR was valid, but found that, had it not been valid, the owners’ demurrage claim based on the second NOR would have been barred as that NOR had not been submitted to charterers within the 90 day limit.

The owners must submit their claim and the specific documentation referred to in the clause within the specified time limit. A requirement to present original documents will not be satisfied by submission of copies.¹⁷ If the documents are in existence they must be presented with the claim within the time limit.¹⁸ This may present difficulties when it is the disponent owners who are making a demurrage claim, as was the case in *London Arbitration 11/90*.¹⁹ Disponent owners argued that the claim should not be barred as they had not received the relevant documents from the agents at the loading port within the 90 day period. However, the tribunal held that the claim was time-barred. Had owners pressed the charterers' agents harder or approached the registered owners earlier they would have been able to obtain the necessary documents.

The most important documents will be a valid notice of readiness and the statement of facts.²⁰ A valid notice of readiness will be an essential document that has to be presented within the specified deadline. In *The Eagle Valencia*²¹ the vessel was chartered on the Shellvoy 5 form. The shipowners submitted their demurrage claim within 30 days and after 90 days the charterers rejected it on the grounds that the NOR was invalid under cl.22 because free pratique had not been granted until more than six hours after NOR was given.

¹⁷*London Arbitration 8/01* (2001) 560 LMLN 2. In contrast, there is a brief report of an arbitration in the Britannia Club's online publication 'Risk Watch. Claims and Legal' of 1 August 2014 where the tribunal held that tender of copy documents was acceptable. The arbitrators concluded that since charterers had been properly informed about the demurrage claim and had received copies of all the appropriate documents within the 90 day period, the demurrage claim was valid and was not time barred.

¹⁸ In *London Arbitration 18/89* (1989) 254 LMLN 4, the clause provided: "Demurrage, if any, shall be payable by the charterer against owners' invoice supported by notices of Readiness and Statements of Facts from loading and discharge ports duly signed by shippers/receivers respectively." The tribunal noted that there had to be read into the second sentence of the clause the qualification, after the recital of the required documents, "if such exist". Similarly, in *The Sabrewing* Gloster J stated that where the clause required presentation of documents signed by the terminal, if owners could not obtain the signatures within the 90 days they could present letters or protest instead.

¹⁹ *London Arbitration 11/90* (1990) 285 LMLN 3(2).

²⁰ For indemnity provisions on demurrage in sale contracts, the most relevant documents will be owners' demurrage claim and invoice. Failure to provide these documents in time led to the claim being barred in *Mabanaft International Ltd v. ERG Petroli S.p.A. (The Yellow Star)* [2000] 2 Lloyd's Rep 637. Central London County Court Business list.

²¹ *The Eagle Valencia* [2010] EWCA Civ 713; [2010] 2 Lloyd's Rep. 257.

Charterers contended that time did not start to run until the vessel berthed.²² The shipowners submitted an alternative claim based on a second NOR given after the vessel obtained free pratique, while still waiting to berth, but the Court of Appeal held that this claim was time barred by cl.15(3).²³ The shipowners' initial demurrage claim had not been "fully and correctly" documented in that the shipowners had attached a copy of the initial, invalid NOR, and had not included a copy of the second, valid, NOR.²⁴ Longmore LJ stated:

In the present case it might well be fair to say that the substance of the owners' claim was presented in time inasmuch as it was always clear that they were claiming that a particular number of days and hours had been spent at Escravos when no berth had been accessible for the vessel. But an essential document in support of every demurrage claim is the notice of readiness and, if the only notice of readiness submitted is a contractually invalid notice, the claim cannot be said to be "fully and correctly documented" within the wording of clause 15(3). That is not necessarily to say that alternative laytime statements and invoices would always have to be submitted to avoid the extinction of an alternative claim but merely to say that the documents to be submitted pursuant to the clause must include a valid notice of readiness. It is not unreasonable for charterers to require such a notice nor is it unreasonable to expect owners to supply it.²⁵

If the time-bar clause requires owners to submit *all* supporting documentation, they will be required to submit all documentation that is relevant to their demurrage claim. The owners failed to do this in *The Adventure* where the vessel was chartered on BPVoy 4 form.²⁶ The tribunal held that the demurrage claim was partially barred under clause 19.7.3 in relation to the claim for "additional time" under the pumping warranty, and wholly barred

²² The parties subsequently debated in correspondence about demurrage prior to berthing but could not agree. Charterers made a payment of US\$193,500 and no more on account of demurrage.

²³ "Owners shall notify Charterers within 60 days after completion of discharge if demurrage has been incurred and any demurrage claim shall be fully and correctly documented, and received by Charterers, within 90 days after completion of discharge. If Owners fail to give notice of or to submit any such claim with documentation, as required herein, within the limits aforesaid, Charterers' liability for such demurrage shall be extinguished".

²⁴ Some London arbitration decisions have shown a more flexible approach to whether a notice of readiness needs to be presented within the time specified.

²⁵ [30].

²⁶ [2015] EWHC 318 (Comm); Lloyd's Law Reports, [2015] 1 Lloyd's Rep. 473. *Kassiopi Maritime v Fal Shipping Co Ltd*.

under clause 20 because of the failure to submit: “(1) The port log and time sheets kept as referred to in the Letters of Protest;(2) A manuscript note on an email, made by Captain Karalexis, that the Master had received free pratique by VHF at Port Sudan.”

Clause 20.1 required a claim in writing to be presented to charterers within 90 days of completion of discharge, “together with all supporting documentation substantiating each and every constituent part of the claim.” The owners did not submit a port log and time sheet but submitted, however, that these documents were not required as all the information required for the purpose of the demurrage claim was set out in the signed statement of facts. As the documents provided substantiated “each and every constituent part of the claim” owners were not required to provide additional documentation which would simply provide further substantiation. Hamblen J rejected this argument. All supporting documentation had to be provided, including the port log and time sheet which were the tribunal had found to be relevant to owners’ demurrage claim. He also rejected the argument that only ‘essential’ documents, which generally means the NOR and statement of facts, had to be provided.²⁷

Hamblen J noted that:

Where the owners have available documentation from the load and discharge ports such as port logs and time sheets those are, as the tribunal found, “relevant” to the claim made. In the present case that is specifically borne out by the fact that the letters of protest relied upon refer to delays and stoppages recorded in the port log/time sheets. As such they are clearly supporting documentation for the claim made. In any event I consider they are primary documents containing factual material which should be made available to the charterers so that they may satisfy themselves that the claim is well founded, consistent with the purpose of the clause.²⁸

Owners had also failed to submit the master’s email of 22 July 2011. Although this was secondary documentation which would not normally be required, here it was required, as evidence of when free pratique was granted which was important to the start and proper calculation of laytime.

²⁷ Owners’ argument here was based on the statement of Longmore LJ *The Eagle Valencia* that “an essential document in support of every demurrage claim is the notice of readiness” [30] and to the statement of Tomlinson LJ in *The Abqaiq* “In the present case no essential document was missing from those presented . . .” [64]. However, in neither of these passages was the court seeking to define what documents are required to be presented under the clause.

²⁸ [41].

Additional documentation may be specified in relation to the claim for additional time under the pumping warranty. This is the case with the BPVoy forms which have a separate clause specifying the documentation needed to support a claim for additional time. The relationship between these two clauses was considered in *The Sabrewing* the vessel was chartered on BPVoy 3 form.²⁹ Clause 16 provided. “Charterers will not consider any claim by Owners for additional time used in the foregoing circumstances in the absence of the provision by Owners of the following documentation:

- (a) an hourly pumping log, signed by a responsible officer of the Vessel and terminal or Charterers' representative, showing the pressure maintained at the manifold throughout discharge and, in the absence of a signature from a terminal or Charterers' representative, a Note of Protest;
- (b) copies of all Notes of Protest issued or received by the Vessel in relation to the discharge in question; and
- (c) copies of any other documentation generated by the Vessel or by the shore receiving terminal relevant to the discharge in question.”

Clause 23 required a claim in writing to be presented to charterers within 90 days of completion of discharge “together with supporting documentation substantiating each and every constituent part of the claim”. Owners purported to submit the pumping logs within the 90 days but the documents presented were not their face described as pumping logs and were unsigned. Charterers rejected owners’ composite demurrage clause in its entirety, due to the failure to present a signed pumping log as required by cl.16(a). Owners argued first that there was no link between the documentary requirements in cl. 16, which made no reference to presentation within a specific time, and those in cl. 23. Under cl. 23 owners were required to provide the usual documents to evidence a demurrage claim, such as NOR and a statement of facts, but they were not required to provide pumping logs. Their claim was not dependent on the pumping logs which might be relevant to a defence by charterers to owners’ demurrage claim but not to the demurrage claim itself. Breach of the pumping warranty amounted to an exception to laytime and the burden of proof was on charterers to prove that exception.

²⁹ *Waterfront Shipping Co Ltd v Trafigura AG (The Sabrewing)* [2007] EWHC 2482 (Comm); [2008] 1 Lloyd’s Rep 286.

Gloster J rejected this argument. Any claim for demurrage while discharging beyond the 24 hours was a claim for “additional time” and formed part of owners’ demurrage claim. Without the pumping logs owners could not justify their claim for this “additional time”. Clause 16 was linked with cl. 23 by identifying some of the necessary “supporting documentation” for the purposes of that clause. The possible difficulties of obtaining some of this documentation, such as that specified in cl. 16(c), were more imagined than real.

If the terminal had not "generated" a document "relevant to the discharge in question", in the sense of producing it upon requests by the vessel within the 90-day period, owners would hardly have come under an obligation to produce it, as opposed to a note of protest. The clause would not be construed as imposing an obligation upon owners to produce documents that it was realistically impossible for them to obtain from the terminal within the 90-day period.³⁰

Owners also argued that their failure to supply signed pumping logs was *de minimis* and therefore legally irrelevant. The pumping logs provided by owners were obviously the vessel's documents owners’ failure to sign them was of little significance and had not prejudiced charterers, and, indeed, owners could sign the documents now. Gloster J rejected this argument. The signature of a responsible officer of the vessel was obviously important to show that such a person was prepared to put his name to the document to confirm its accuracy, to authenticate it and to prove its provenance. Only in very special circumstances, which did not exist here, would the *de minimis* principle apply to a document that was expressly required to be produced by the contract and was plainly relevant.³¹

The BPVoy form clause on “additional time” also contains a general provision as to the documentation owners must supply. In BPVoy 4 this is cl. 19.7.3 which requires presentation of “copies of all other documentation maintained by those on board the Vessel or by the Terminal in connection with the cargo operations.”³² In *The Adventure* Hamblen J interpreted this as referring to contemporaneous records kept by the vessel relating to the

³⁰ [22].

³¹ In *The Yellow Star* Judge Hallgarten QC found that the *de minimis* principle had no application in relation to a failure to provide a document which was plainly relevant.

³² The equivalent provision in BPVoy 3 is cl. 16(c) which refers to: “copies of any other documentation generated by the Vessel or by the shore receiving terminal relevant to the discharge in question”.

cargo operation of which the pumping log would be the most obvious example. However, the clause did not require the owners to provide copies of all documents which they would be required to disclose in an arbitration reference, but focussed on documents that were required to be kept or compiled on an ongoing, rather than a “one-off” basis. Had he ruled in owners’ favour on compliance with cl.20 he would have remitted to the arbitrators the issue of whether the port logs and time sheets in this case were such records

(iii) presentation

The requirement that the claim and documents be “presented” to charterer obliges owners to ensure that the charterers receive such documentation within the specified time limit. In *London Arbitration 25/92* the charter contained a clause requiring presentation to charterers in writing within 90 days of completion of discharge.³³ Discharge was completed on September 17, 1989. Owners stated that they had sent details of their claim under cover of a letter dated October 31, 1989 to their London brokers who had duly passed all details of the claim, under cover of a letter dated November 7, 1989, to intermediate brokers, who in turn passed details of the claim, under cover of a letter dated November 13, 1989, to the charterers’ brokers. Reminders were subsequently sent up the chain of brokers but charterers argued that the demurrage claim was not in fact received by them until March 21, 1990, when it had been forwarded to them by fax transmission from their brokers, who at the same time, forwarded the claim by registered mail. The tribunal held that the owners bore the responsibility of ensuring that their claim was properly presented to the charterers within the applicable time limit. Within that context presentation to the charterers’ brokers would be sufficient but as there was no evidence before the tribunal to establish that that had occurred, the tribunal could not therefore conclude that there had been effective “presentation” of the claim.

A vexed issue is whether the claim and the documents must be presented simultaneously. This issue was considered, *obiter*, in *The Sabrewing* by Gloster J. Clause 16(a) of BPVoy 3 required that the pumping logs be signed by the terminal or the charterers’ representative. Owners argued that this requirement had been satisfied when the charterers

³³ *London Arbitration 25/92* (1992) 337 LMLN 2.

had received pumping logs signed their representatives, Certispec, within the 90 day period.³⁴ Applying the futility principle whereby the law would not compel a person to do something which is useless or unnecessary³⁵, charterers would not be entitled to ignore documents within their possession evidencing the claim. Again, Gloster J rejected owners' arguments. Charterers were entitled to be told what owners' claim was and what documents they were relying on to support it. Owners needed to present a package of documents "that was sufficient in itself for them to consider (without the need for any collateral investigation and, therefore, without the need to make any check of other documents received from third parties) in order to evaluate each and every part of owners' claim.... charterers were entitled to look only at the documents supplied by owners and to determine promptly, by reference to those documents alone, whether or not the owners' claim was fully supported or was time-barred."³⁶

However, in *The Abqaiq* the Court of Appeal held that there was no requirement of simultaneous presentation of the claim and supporting documentation in cl 20 of BPVoy 4. Charterers argued that the revised demurrage claim, submitted under the first invoice, had been unsupported by any of the required documentation, and that it was not sufficient that this had subsequently been provided in support of the second invoice for the original demurrage claim. Field J accepted charterers' submissions and rejected owners' argument that the charterers already had these documents which had been presented with the demurrage invoice, stating: "The Claimant was obliged to comply carefully and strictly with the requirement to present all supporting documentation substantiating each and every constituent part of the claim and it is not enough for the Claimant now to seek to rely on documents presented with an entirely separate claim from the claim for additional freight which was made through the Time and Bunkers Invoice."³⁷

³⁴ Given the finding that it was not *de minimis* to require production of pumping logs signed by or on behalf of owners, the issue did not strictly arise for determination, although, theoretically, it could have done so in the event that the logs were in fact signed by owners

³⁵ *Barrett Bros (Taxis) Ltd v Davies* [1966] 1 WLR 1334 at page 1338

³⁶ [37]

³⁷ [43]. This approach to construction of such clauses mirrors that previously adopted by Gloster J in *The Sabrewing* where she stated: "The authorities show that parties are obliged to comply carefully and strictly with demurrage time bar clauses of this sort, which are well-known within the industry. Importance is also attached to requirements for signed documents where included." [30].

However, the Court of Appeal held that the words “together with” in clause 20 required only that the claim and the supporting documentation be presented within the 90 day period. There was no requirement for the documentation to be presented at the same time as the claim, although the charterers must be in a position to know how one related to the other. No essential document was missing from those presented on 2 April 2008, and all of the documents had been presented by the owners in support of a claim under the charterparty; they were not documents which by happenstance came into the possession of the charterers before the expiry of the time bar.

A related issue is whether the documentation has to be presented by the owners, or whether account can be taken of documents that come into charterers’ possession from another source. In *The Sabrewing*, Gloster J had expressed the view that documents must be presented by the owners themselves, and that the owners could not rely upon the circumstance that the charterers may be in possession of documents from another source. In *The Abqaiq* Tomlinson L.J. saw no need to express a view on these *dicta* but went on to state:

I would however again caution against too mechanistic an approach. I cannot think that the mere fact that a necessary document has been supplied by a third party who is not for that purpose an agent of the owners should of itself and automatically result in the conclusion that there has been non-compliance with the clause. What is important, as Bingham J observed, is that the charterers are put in possession of the factual material which they require in order to satisfy themselves whether a claim is well-founded or not. No doubt ordinarily the documents will be presented by the owners or by their agents, but I would not rule out the possibility that there could be circumstances in which compliance could be achieved in another manner, for example by asking charterers to refer to documents already in their possession or shortly to be received from third parties.³⁸

A similar finding was made recently by the Tribunal in *London Arbitration 22/17*³⁹ in respect of a clause providing: “Charterers shall be discharged and release [sic] from all liability in respect of any claims under this Charter unless such claim has been presented to Charterers in writing with supporting documents within 30 days from completion of discharge.” Charterers argued that the clause required that there had to be simultaneous

³⁸ [64].

³⁹ *London Arbitration 22/17* (2017) 985 LMLN 4.

presentation within the 30 days of the written demurrage claim, together with the supporting documentation. The two notices of readiness had not been submitted with the written claim, although copies had been supplied before the cut-off period, and they had been supplied contemporaneously with the events to which they related. The Tribunal rejected charterer's contention. The owners had provided enough documentation for charterers to evaluate the demurrage claim. The documentation had to be provided within the deadline but did not need to be provided simultaneously with the claim. Accordingly, owners' demurrage claim was not time barred.

It is unclear whether the owners are required to present documents which they have already presented to charterers prior to the completion of discharge. An example would be the notice of readiness. An argument along these lines was rejected in *The Eagle Valencia* where the owners' reformulated claim relied on a second notice of readiness which was clearly in the charterers' possession, but had not been included in the documents submitted with the original claim. The problem was that charterers had no means of knowing that such an alternative claim was being made. Had owners advised charterers that they were making such an alternative claim and basing it on the second notice of readiness already in charterer's possession, it is arguable that, applying the 'futility principle', there would have been no need to present a further copy of the notice with the supporting documentation.⁴⁰

(iv) composite claims and documentation

A claim for demurrage may consist of separate claims, for example a claim for loadport demurrage and a claim of discharge port demurrage. With a tanker charter, there may also be a separate claim for additional time discharging at a terminal in excess of the time specified under the pumping warranty. If these claims are presented as a composite claim, owners may

⁴⁰ *London Arbitration 26/92* (1992) 337 LMLN 2(2) is an example of the application of the futility principle.

The Tribunal held that owners' claim was not barred for failure to submit NOR from the load port. The clause required submission of "supporting documents..." The owners were unable to supply the loading port notice of readiness within the 90 day limit as they had not been able to obtain it from charterers' agents at the loading port. The Tribunal reasoned that the purpose behind the time limit clause was to enable charterers to pursue any claim for demurrage they might have under a sale and purchase contract within any time limit that such contract might contain. Charterers would only need the load port NOR to claim against the shippers who, by definition, would have had the notice. They would, therefore, not need to have it produced to them by the charterers.

Formatted: Not Superscript/ Subscript

Formatted: Not Superscript/ Subscript

face a problem if one part of that claim is missing the required documentation. This was the situation faced by owners in *The Sabrewing*.⁴¹ The vessel was chartered on BPVoy 3 form. Clause 16⁴² specified the documentation required for a claim for additional time under the pumping warranty and owners had failed to provide one of the specified documents – pumping logs signed by themselves. Clause 23⁴³ provided.

Charterers shall be discharged and released from all liability in respect of any claim for demurrage which Owners may have under this Charter unless a claim in writing has been presented to Charterers together with supporting documentation substantiating each and every constituent part of the claim within 90 days of the completion of discharge of the cargo carried hereunder.

Charterers argued that a failure to supply the required documentation for one part of the composite claim meant that the entire claim was discharged. Gloster J agreed. Demurrage time bar clauses of this sort required strict and careful compliance by the parties. Gloster J analysed the requirements of cl.23. :

“Clause 23 required owners to present ‘a claim in writing’ (my emphasis) within 90 days of discharge of cargo, ‘together with supporting documentation substantiating *each and every constituent part of the claim*’ (my emphasis). Unless such a claim, with supporting documentation, is presented within the relevant time period, charterers are released ‘from *all* liability in respect of *any* claim for demurrage’, ie not merely that particular constituent part of the claim that is not supported by relevant documentation.”⁴⁴

Therefore if only a single composite claim for demurrage was made, as had been the case here, the whole claim would be time-barred, notwithstanding that the absence of documents only related to one constituent part of the claim.

⁴¹ [2007] EWHC 2482 (Comm); [2008] 1 Lloyd’s Rep. 286.

⁴² The precursor to cl 19 of BPVoy 4.

⁴³ The precursor to cl 20 of BPVoy 4.

⁴⁴ [30]. Gloster J. distinguished the previous, unreported, decision of H.H. Judge Knight QC in *The Minerva* on the grounds that the wording in the relevant time bar clause there was much less clear than that in the instant case provisions of cl.23, but also because the case appeared to have been treated as one where more than one claim for demurrage had been made (in respect of the loadport and the two different discharge ports).

However, David Steel J. declined to follow the decision in *The Eternity*, where, again, there was a deficiency in the documents supplied in relation to the claim for “additional time” under the pumping warranty. He noted that the clause did not require owners to submit a composite claim and had they presented separate claims a failure to document one or more of them would not have barred the balance.⁴⁵ Even if the clause did require a composite claim he was not persuaded that “[on] its proper construction the effect of clause 20 was such that the failure to provide all ‘supporting documentation’ (whether needed by reason of the requirements of clause 19 or otherwise) for one constituent part of the claim discharged liability for the entire demurrage claim.”⁴⁶ In *The Adventure Hamblen J* inclined to the view expressed by David Steel J, stating:

Although David Steel J did not explain precisely how he reached his conclusion as a matter of construction of the wording of clause 20.1, it was presumably on the basis that where the demurrage claim can be divided into “constituent” parts and it is only a part of such claim which is not substantiated by the requisite documentation, then it is “all liability” in respect of the “claim for demurrage” for that part rather than the claim as a whole which is discharged. If it had been necessary to determine this question I would have held that this is the preferable construction and that the general position is as stated in Cooke, *Voyage Charters*, at para 16.21(4): “If the required documentation relating to one part of the claim is incomplete the owner will . . . not be barred from recovery of another part of the claim, where the two parts are unrelated”.

(v) *Incorporation into sale contracts, and bills of lading.*

The terms of charterparties are frequently incorporated into other contracts, such as contracts of sale, and contracts contained in or evidenced by a bill of lading. As regards the former category a demurrage time bar is unlikely to be brought into the contract by incorporation of the demurrage provisions of the charter. In *OK Petroleum v Vitol* Colman J held that a charterparty timebar relating to demurrage would not be incorporated into a cif sale contract

⁴⁵ *The Eternity* [2008] EWHC 2480 (Comm) at [37] and [38]; [2009] 1 Lloyd’s Rep. 107.

⁴⁶ [45].

which provided for 'demurrage as per charterparty'.⁴⁷ However, Colman J stressed that the incorporation of a charterparty provision into a sale contract was rather different from the incorporation of its provisions into a bill of lading. First, the shipowner is the same party under both the bill of lading and the charter and his interest is to match the terms of both contracts. In contrast the seller is the recipient of the benefit of the charter and the provider of that benefit under the sale contract. Secondly, the bill of lading is a negotiable instrument, whereas there can be no assumption that the *cif* buyer will transfer or assign its rights to a third party. Thirdly, the bill of lading cases have proceeded on the basis that the original bill of lading holders must be taken to have had access to the terms of the charter at the time they entered into the bill of lading contract. In the present case, however, the charterparty had not been concluded at the time the *cif* contract was made. The sale contract did not provide for an indemnity to the seller in respect of its demurrage obligations under the charterparty, but rather gave the seller a free-standing right. Colman J then stated: 'In cases like this where the incorporated contract does not exist when the incorporating contract is made, and cannot be presumed by the parties to the latter to contain any specific terms, the words only bring in provisions relating to the subject matter of that contract.' The incorporating words did not bring in 'ancillary' terms such as a time bar. "Its ancillary nature is conclusively demonstrated by the fact that its contractual function is confined to the enforcement of already-accrued contractual rights. It is exclusively concerned with recovery of such demurrage as has already fallen due."⁴⁸

With a contract under a bill of lading which incorporates the terms, provisions, or conditions of the charterparty, there will be incorporated into the bill of lading all the terms of the charter which are 'directly germane to the subject matter of the bill of lading (i.e. to the shipment, carriage and delivery of the goods.)'⁴⁹ This will bring in the demurrage provisions of the charter, depending on how they are worded⁵⁰, and it is arguable that this will also bring

⁴⁷ [1995] 2 Lloyd's Rep 160.

⁴⁸ 168, col 2.

⁴⁹ *The Annefield* [1971] P168 at 184.

⁵⁰ However, if the demurrage provisions in the charter are worded so that the charterer is to pay demurrage, as is the case in the Shellvoy and BPVoy forms, their incorporation into the bill of lading will not impose a liability for demurrage on the bill of lading holder and the court will not manipulate the language of the clause to impose such a liability. *Miramar Maritime Corp v Holborn Oil Trading Ltd (The Miramar* [1984] A.C. 676).

in any demurrage timebar, although there is no authority on the point. However, the wording of the timebar may be such as to refer only to demurrage claims against charterers⁵¹ and therefore would not apply to demurrage claims against the shipper or the lawful holder of the bill of lading.⁵²

(vi) estoppel

Getting the presentation of the demurrage claim wrong, or failure to present the correct documents will have disastrous effects for owners. In *The Eagle Valencia* owners submitted a demurrage claim based on an incorrect assumption as to the start of laytime. They believed that it started six hours after the NOR tendered on 15 January, and within 30 days of discharge they submitted a claim accordingly with full supporting documents. After the 90 days expired, charterers took the point that the NOR was invalid.⁵³ A second NOR had been tendered to charterers on 16 January and that was valid, but owners' demurrage claim had become extinguished for failure to tender that NOR with the documents presented to charterers for the original claim based on laytime starting with the invalid notice of 15 January. Can charterers just let owners fall into a mistake which will lead to their demurrage claim being extinguished? Should charterers be alerting owners to their mistake before the expiry of the 90 days so as to allow them to rectify it? The answer to these questions is almost certainly 'no'.

To avoid the extinguishment of their claim under the demurrage time bar, owners would need to rely on some form of estoppel, arising out of a representation by charterers on which the owners had relied to their detriment. There are various forms of estoppel: promissory estoppel which is founded upon a representation by a party that he will not enforce his legal rights and which is relied upon by the representee; an estoppel by silence or acquiescence an which arises whenever the party against whom the estoppel is raised is under

⁵¹ As with cl.15(3) of Shellvoy 6 and cl.39.2 of BPVoy 5.

⁵² The wording of the timebar clause would not be manipulated to make it fit in the bill of lading contract. *The Miramar*.

⁵³ Some indication of charterers' position might have been derived from the fact that the form of the original notice of readiness had a line on which it was to be noted when it was accepted by charterers. In the present case, the word "accepted" had been deleted and substituted by the word "received" timed at 13.04 on 19 January, the moment when the vessel left its anchorage and started shifting to the berth.

a duty to speak; an estoppel by convention; an estoppel by convention which is based on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter.

Estoppel arguments were briefly considered, and rejected, in two decisions of the High Court, and one in the Central London County Court, Business List. In *The Bow Cedar*⁵⁴ charterers argued that owners' claim against them for repudiation of the charter was subject to the provisions of the very extensive time bar clause.⁵⁵ Mr Nigel Teare QC, as he then was, found that the clause did not cover a claim for damages for repudiation, which damages would cover demurrage accrued at the date of repudiation and demurrage that would have accrued had the charter not been terminated. If the time bar clause had covered the claim, then owners would have been out of time. Owners pointed to a letter by charterers' solicitors of 7 August 2003 stating that they were awaiting instruction and adding: "We are surprised, in view of the time it took you to present your claim (Oct. 21, 2002 until July 15, 2003) that you now require a response within days." Owners argued that this amounted to a representation that there was no applicable time bar. Mr Nigel Teare QC held that it did not constitute a material representation by charterers, and there was no material reliance by owners⁵⁶, and therefore no estoppel.

In *Lia Oil SA v ERG Petroli SPA*⁵⁷ Mr Julian Flaux QC found that the necessary supporting documents had been supplied within the 100 day time limit, but, had that not been the case, he would not have found a representation that the buyers had all the requisite documents out of their fax of 10 September 1999 which stated "With reference to your demurrage claim for \$59,937.50 dated 10 August 1999 please note that we have just realised

⁵⁴ [2004] EWHC 2929 (Comm); [2005] 1 Lloyd's Rep 275.

⁵⁵ Clause 20(2) provided " Any other claim against charterers for any and all other amounts which are alleged to be for charterers' account under this charter shall be extinguished, and charterers shall be discharged from all liability whatsoever in respect thereof, unless such claim is presented to charterers, together with full supporting documentation substantiating each and every constituent part of the claim, within one hundred and eighty (180) days of the completion of discharge of the cargo carried hereunder."

⁵⁶ The letter was written at a time after the expiry of the 180 day time limit in cl. 20(2).

⁵⁷ [2007] EWHC 505 (Comm); [2007] 2 Lloyd's Rep. 509.

that a wrong charterparty (Liano-c/p 28.6.99) was enclosed to your claim. Please check into your file and let us have the correct supporting documents.”⁵⁸

In *The Yellow Star*⁵⁹ Judge Hallgarten QC rejected a plea of estoppel based on the charterers’ failure to comment on the deficiency of the documentation supplied until after the expiry of the time stipulated for submission. The charterers were under no duty to study the documents and to inform the claimants that their claim was insufficiently documented. The claimants bore the risk of insufficient documentation. “It might have been different had the defendants, between Jan. 4 and Feb. 19, 1999, sent some message which could be construed as luring the claimants into thinking that documents required under part (4) were not in fact required, but such was not the case.”

A similar result occurred in *London Arbitration 8/01*⁶⁰ where the demurrage time bar required owners to present “original signed notice of Readiness submitted and accepted and duly signed Time Sheets and Statement of Facts duly countersigned by shippers and receivers respectively and original Pumping Logs duly countersigned by terminal representatives various original documents”. The owners first argued that the requirements of the clause had been varied by reason of the fact that the charterers’ voyage instructions had made no mention of a requirement for original documents, but only asked that there be sent from the discharging port “all cargo documents ... to include but not limited to copies of NORs, SOF duly signed by terminal reps/all concerned along with ullage reports, dry tank certificates, pumping logs, copies of letters of protest given and received and other relevant documents”. The tribunal rejected these contentions. Such voyage instructions could not in any way be said to vary the contractual provisions already agreed in respect of demurrage claims.

⁵⁸ Shortly before this, the sellers had sent the following to the buyers:

“In addition to our claim of 9 August 1999 please find enclosed copy of pumping log for discharge port. Please let us know if you still require additional documents or you still something missing so we will not be informed afterwards that we did not send you owners claim or their invoice. Your silence will be considered as confirmation that you have fully documented claim at your possession.”

⁵⁹ *Mabanaft International Ltd v. ERG Petroli S.p.A. (The Yellow Star)* [2000] 2 Lloyd’s Rep 637. Central London County Court Business list.

⁶⁰ *London Arbitration 8/01* (2001) 560 LMLN 2.

The owners then argued that the charterers were estopped by their conduct from relying on a strict reading of the time bar clause, by failing to point out to the owners the alleged deficiency in their documentation, and by acquiescing in the state of affairs of which they complained. The owners relied on *Chitty on Contracts* (28th edition) at paragraphs 3-084 and 3-086. Paragraph 3-084 said, in relation to the doctrine of forbearance in equity:

“There must, next, be a promise (or an assurance or representation in the nature of a promise) which is intended to affect the legal relationship between the parties and which indicates that the promisor will not insist on his strict legal rights, arising out of that relationship, against the promisee.”

Owners also referred to paragraph 3-086, which said:“... failure to object to a known defect or deficiency within a reasonable time of its discovery may be regarded as an unequivocal indication of the injured party’s intention not to insist on his strict legal rights.” The owners had said that the charterers had failed to perform their duty to disclose facts, and they relied also on paragraph 3-087 of *Chitty*:

“Although a promise or representation may be made by conduct, mere inactivity will not normally suffice for the present purpose ... The only circumstances in which “silence and inaction” can have [the effect of losing a contractual right] are the exceptional ones ... in which the law imposes a duty to disclose facts or to clarify a legal relationship and the party under the duty fails to perform it.”

The Tribunal rejected these arguments. Whilst there was, on the charterers’ side, a case of “mere inactivity”, was this case an exceptional one in which there was a duty to disclose facts or to clarify a legal relationship? The answer was no. A contract of the present kind was not one which depended upon utmost good faith. It could not be said that the charterers had in any way misled the owners or had sought to mislead them. If they had thought about it at all, the owners had relied on their own hope or expectation that copy documents would be sufficient.

Conclusion

In the last ten years the demurrage time bar provisions of BPVoy 3 and 4 have come under the scrutiny of the High Court in *The Sabrewing*, *The Eternity*, and *The Adventure*, and have

come before the Court of Appeal in and *The Abqaiq*⁶¹, with the demurrage time bar provisions in clause 15(3) of Part II of Shellvoy 5 coming before the Court of Appeal in *The Eagle Valencia*.

In *The Sabrewing* we see Gloster J adopt the approach of ‘strict compliance’ which means that the claim and all supporting documents must be submitted together as a package by the owners within the 90 days. The Court of Appeal in *The Abqaiq* took the view that it was not helpful to introduce into the approach to these provisions a notion of strict compliance. The correct approach was “a requirement of clarity sufficient to achieve certainty”. This meant that the documents and the claim needed to be received by charterers within the 90 days and that the words ‘together with’ did not import a requirement of simultaneous presentation, although charterers had to be in a position to know that the documents related to the claim. Thus the documents presented with owners’ demurrage claim could be said to have been presented in connection with their separate claim under the Vitol Interim Port clause, which was subsequently reformulated as a claim for demurrage.

The Court of Appeal also took the view that a claim initially presented as a claim under the Vitol Interim Port clause could be reformulated as one for demurrage as it was in substance a demurrage claim, something which charterers had appreciated when it was presented. In contrast, in *The Eagle Valencia* owners’ initial claim was not ‘in substance’ the same as their reformulated claim, as it took a different date, and a different NOR, for the commencement of laytime. Owners would do well to take the guidance proffered by Longmore LJ:⁶²

Disputes about the validity of notice of readiness are by no means uncommon. In those circumstances, as Donaldson J said in *Zim Israel Navigation Co Ltd v Tradax Export SA (The Timna)* as long ago as [1970] 2 Lloyd’s Rep 409, page 411 col 1:

It is a good working rule in such situations to give notice of readiness and to go on giving such notices in order that, when later the lawyers are brought in, no one shall be able to say "If only the master had given notice of readiness, laytime would have begun and the owners would now be able to claim demurrage".

⁶¹ *The Sabrewing* involved cl. 23 of BPVoy 3, the other cases cl.20 of BPVoy 4. The clauses are in materially the same form, as is cl.39 of the latest iteration of the form, BPVoy 5.

⁶² [27].

The fact that the master in the present case thought it wise to send the two emails of 16 January as earlier discussed shows that he had taken on board the thrust of Donaldson J's reasoning. In these circumstances it is not unreasonable to expect an owner claiming demurrage to include alternative notices of readiness when he submits a claim, on the basis that they may be legally relevant.

'Strict compliance' is, however, required as regards the documents to be presented within the time limit. *The Adventure* makes it clear that "all supporting documentation" means what it says, and that owners cannot get by with just submitting 'essential' documents. Owners need to be assiduous in getting all the required original documentation together and submitted within the applicable time limit. If other parties have the documentation, which will be the case when disponent owners are involved, they need to make strenuous efforts to obtain it, and to document those efforts.

An area of uncertainty remains with regard to the effect of submitting a composite demurrage claim, one element of which is inadequately documented. At the moment there are conflicting first instance decisions on this point and owners would be well advised to submit separate demurrage claims where possible. For instance, in *The Sabrewing* three claims could have been submitted, each with their supporting documentation – load port demurrage, discharge port demurrage, claim for additional time over the time allowed for discharge. By submitting a single demurrage claim for all three elements, the lack of documentation relating to the third element had the effect that the first two claims were also extinguished.

Finally, what about charterers? There is something unappealing about the conduct of charterers in *The Eagle Valencia* in not raising the point about the invalidity of the initial NOR of 15 Jan within the 90 day time limit. When they did raise the point it was too late for owners to resubmit their claim based on the subsequent NOR which was valid and the demurrage claim for the waiting time at the second load port was extinguished. However, charterers owe no duty to alert owners to their mistake and, absent something said or done which indicates that they will not be insisting on their rights under the time bar clause, charterers are quite at liberty to sit back and let owners fall into the pit. Charterers would be well advised to make no comment on owners' claim and documentation within the submission period.

