

Circular Ref: 2019/0016

Date: 31 October 2019

装卸时间 - 除外和不可抗力

在伦敦仲裁 21/19 中，双方因 7 月 31 日签订的一份 COA 包运合同引发纠纷。原告船东向被告租家索赔滞期费 330,494.99 美元。这艘货船原本要在密西西比河的一个码头装载 6 万吨煤，并运往墨西哥。

案件回顾

- 8 月 25 日，该船如期抵达码头并发出准备就绪通知。
- 8 月 25 日 22 点 20 分，船舶开始装货并计时，允许的装卸时间为 48 小时 50 分钟。一场热带风暴或飓风正在接近海岸。
- 8 月 26 日 9 时 30 分，美国海岸警卫队发布通知，未来 48 小时在 South West Pass(SWP)将有大风，并将港口状态调整为“port condition X-ray”，并预计可能在下午一点进一步提升到“port condition Yankee”。船舶继续装货，并未停止。
- 8 月 26 日 10 点 59 分，这时预计完成装货并离港的时间为 8 月 27 日(周一)17 至 19 点。码头给出指示：

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.

- 在此后某个未知的时间，码头决定命令船只离开泊位。码头指定领航员在 8 月 26 日(周日)16 点就位，但领航员 15 点 15 就已抵达；15 点 30 分，船舶在装了一半货物的情况下停止装载，并离开了泊位。之后的报告，显然来自码头，阐明如下：

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

- 8月26日(周日)下午17点30分, 该船转移至下游大约距离30分钟的锚地。8月27日(周一), 船舶在那里闲置了一整天。
- 8月29日(周二)上午, 飓风在SWP以西登陆。8月28日12时, USCG发布COTP (Captain of the Port)命令“Closed the port to all movements”。一个月后的9月26日, 该船终于重新回到泊位, 于9月28日10点35分完成装货, 并在当天12点45分驶离。

争议点

- 1) 8月26日15点30分, 当该船被命令离开码头时, 装卸时间停止计算了吗? 和
- 2) 租家减小飓风对船舶的影响的义务是什么? 他们履行义务了吗?

COA 有关条款

COA 中相关的条款如下:

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.

法庭的决定

争议1

- 仲裁庭认为，该船是因坏天气的预期而被命令离开泊位，而不是由于实际坏天气的影响，因此租家引用第 44.2 条“坏天气”除外条款的理由被驳回。对可能影响船舶安全的坏天气预期与实际恶劣天气的境况截然不同。
- 租家给出了另外一种解释，即在条款 44.2 下，*船舶装卸延迟或暂停的原因不是租船人或其托运人/接收人造成的*，也就是说，8 月 26 日 15 点 30 分，是码头作出停止装卸且离开泊位的决定。因此，租家有权主张条款 44.2 剩余部分中的“*其他原因*”除外条款。
- 在这种情况下，由于船舶离开泊位是码头的命令，区别于坏天气本身的原因，法庭同意船东主张租家引用不可抗力不成立，同理，他们引用 44.2 坏天气除外条款也不成立。对于不可抗力条款，事件的操纵必须是超出操作员/码头的控制范围，但命令船只离泊完全是在码头和操作员的控制下。

争议2

根据第 44.2 条，法庭不认为租家有单独的、更高的减损义务。租约的装卸时间无非只是在船舶离开泊位这一段“逝去的时间”期间被中断了。

ALCO 抗辩险部门(FDD department)给 Andrew Liu 客户如下建议：

- a) 任何合同中的例外因素都应该仔细分析。这不仅仅是一个阅读条款的问题。本案就是一个很好的例子。
- b) FDD 部门指导过客户要系统地整理证据，使得在仲裁中呈现一个好的案例。FDD 部门定期为 ALCO 客户处理仲裁事宜。

以上由 Andrew Liu & Co., Ltd 编译，应以英文为准！

信息来源：Andrew Liu & Co., Ltd www.andrewliu.com.hk

Andrew Liu & Co., Ltd