UK DEFENCE CLUB

Soundings

Force majeure: the Classic Maritime case

In the wake of Vale's declaration of force majeure following the recent collapse of one of its Brazilian dams, it is timely to consider some of the principles involved in force majeure cases, as illustrated by the case of Classic Maritime Inc v Limbungan Makmur SDN BHD [2018] EWHC 2389 (Comm). In that case, three particular points of general interest in relation to force majeure clauses were considered: construction and causation; alternative modes of performance; and the relevance of a force majeure clause to the assessment of damages. Incidents such as these can have significant contractual repercussions and it is worthwhile taking time to ensure that any force majeure clauses will afford parties the desired protection.

Force majeure clauses are commonly included in commercial contracts to allow parties to be relieved from performance of their contractual obligations when circumstances arise that are beyond their control. Force majeure, having its roots in civil law systems, is not fully recognised as a concept under English law. So it is essential for parties to clearly define any events that are intended to be considered as force majeure, together with their consequences, within express clauses. The drafting of any force majeure clause can be crucial in terms of its interpretation and this case provides a clear illustration of that fact.

Facts

The claimant owner and the defendant charterer entered into a long-term contract of affreightment (COA) for the carriage of iron ore from Brazil to Malaysia.

Clause 32 of the COA provided:

"Exceptions

Neither the vessel, her master or Owners, nor the Charterers, Shippers or Receivers shall be Responsible for loss of or

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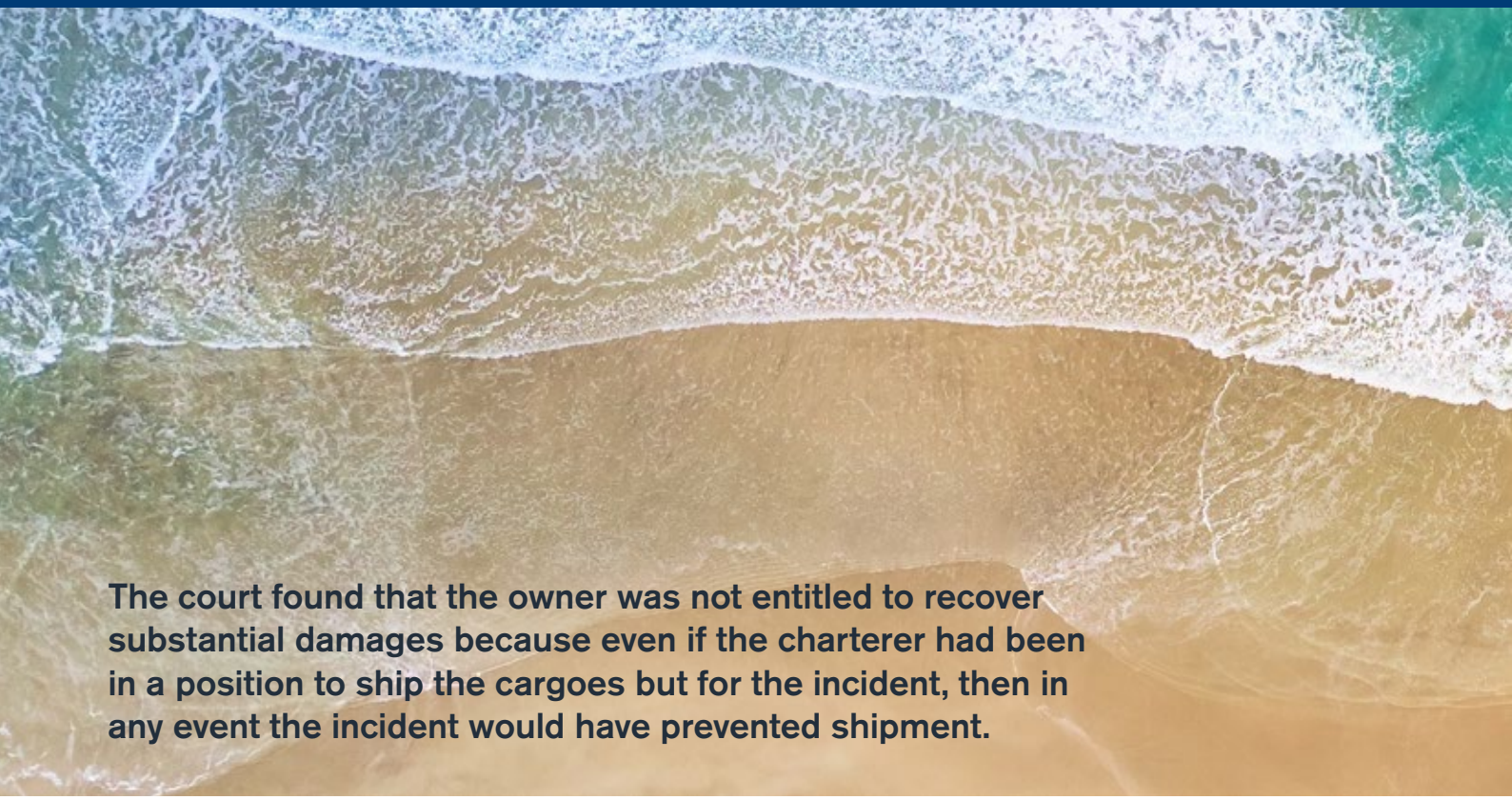


The court found that the owner was not entitled to recover substantial damages because even if the charterer had been in a position to ship the cargoes but for the incident, then in any event the incident would have prevented shipment.

damage to, or failure to supply, load, discharge or deliver the cargo resulting from: Act of God,…floods….accidents at the mine 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…"

The charterer had contracted with two suppliers of iron ore pellets in Brazil: Samarco and Vale. Samarco exported pellets through Ponta Ubu and Vale through Tubarao. Since August 2011, Vale had been unwilling or unable to supply pellets through Tubarao and that contract was in effect "idle".

On 5th November, 2015, the Fundão dam burst, causing wide-spread destruction and halting production at Samarco's mine, leaving it unable to supply pellets to the charterer through Ponta Ubu. With no other available suppliers, the charterer was unable to perform the five shipments remaining under the COA. The charterer sought to rely on clause 32 to exclude its liability for failure to ship cargo after the incident.

Mr Justice Teare held that the charterer could not rely on clause 32 because the charterer could not show that its failure resulted from the incident or that the incident directly affected the performance of its obligations. Limbungan had already defaulted on two shipments before the dam burst because of the weak market and it was therefore considered likely that the charterer would have failed to ship the cargoes even if the dam had not burst.

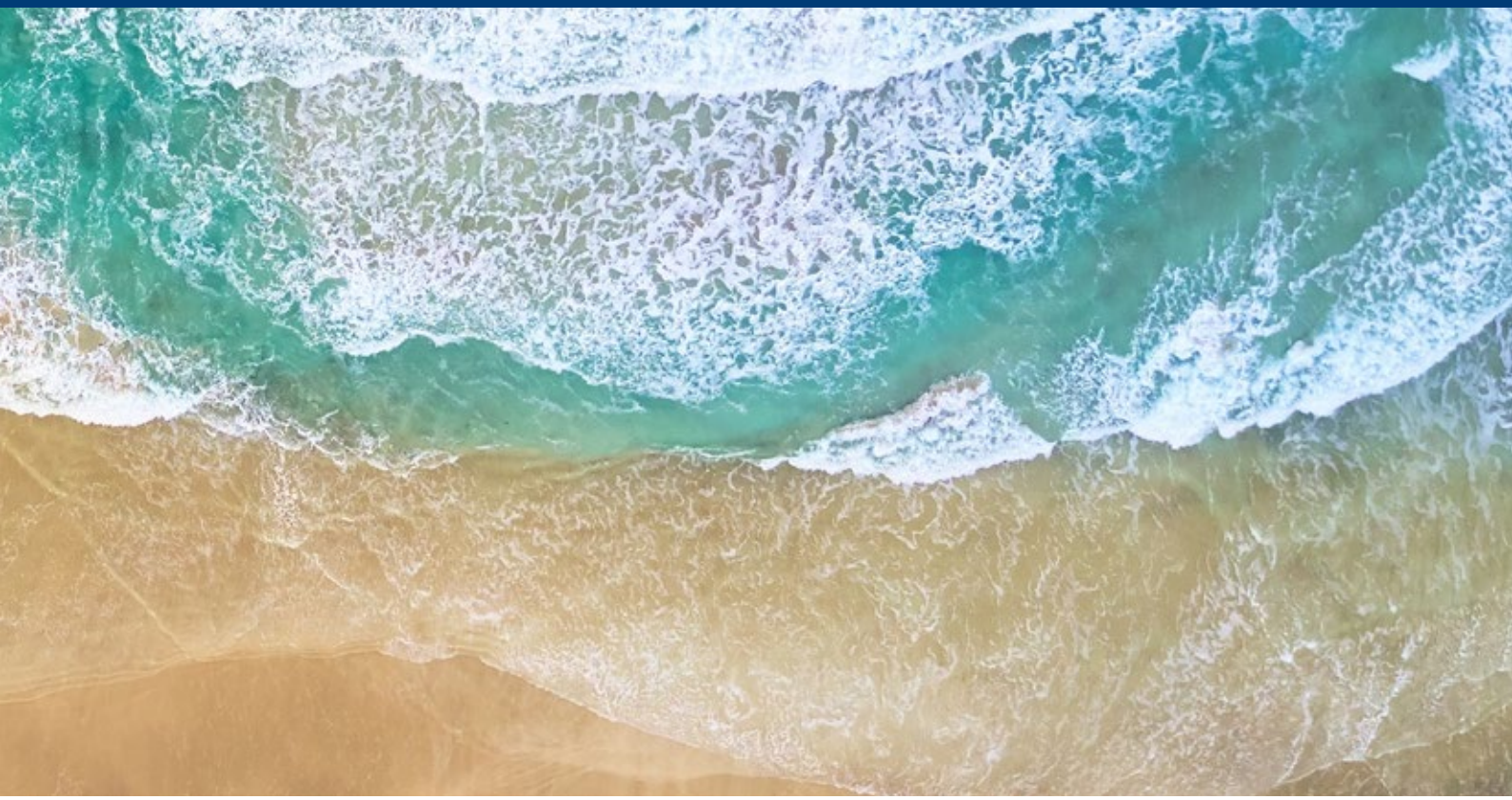
However, the court found that the owner was not entitled to recover substantial damages because even if the charterer had been in a position to ship the cargoes but for the incident, then in any event the incident would have prevented shipment. In those circumstance, clause 32 would have excused the charterer from liability. The owner could not be put in a better position than it would have been, had the charterer been able and willing to ship the contracted cargoes.

Construction and causation

A force majeure clause may act as a contractual frustration clause and bring the contract to an end. Alternatively, it may act as an exception clause and simply excuse liability for breach.

Like the doctrine of frustration, a contractual frustration clause does not, in the absence of clear words, require the party relying on it to show that it would not be in breach but for the frustrating event. The purpose of the clause is to provide for termination of the contract. By contrast, exception clauses deal with liability for breach. In this context, the court held that it would be surprising if a party could be excused from liability, even though an event within the clause had occurred which made performance impossible, where it would not have performed in any event for different reasons.

As with any point of contractual construction, whether a clause is properly to be understood as a contractual frustration or an exception clause depends on its wording. In this case, clause 32 was described in the COA as an exception clause. It was expressly limited to failures "resulting from" force majeure events which "directly affect the performance of either party". This wording imported a



"but for" causation requirement. Therefore, the charterer was required to prove that, but for the incident, the cargo would have been supplied. It failed to do this.

Alternative performance and causation

Generally, where a contract provides for alternative methods of performance, and one method is prevented by an excepted peril, then the party affected must seek to perform by an alternative method. Mr Justice Teare held that this principle was capable of applying to the charterer's entitlement under the COA to ship either from Ponta Ubu or from Tubarao.

It was not incumbent on the charterer to make alternative arrangements in advance on the mere off-chance that the first chosen mode of performance may fail. If the arrangements which the charterer had made broke down as a result of an unexpected peril, the charterer would be relieved of liability provided it had acted with reasonable promptness in obtaining cargo by alternative means.

Therefore, the factual issue of whether the charterer could be regarded as having made arrangements to ship the relevant cargoes was an important one. If the charterer had made no arrangements to provide cargo, that might make it more difficult to establish that the failure to supply cargoes had resulted from the incident. Mr Justice Teare determined this factual point against the charterer.

In these circumstances, the charterer could not rely on the incident as the cause of its failure to perform unless it could show that, following the incident, it had made reasonable efforts to ship through Tubarao without success. The burden of proof was on the charterer as the party seeking to rely on the force majeure clause. On this point, the court held that Vale would probably not have agreed to supply cargo for the charterers through Tubarao.

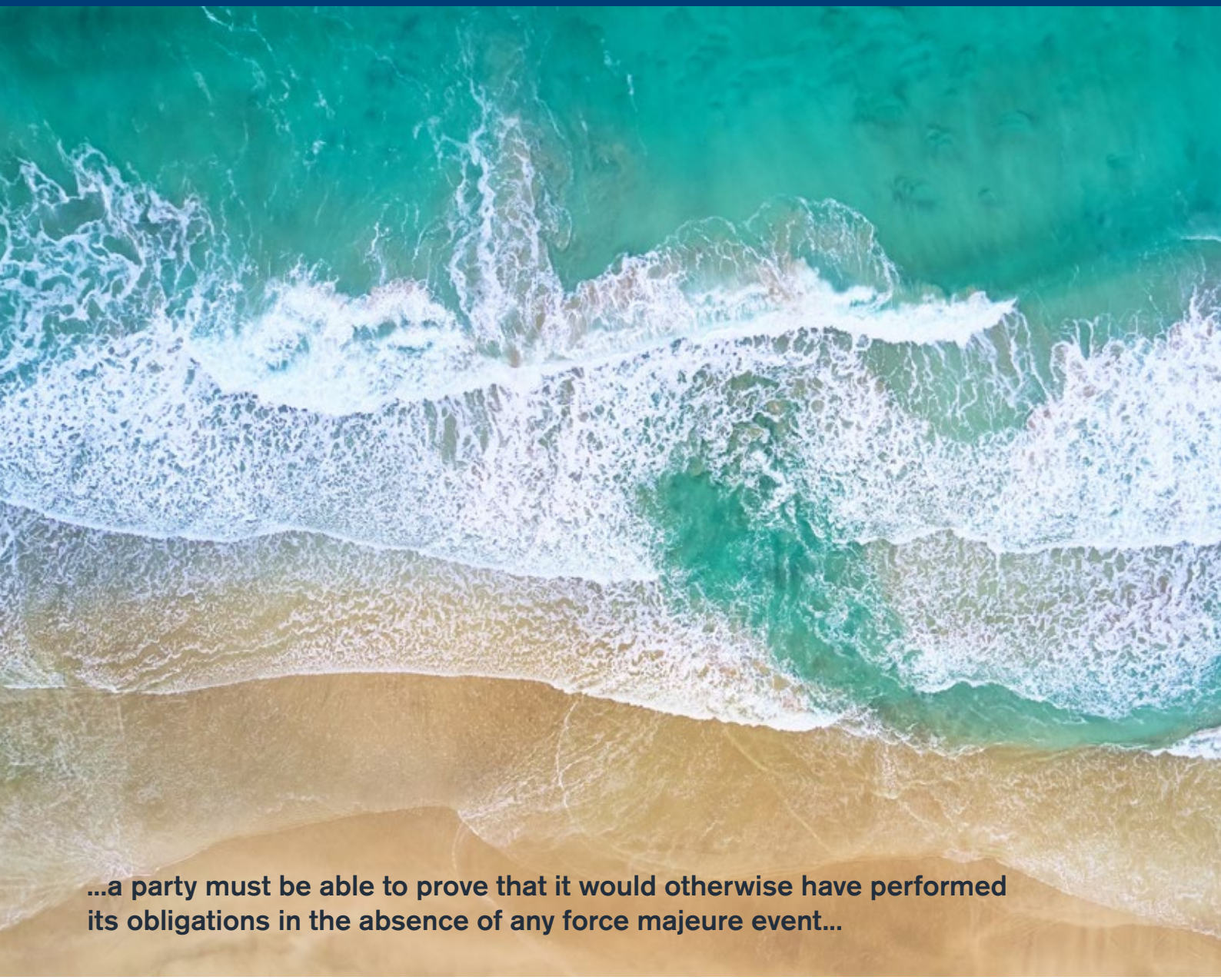
Since the charterer could not establish that they would have fulfilled their obligations under the COA but for the incident, they were unable to rely on the force majeure clause.

The relevance of a force majeure clause in the assessment of damages

Despite having reached this conclusion on clause 32, the judge took the clause into account at the damages stage and denied the owner's recovery.

The court considered the owner's position as a result of the breach and the position it would have been in had the charterer performed its obligations under the COA. Mr Justice Teare held that even if, but for the incident, the charterer had been able and willing to ship the cargoes, in fact no cargoes would have been shipped because of the incident. In that event, the incident would have excused the charterer from its failure to make the required shipments. The owner could not be put in a better position than it would have been in had the charterer been able and willing to ship. Therefore, the owner was not entitled to the substantial damages claimed.

This bears similarities to the House of Lord's application of the compensatory principle in Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (The "Golden Victory") [2007] UKHL 12. In that case, the outbreak of the Second Gulf War fifteen months after the alleged breach would in



...a party must be able to prove that it would otherwise have performed its obligations in the absence of any force majeure event...

due course have entitled the defendant to terminate the charterparty. The majority of the House of Lords upheld the arbitrator's decision to limit recoverable damages to the period before the defendant became entitled to terminate the charterparty.

This was on the basis that, had the defendant not been in breach, it would lawfully have been able to terminate from that point. The claimant should not be compensated for the charterparty term after that point, because that would put the claimant in a better position than if the defendant had not been in breach.

In both The "Golden Victory" and this case, the court took into account rights which the defendant would have had under the contract.

Conclusion

The case highlights a number of interesting legal principles and provides clarity in relation to the interpretation of force majeure clauses in general. In particular, Mr Justice Teare's analysis shows that a party must be able to prove that it would otherwise have performed its obligations in the absence of any force majeure event and that, even where a force majeure clause cannot be relied on at the liability stage, nonetheless it may be relied on at the quantum stage to substantially reduce the damages payable. Parties are advised to pay careful attention to force majeure clauses at the drafting stage to ensure that they will achieve the intended result should a force majeure event occur.

If Members have any questions relating to force majeure clauses, they should contact the Managers.

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