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Construction Law Update

In Breach, But at What Cost? Force Majeure, Causation and Damages

The recent Judgment of the Commercial Court in *Classic Maritime Inc. ("**CMI**") v Limbungan Makmur SDN BHD & Anor ("**Limbungan**") [2018]* examines the role of causation when defending a matter on the grounds of force majeure. The Judgment also includes an interesting application of the compensatory principle when assessing damages.

Background

CMI (a shipowner) entered into a long-term contract with Limbungan (a charterer), for the transport of iron ore pellets. The iron ore was mined in the industrial complex of Germano in Brazil, in which the Fundao dam is situated. The dam burst in November 2015 and the production of iron ore in the mine ceased. Limbungan could no longer provide cargoes of iron ore pellets, and CMI claimed damages in excess of $20million. To excuse it from liability, Limbungan relied upon the dam burst as a force majeure event. CMI argued that, but for the dam burst, the shipments would still not have been performed.

Limbungan relied upon what was described by the parties in the hearing as a force majeure clause (clause 32) to defend CMI's claim which stated:

"*Neither the vessel, her master or Owners…shall be Responsible for loss of or 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…*"

Of particular interest to the Court were the phrases "*resulting from*" and "*directly affect*". The Court held that the use of these phrases imports a causation requirement to the clause and that the 'force majeure event' must directly affect the performance of Limbungan's obligations in order to excuse it from liability.

The Court explained the difference between a contractual frustration clause (which does not require the 'but for' test to be satisfied) and an exceptions clause which does:

"A contractual frustration clause, like the doctrine of frustration, is concerned with the effect of an event upon a contract for the future. It operates to bring the contract…to an end…An exceptions clause is concerned with whether or not a party is exempted from liability for a breach of contract at a time when the contract remained in existence…"

It was held that clause 32 was an exceptions clause and Limbungan was required to prove causation.

The "But For" Test

In order to escape liability, Limbungan would need to demonstrate that, but for the dam burst, Limbungan could have shipped the cargo but due to the dam burst it did not ship the cargo.

The Court concluded that Limbungan had not made sufficient alternative arrangements to comply with its obligation to transport the iron ore by other means, finding that but for the dam bursting Limbungan would still not have shipped the cargo. The breach was due to Limbungan not shipping for economic reasons rather than due to the dam bursting. Therefore, Limbungan could not rely on force majeure to excuse its failure to supply the cargo and was found liable for breach of contract.

Damages and the Compensatory Principle

Whilst the Court found that Limbungan was unable to rely upon the dam burst as a reason for its failure to perform the contract, it nevertheless decided that Limbungan was not liable to CMI for substantial

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damages. In reaching this conclusion, the Court applied the compensatory principle. However, the way it was applied was slightly modified. Rather than comparing the position that CMI was in as a result of Limbungan's breach with the position CMI would have been in had Limbungan complied with the contract, the Court compared the position CMI was in with the position it would have been in had Limbungan been able and willing, but for the dam burst, to supply and ship the cargoes. The Court found that even if Limbungan was ready and willing to ship the cargoes, it would not have been possible to do so due to the burst dam. The compensatory principle (as applied in this case) therefore debarred recovery of substantial damages.

Analysis

Whilst this was a case concerning the transport of cargo, this decision may have implications for those seeking to rely upon force majeure events generally to defend claims in other sectors, including construction and engineering. This Commercial Court decision demonstrates that, subject to the precise wording of the contract, a party relying on a force majeure event as a defence to a failure to perform its contractual obligations must be able to show that 'but for' the force majeure event, it would have complied with such obligations.

However, even if it fails that test, all is not lost. Provided it can show that the claimant would not have received the sums claimed in any event, it may significantly reduce, or potentially eradicate entirely, any claim for damages. This Judgment serves as a stark reminder as to the effects of precise words within a contract. Careful consideration must be given to the use of certain words or phrases. As in this case, the words, "resulting from" and "directly affect" can make all the difference. What a party may believe to be a force majeure clause may not, in fact, be.