

Circular Ref: 2019/0016

Date: 31 October 2019

LAYTIME - Exception and Force Majeure

In a new London Arbitration 21/19, a dispute between the parties arose out of a Contract of Affreightment dated 31 July ('the COA'). The Claimant owners claimed demurrage in the sum of US\$330,494.99 from the Respondent charterers. The subject vessel was due to load a cargo of 60,000 mt of coal at a terminal on the Mississippi for shipment to Mexico.

Chronology of Events

- The vessel duly arrived at the terminal and gave Notice of Readiness on 25 August.
- Loading started and time started to count at 22.20 on 25 August. 48 hours 50 minutes of laytime was allowed. A tropical storm or hurricane was approaching the coast.
- At 09.30 on 26 August the US Coast Guard predicted gale force winds at South West Pass in 48 hours – setting “port condition X-ray”, with an anticipation of setting “port condition Yankee” at 13.00 on 26 August. The vessel continued to load.
- As at 10.59 on 26 August the projected time of completion of the cargo/departure of the vessel was 17.00/19.00 on Monday 27 August. The terminal at that time indicated:

Terminal presently has no intention to shut-down due to the uncertain landfall of TS/Hurricane [X]; unless USCG issue condition status all facilities ... must make preparation for the TS/Hurricane.

- At some unknown time thereafter, the terminal decided to order the vessel off the berth. It ordered a pilot for 16.00 on Sunday 26 August, but he arrived at 15.15; loading ceased at 15.30 and the vessel vacated the berth when only half the cargo was loaded. A later message, apparently from the terminal, stated:

Due to Bar Pilots shutting down later tonight anchorages will begin to fill. This leaves [the terminal] no alternative but to vacate the vessel from our berth for the safety of our dock, fleet and terminal

- The vessel shifted to an anchorage about 30 minutes downriver, anchoring there at 17.30 on Sunday 26 August. She remained there idle all day on Monday 27 August.
- The hurricane made landfall west of the Southwest Pass in the morning of Tuesday 29 August. At 12.00 on 28 August the USCG had issued a COTP (Captain of the Port) order “Closed the port to all movements”. The vessel finally reberthed a month later, on 26 September, completed loading at 10.35 on 28 September and sailing at 12.45 on that day.

The issues

- (1) Did time stop running at 15.30 on 26 August when the vessel was ordered off the terminal? And
- (2) What obligations did the charterers have to minimise the effects of the hurricane on the vessel? Did they fulfil them?

Relevant Clauses in COA

The relevant provisions of the COA were as follows:

44. Exceptions to laytime and demurrage

Time elapsed in the following circumstances shall not count as laytime or time on demurrage:

...

44.2 if the berthing, loading or discharging does not start or is delayed or suspended due to fire or bad weather (including but not limited to floods, rain, frosts, fog, snow, hail, storms, high winds, ice, perils of the sea or other waters) or for other reasons not attributable to Charterers or their shippers/receivers; time to count once vessel is on demurrage, but per main terms loading/discharge on WWD basis so time lost due to weather conditions not to count as laytime used.

...

44.17 Any time lost due to a Force Majeure Event.

50. Force Majeure

50.1. For purposes of this Charter Party, 'Force Majeure Event' means any event or circumstance whatsoever occurring after the date of this Charter Party which is beyond the reasonable control of the party affected (the 'Affected Party'), that prevents, restricts or delays such party's performance under this Agreement. Provided that they satisfy the foregoing criteria, events or circumstance constituting Force Majeure Event shall include without limitation the following:

- a) fire, flood, lightning, storm, typhoon, tornado, tidal waves, low water, drought, earthquake, landslide, perils of the sea, soil erosion, subsidence, washout, epidemic or other acts of God;

...

50.3 The Affected Party shall as soon as practicable after learning of the Force Majeure Event notify the other party (the 'Non-Affected Party') of the commencement of the Force Majeure Event and, to the extent then available, provide to it a bona fide non-binding estimate of the extent and expected duration of its inability to perform. The Affected Party shall use reasonable endeavours to mitigate and overcome the effects of the Force Majeure Event and shall, during the continuation of the Force Majeure Event, provide the Non-Affected Party with reasonable bona fide updates, when and if available, of the extent and expected duration of its inability to perform those obligations affected by the Force Majeure Event.

...

50.5 For the purposes of Clause 50.1, an event or circumstance shall not be considered to be a Force Majeure event in relation to a party unless:

...

- b) in the case of the Charterer, it is beyond the reasonable control of the Charterer, its affiliates, the operator of the relevant port and any servant or agent of the Charterer.

Tribunal Decision

Issue 1

- It was held that the vessel was ordered out of the Berth due to the anticipation of bad weather and not due to actual bad weather so the Charterers' argument to rely on Clause 44.2 "bad weather" exception was rejected. Anticipation of bad weather that can affect the safety of vessel is something very different from the bad weather scenario.
- The Charterers had made out their alternative case, namely that under clause 44.2, *loading was delayed or suspended for a reason not attributable to the charterers or their shippers/receivers*, that is, the order from the terminal to cease loading and vacate the berth at 15.30 on 26 August. Accordingly, the Charterers were entitled to rely on the "other reasons" exception in remaining part of Clause 44.2.
- Under the circumstances, the tribunal agreed with the Owners that the Charterers' reliance on force majeure failed for the same reason that their reliance on the bad weather exception in clause 44.2 failed, as the order of the Terminal for the vessel to leave berth was different from the bad weather itself. For the *force majeure* clause to operate the event has to be beyond the control of the operator/terminal and ordering the vessel to leave was definitely within the control of terminal/operator.

Issue 2

The Tribunal did not accept that, under clause 44.2, the charterers had some separate, higher obligation to mitigate. Contractual laytime was simply interrupted for the period of the "time elapsed".

FDD department of ALCO advice to clients of Andrew Liu is as follows:

- a) The exceptions in any contract should be analysed very carefully. It is not just a matter of reading a clause. This case is a good example.
- b) FDD department has guided the clients to collate evidence in a systematic fashion to present a good case in arbitrations. FDD department are regularly manage arbitration for only ALCO's clients.

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