UK DEFENCE CLUB

Update on force majeure clauses - Classic Maritime decision overturned on appeal.

The Court of Appeal has overturned an earlier, somewhat controversial, decision of the Commercial Court in relation to force majeure clauses. The case grapples with two key questions: whether it is necessary to show "but for" causation in order to invoke a force majeure clause and whether the innocent party is entitled to damages even if the contract would not have been performed in any event.

The facts

As reported in our February, 2019 Soundings article, the owner had concluded a contract of affreightment ("CoA") with the charterer for the carriage of iron ore from specified Brazilian ports to Malaysia. In November, 2015 the Samarco dam burst, preventing iron ore shipments from the Brazilian ports in question. The charterer declared force majeure, based on the following clause contained in the CoA:

Exceptions

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… [a long list of typical force majeure-type events]; 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. If any

continued overleaf

In short, the court held that the correct approach according to the English law of damages was to put the owner in the position that it would have been in if the CoA had been performed, not the position that it would have been in if the charterer had been ready and able to provide a cargo.

time is lost due to such events or causes such time shall not count as Laytime or demurrage (unless the Vessel is already on demurrage in which case only half time to count).

The owner contested the charterer's force majeure declaration, arguing that (i) on its proper interpretation, the charterer could only rely on the force majeure clause if, but for the force majeure event, it would have been ready and able to provide a cargo; and (ii) but for the force majeure event, the charterer would not, in fact, have been ready and able to provide a cargo, as a result of a dispute with its suppliers.

Teare J's decision

The case came before Teare J in the Commercial Court who agreed with the owner on the construction of the force majeure clause. However, in the more controversial aspect of his judgment, Teare J went on to hold that, although the charterer had not been entitled to declare force majeure, the owner had not suffered any loss.

Teare J's reasoning was as follows: (i) the owner was only entitled to be placed in the position that it would have been in if the charterer had not breached the CoA; (ii) if the charterer had been ready and able to provide a cargo, it would not have breached the CoA, since it would have been able to rely on the force majeure clause; (iii) the owner would, therefore, not have been any better off if the charterer had been ready and able to provide a cargo, since no voyages would have taken place due to the force majeure event, and the owner would not have had any claim against the charterer, who would have been protected by the force majeure clause.

This decision caused some consternation in the market. Even though the charterer was not entitled to declare force majeure because it would not have been ready and able to provide a cargo, the owner still did not recover any damages.

The Court of Appeal's decision

However, in a judgment handed down on 27th June, 2019 (Maritime Inc v Limbungan Makmur SDN BHD [2019] EWCA Civ 1102), the Court of Appeal has restored order to the law of force majeure clauses. Although the Court of Appeal agreed with Teare J that, on the proper construction of the force majeure clause in question, the charterer could not declare force majeure unless, but for the force majeure event, it would have been ready and able to perform, the Court of Appeal overturned Teare J's decision on damages.

In short, the court held that the correct approach according to the English law of damages was to put the owner in the position that it would have been in if the CoA had been performed, not the position that it would have been in if the charterer had been ready and able to provide a cargo. The court found that if the CoA had been performed, the owner would have earned substantial freight and the owner was therefore awarded damages of USD 19m.

Practical impacts

Two key points can, therefore, be drawn from this judgment. Firstly, the "but for" principle should be applied in order for a party to be able to rely on a force majeure clause of this type. Secondly, a party may be entitled to damages even if the defaulting party would not have been able to perform the contract in any event. However, it remains to be seen whether the Supreme Court will take a different view on any appeal.

Members wishing to protect themselves from the difficulties that the owner encountered in this case would be well-advised to: (i) make clear in any force majeure clause whether it is a precondition of a declaration of force majeure that, but for the force majeure event, the defaulting party would have been ready and able to perform; and (ii) make clear that, in the event that the defaulting party would not have been ready and able to perform, the innocent party should be able to recover substantial damages.

Please contact the Managers for further advice in relation to any of the issues discussed above.

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