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Force Majeure: substantial damages even if you cannot perform

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In a recent decision, the Court of Appeal has awarded substantial damages to the innocent party after a force majeure event, in circumstances where the party seeking to rely on the force majeure event to excuse liability would not have been able to perform its obligations under the contract (even if the force majeure event had not occurred).

Facts of the case – the Fundao dam burst

In Classic Maritime Inc v Limbungan Makmur SDN BHD [2019] EWCA Civ 1102, Classic Maritime, a ship owner, entered into a long-term affreightment contract with Limbungan, a charterer, for the carriage of iron ore pellets from Brazil to Malaysia.

Following the burst of the Fundao dam in Brazil on 5 November 2015, Limbungan claimed that the burst was a force majeure event that prevented it from supplying five cargo shipments of iron ore pellets from Brazil to Malaysia between November 2015 and June 2016.

The decision at first instance

At first instance (discussed here), Teare J had held that the force majeure event had not caused Limbungan's failure to perform its obligations under the contract. Teare J applied the "but for" test of causation to determine whether Limbungan could rely on the clause in question to avoid liability for its failure to perform. He concluded that Limbungan would not have performed even if the force majeure event had not occurred.

However, despite ruling that Limbungan was not entitled to rely on the clause in question to excuse performance, Teare J only awarded Classic Maritime nominal damages. The rationale being that even if Limbungan would have been able to perform, the force majeure event would, in any case, have prevented Limbungan from performing and therefore, it would be wrong to award compensation to Classic Maritime.

Classic Maritime appealed to the Court of Appeal on damages, whilst Limbungan cross-appealed on the point of liability.

The Court of Appeal's decision

The "but for" causation test

The Court of Appeal upheld Teare J's decision that Limbungan was required to prove that "but for" the dam burst, it would have performed its obligation under the contract to provide shipments of iron ore pellets from Brazil to Malaysia.

Giving the leading judgment, Males LJ primarily relied on the wording of the clause that Limbungan sought to rely on, which stated:

"Neither the Vessel, her Master or Owners, nor the Charterers, Shippers or Receivers shall be Responsible for loss or damage to, or failure to supply, load, discharge or deliver the cargo **resulting From:** Act of God, act of war….accidents at the mine…**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 under This Charter Party."

The Court of Appeal agreed with Teare J that the worlds "resulting from" together with "or any other causes" and the words "directly affect the performance of either party" indicated a causation requirement. The combined effect of these words signified a more demanding causation requirement than simply stating that the force majeure event caused the failure to perform. The dam burst did not cause Limbungan to do anything different because it had no intention of supplying the remaining cargo shipments in the first place and hence, its performance was not "directly affected" by the dam burst.

The compensatory principle and damages

The Court of Appeal reversed Teare J's decision in relation to damages and awarded Classic Maritime almost USD $20 million in damages. The Court of Appeal held that Teare J had applied the compensatory principle incorrectly and the injured party, Classic Maritime should be placed in the position it would have been had the contract been performed i.e. if the five shipments of iron ore pellets had been made.

Comment

Although primarily relying on the specific wording, Males LJ also drew a distinction between a force majeure clause and an exceptions clause, noting that a force majeure clause operates to qualify a party's obligations, whereas an exceptions clause seeks to exclude or limit liability for a breach.

The rejection of any general principle and a focus on the clause wording raises an interesting question on the 2017 FIDIC suite in which the "Force Majeure" clause in the 1999 suite has now become an "Exceptional Events" clause. Based on the Court of Appeal's decision, there can be no guarantee that a contractor will be excused performance simply by demonstrating that his performance is prevented by an event specified in the clause. It is possible that the contractor will now also need to demonstrate that it could have performed "but for" the force majeure event.

On the other hand, the FIDIC clause is worded quite differently from the clause in the Limbungan case – the test is whether the affected party "is or will be prevented from performing any obligations under the Contract due to an Exceptional Event". The wording does not suggest that the Exceptional Event needs to "directly cause" the failure to perform and contractors may therefore be able to distinguish their position from that of the unfortunate charterer in Limbungan.

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