

Circular Ref: 2018/0013

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Force Majeure - Recent case

In the recent case of *Classic Maritime Inc v Limbungan Makmur Sdn Bhd and Another* - QBD (Comm Ct) (Teare J) [2018] EWHC 2389 (Comm) - 13 September 2018, a claimant shipowner ('Owner') entered into a long-term contract of affreightment ('the COA') with the defendant Limbungan Makmur Sdn Bhd (Limbungan), as charterer ('the charterer'), for the carriage of iron ore pellets from Brazil to Malaysia.

According to the contract, iron ore pellets from Brazilian mining company Samarco Mineracao SA (Samarco) were shipped through Ponta Ubu in Brazil, and iron pellets from another Brazilian mining company, Vale SA (Vale), were shipped through Tubarao, also in Brazil.

On 5 November 2015, the Fundao dam, where iron ore was mined, burst, stopping production at the iron ore mine. The Owners claimed damages against the Charterer in respect of five shipments which should have taken place between November 2015 and June 2016, after the dam burst. The sum claimed was about US\$20 million. The Charterer relied on clause 32 of the COA, contending that the dam burst was a *Force Majeure* and it provides:

Neither the vessel, her master or Owners, nor the Charterers, Shippers or Receivers shall be Responsible for loss of or damage to, or failure to supply, load, discharge or deliver the cargo resulting from: Act of God, ... floods ... accidents at the mine [emphasis added] or Production facility ... or any other causes beyond the Owners' Charterers' Shippers' or Receivers' control; always provided that such events directly affect the performance of either party under this Charter Party ...

There was no dispute as the dam burst was accident at the mines. However, this accident did not affect the operations of Vale, which was in this case unable to supply iron ore pellets to the Charterer as a result of the accident. The Owner's case was based on the relevant test for causation in relation to clause 32, i.e. was the "but for" test, and accordingly they submitted that the Charterer could not show that *but for* the dam burst, it would have supplied cargo for the five voyages in question. It was held by the Court that this question was bound up with another question whether the Charterer had in fact made arrangements to ship from Ponta Ubu.

The court therefore turned to the related question of fact, whether in this case, the Charterer would in fact have defaulted on the COA with the Owner even in the absence of the dam burst, that is the "but for" question. The burden was on the Charterer to show that it was *more likely than not* that it would have performed its obligations under the COA with the Owner. On facts it turns that the Charterer would not have been able to perform in any event, irrespective of the dam burst. The next issue was whether the Charterer took all reasonable steps, following the dam burst, to ship iron ore pellets from Tubarao via Vale instead of the other port. It turns out on the facts, that it would not have been possible for the Charterer to even ship the cargo from alternative port of Tubarao.

Therefore, it was held that the Charterer cannot rely on the Clause 32. However, if the answer was found on the basis that had they been able to provide the cargo, but it still did not answer the question as to the basis of compensation. Would the Owner be able to claim the full hire on this basis? It was held, even though the Charterer cannot rely on Clause 32 to excuse them from the breach as they would not have been able to perform either way, but the damages that the Owners could claim was not substantial as the compensatory principle is based on “*as if the contract would have been performed*” and in this case even if the cargo would have been loaded, it would have been difficult for the Owner to have ship loaded due to dam burst, even if the Charterer was willing and able to supply the cargo on board the vessels pursuant to COA.

ALCO’s FDD department comments are:

- a) It brings out interesting legal arguments in the case. In such matters, a local correspondent should find out all the local facts at the loading port surrounding the incident.
- b) FDD department is available 24 x 7 to assist the clients of ALCO.

Source of Information: Andrew Liu & Co., Ltd www.andrewliu.com.hk