NEWS BRIEF

Force majeure and causation: ready, willing and able?

A recent Court of Appeal decision has significant implications for the drafting of force majeure and exceptions clauses and serves as a reminder of the importance of using the correct terminology to reflect the parties' intentions (*Classic Maritime Inc v Limbungan Makmur Sdn Bhd and another [2019] EWCA Civ 1102*). The court found that whether a party seeking to rely on a force majeure clause will be required to prove that it was ready, willing and able to perform the contract "but for" the force majeure event will depend on the precise wording used in the relevant clause.

The dispute

The dispute arose from a long-term contract between a shipowner, Classic Maritime Inc, and a charterer, Limbungan Makmur, under which Limbungan undertook to make numerous shipments of iron ore from Brazil to Malaysia. In November 2015, a dam burst, stopping production at the mine that supplied the iron ore to Limbungan. As a result, Limbungan could not make five shipments that it had undertaken to perform between November 2015 and June 2016. Classic Maritime sued Limbungan for nearly $20 million in damages.

Limbungan denied liability, relying on a so-called "exceptions" clause in the parties' contract which provided that it would not be responsible for, among other things, a failure to deliver the cargo "resulting from accidents at the mine or production facility...or any other causes beyond the owners', charterers', shippers' or receivers' control; always provided that any such events directly affect the performance of either party".

Classic Maritime argued that, while an accident at the mine had occurred, Limbungan's failure to supply the cargoes did not result directly from that accident, as required by the exceptions clause. It asserted that Limbungan would not have performed its obligations in any event due to a collapse in demand at the Malaysian steel mills for which the cargoes were intended, noting that no shipments had taken place in the second half of 2015.

Drafting implications

The decision in *Classic Maritime Inc v Limbungan Makmur Sdn Bhd and another* makes clear the need for care in drafting force majeure clauses in contracts governed by English law (*[2019] EWCA Civ 1102*) (*see feature article "Force majeure in a changing world: predicting the unpredictable", www.practicallaw.com/w-019-2821*). It also means that force majeure provisions excusing a party for failure to perform "resulting from" a force majeure event or requiring that the event must "directly affect the performance of a party" will likely require a party invoking these provisions to show that, but for the force majeure event, it would have performed the contract. If parties wish a clause to be of wider effect and do not wish the "but for" requirement to apply, they should avoid using this language.

Similarly, references in contractual provisions to force majeure events as "causes" could have the same effect of requiring a party seeking to invoke the provision to prove that the force majeure event was the cause of its failure to perform. If parties wish to avoid this implication, they could simply refer instead to "events".

Limbungan contended that a party seeking to rely on a force majeure event does not have to show that it would have performed its obligations "but for" the force majeure event. It relied on a line of authority stemming from the House of Lords' decision in *Bremer Handelsgesellschaft v Vanden Avenne-Izegem* that a party does not have to show that it would have performed its obligations but for a force majeure event in order to rely on a contractual frustration clause; that is, a clause that allows for a contract to be cancelled for the future without liability on either side in case of a force majeure event (*[1978] 2 Lloyd's Rep 109*).

The High Court held that Limbungan could not rely on the force majeure clause as it would not have been ready and willing to supply the cargoes even if the accident had not occurred (*[2018] EWHC 2389 Comm*). However, it only awarded Classic Maritime nominal damages of $1 for each cargo, as to do otherwise would have put it in a better financial position than if Limbungan had been ready and willing to provide the cargoes. Classic Maritime appealed on the issue of damages and Limbungan cross-appealed on the issue of liability.

Court of Appeal decision

The Court of Appeal dismissed Limbungan's cross-appeal, agreeing with the High Court that:

- Limbungan could not rely on the exceptions clause if it was unable to show that it would have performed its obligations under the contract but for the force majeure event.
- On the facts, Limbungan could not have performed its obligations under the contract in any event due to the collapse in demand at the Malaysian steel mills.

The court based its decision on the interpretation of the exceptions clause. In particular, a key point was that the clause excused Limbungan from liability for a failure to supply cargo "resulting from" an accident at the mine, "provided that" the event in question would "directly affect the performance of either party". The court found that this wording created a causation requirement so that Limbungan had to show that its failure to supply the cargoes resulted from the accident at the mine, and that this accident had directly affected its performance.

The court considered that this view was further supported by the clause's reference to "causes" beyond the charterer's control. This indicated that the parties envisaged that Limbungan could be excused from liability only where "causes" directly affected performance, rather than where events "happen to have occurred".

The court agreed with the High Court that *Bremer Handelsgesellschaft* is applicable only to contractual frustration clauses; that is, clauses that bring a contract, or part of a contract, to an end automatically. Therefore it is not applicable to exceptions clauses, which excuse a party from the obligation to pay damages after a breach has occurred.

The court's rationale for this distinction was that, since a contractual frustration clause brings a contract to an end, both parties need to know at once when an event occurs whether they are under any continuing obligation to perform the contract, without having to investigate the potentially complex issue of whether a party could have performed its obligations but for that event. Conversely, an exceptions clause that relieves a party from liability for breach, such as that invoked by Limbungan, must simply be interpreted according to its terms. However, the court warned that, ultimately, it is irrelevant whether the clause is labelled as a contractual frustration clause, a force majeure clause or an exceptions clause: what matters is not the label but the content of the tin.

Therefore, on the drafting of the particular clause in *Classic Maritime*, Limbungan was liable to pay damages to Classic Maritime for breaching its obligation to make the shipments. The court allowed Classic Maritime's appeal on the issue of damages, awarding it the full sum claimed, as the fact that Limbungan was unable to perform is irrelevant to the assessment of damages where Limbungan had undertaken an absolute obligation to supply the cargoes, and the exceptions clause provided it with no defence to this.

Contract law implications

Classic Maritime has potential implications for ongoing contractual relationships and disputes. It will create the option, in certain circumstances, for a party faced with a claim of force majeure under a contract to require its counterparty to show that it is willing and able to perform the contract but for the force majeure event if it is to rely on the provision.

While providing welcome guidance on the drafting of force majeure and exceptions clauses, the decision in *Classic Maritime* continues to reflect the courts' desire not to have a rigid approach to the effect of force majeure clauses (*see box "Drafting implications"*). The emphasis on the consequences flowing from the actual words used in these provisions means that there remains a risk of uncertainty in interpreting force majeure clauses.

More specifically, the decision leaves uncertainty as to the interpretation of clauses with characteristics of both contractual frustration and exceptions clauses. For example, it is not clear whether a provision that allows for both suspension of a party's obligations in case of force majeure and excuses it from damages would fall within the category of contractual frustration clauses that the court identified in *Classic Maritime*. As the decision is being appealed, the Supreme Court's ruling may provide further clarity. In the meantime, careful drafting remains of the utmost importance if the parties' intentions as to the effect of force majeure are to be reflected correctly in any contract.

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