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ARBITRATIONS – LONDON

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Demurrage – Vessel ordered to leave loading terminal – Imminent approach of tropical storm – Whether time continued to count – Whether owners entitled to demurrage – Whether charterers entitled to rely on "bad weather" and/or "other reasons not attributable to charterers" exceptions – Whether charterers entitled to rely on "Force Majeure" – Whether charterers under duty to minimise effects of tropical storm on vessel

London Arbitration 21/19

The dispute between the parties arose out of a Contract of Affreightment dated 31 July (the COA). The claimant owners claimed demurrage in the sum of US$330,494.99 from the respondent charterers. The subject vessel was due to load a cargo of 60,000 mt of coal at a terminal on the Mississippi for shipment to Mexico. The vessel duly arrived at the terminal and gave notice of readiness on 25 August. Loading started and time started to count at 22.20 on 25 August. 48 hours 50 minutes of laytime was allowed. A tropical storm or hurricane was approaching the coast. At 09.30 on 26 August the US Coast Guard predicted gale force winds at South West Pass in 48 hours – setting "port condition X-ray", with an anticipation of setting "port condition Yankee" at 13.00 on 26 August. The vessel continued to load. As at 10.59 on 26 August the projected time of completion of the cargo/departure of the vessel was 17.00/19.00 on Monday 27 August.

The terminal at that time indicated:

> "Terminal presently has no intention to shut-down due to the uncertain landfall of TS/Hurricane [X]; unless USCG issue condition status all facilities ... must make preparation for the TS/Hurricane."

At some unknown time thereafter, the terminal decided to order the vessel off the berth. It ordered a pilot for 16.00 on Sunday 26 August, but he arrived at 15.15; loading ceased at 15.30 and the vessel vacated the berth. A later message, apparently from the terminal, stated:

> "Due to Bar Pilots shutting down later tonight anchorages will begin to fill. This leaves [the terminal] no alternative but to vacate the vessel from our berth for the safety of our dock, fleet and terminal."

The vessel had by then loaded about half of the intended cargo. The vessel shifted to an anchorage about 30 minutes downriver, anchoring there at 17.30 on Sunday 26 August. She remained there idle all day on Monday 27 August.

The hurricane made landfall west of the Southwest Pass in the morning of Tuesday 29 August. At 12.00 on 28 August the USCG had issued a COTP (Captain of the Port) order "Closed the port to all movements". The vessel finally reberthed a month later, on 26 September, completed loading at 10.35 on 28 September and sailing at 12.45 on that day.

The COA

The relevant provisions of the COA were as follows:

> "44. **Exceptions to laytime and demurrage**
>
> Time elapsed in the following circumstances shall not count as laytime or time on demurrage:
>
> ...
>
> 44.2 if the berthing, loading or discharging does not start or is delayed or suspended due to fire or bad weather (including but not limited to floods, rain, frosts, fog, snow, hail, storms, high winds, ice, perils of the sea or other waters) or for other reasons not attributable to Charterers or their shippers/receivers; time to count once vessel is on demurrage, but per mainterms loading/discharge on WWD basis so time lost due to weather conditions not to count as laytime used.
>
> ...
>
> 44.17 Any time lost due to a Force Majeure Event.
>
> **50. Force Majeure**
>
> 50.1. For purposes of this Charter Party, 'Force Majeure Event' means any event or circumstance whatsoever occurring after the date of this Charter Party which is beyond the reasonable control of the party affected (the 'Affected Party'), that prevents, restricts or delays such party's performance under this Agreement. Provided that they satisfy the foregoing criteria, events or circumstance constituting Force Majeure Event shall include without limitation the following:
>
> a) fire, flood, lightning, storm, typhoon, tornado, tidal waves, low water, drought, earthquake, landslide, perils of the sea, soil erosion, subsidence, washout, epidemic or other acts of God;
>
> ...
>
> 50.3 The Affected Party shall as soon as practicable after learning of the Force Majeure Event notify the other party (the 'Non-Affected Party') of the commencement of the Force Majeure Event and, to the extent then available, provide to it a bona fide non-binding estimate of the extent and expected duration of its inability to perform. The Affected Party shall use reasonable endeavours to mitigate and overcome the effects of the Force Majeure Event and shall, during the continuation of the Force Majeure Event, provide the Non-Affected Party with reasonable bona fide updates, when and if available, of the extent and expected duration of its inability to perform those obligations affected by the Force Majeure Event.
>
> ...

EDITED BY MICHAEL DAICHES, BARRISTER

> 50.5 For the purposes of Clause 50.1, an event or circumstance shall not be considered to be a Force Majeure event in relation to a party unless:
>
> ...
>
> b) in the case of the Charterer, it is beyond the reasonable control of the Charterer, its affiliates, the operator of the relevant port and any servant or agent of the Charterer."

The issues

The main issues for decision were:

(1) Did time stop running at 15.30 on 26 August when the vessel was ordered off the terminal? and

(2) What obligations did the charterers have to minimise the effects of the hurricane on the vessel? Did they fulfil them?

Held,

Issue (1) – did time stop running at 15.30 on 26 August when the vessel was ordered off the terminal?

The owners maintained that time continued to run even after the vessel was ordered off the terminal. The charterers said that laytime stopped running when the vessel was ordered off the terminal as a result of the operation of the exceptions in clauses 44.2 and 44.17.

Clause 44.2

The charterers relied on the following exceptions in clause 44.2:

> (a) "if the ... loading ... is delayed or suspended due to ... bad weather"; and
>
> (b) "if the ... loading ... is delayed or suspended ... for other reasons not attributable to Charterers or their shippers/receivers".

(a) The "bad weather" exception

The charterers submitted that, on a natural reading of clause 44.2, the words "if the ... loading ... is delayed or suspended due to ... bad weather" covered the suspension of loading on account of the hurricane. They asked rhetorically: "why was loading suspended at 15:30 on 26 August?" to which they answered: "because the hurricane was already in force over the Florida Keys and the Gulf of Mexico and was about to land at [the terminal]".

The owners said that it was for the charterers to bring themselves within the exceptions, as a matter of their construction, and on the facts. They said that "the ordinary principle is that to bring themselves within the clause, charterers have to show that time was lost *directly* due to bad weather. That would not include time lost for other reasons; specifically, it would not include time lost *due to anticipation of* bad weather".

The tribunal considered the authorities, including *The Maria G* [1958] 1 Lloyd's Rep 616, *Gebr Broere BV v Saras Chimica SpA* [1982] 2 Lloyd's Rep 436, and *Watts v Mitsui* [1917] AC 227, the latter case emphasising that the factual circumstances in each case had to be considered. The tribunal also referred to Schofield, *Laytime and Demurrage*, which confirmed that there needed to be flexibility to fit the differing facts of different situations. Having dealt with *Watts v Mitsui*, Schofield continued at paras 4.170 and 4.171:

> "4.170 In theory there would seem no reason why these principles should not also apply to a weather clause. The question would then be how imminent must adverse weather be to make the present weather itself be considered adverse. Common sense would suggest that the answer will vary with different types of adverse weather. Thus with rain or snow, for instance, it is unlikely that the weather would be considered adverse until it actually started raining or snowing, as the case may be. When this happened the hatches could be quickly closed and cargo operations suspended.
>
> 4.171 In contrast, however, if the adverse weather feared was a typhoon, then it is suggested that there might be scope for invoking the principles set out above. Clearly, a typhoon would affect both cargo operations and the safety of the vessel/berth. *It is therefore suggested that at the point where good seamanship dictates that cargo operations should cease and the vessel sail, that is the time at which the threat of adverse weather could itself be considered adverse weather*, notwithstanding that, at the moment, wind strengths had not yet risen so far as to of themselves justify suspending cargo operations." [Emphasis added by tribunal.]

The charterers submitted that good seamanship would dictate that one didn't leave one's vessel in a port that was about to be hit by a hurricane after being ordered off the berth by the port and told that the port's pilots were about to cease operations.

The owners responded by referring to Schofield for another London Arbitration Award summarised as follows:

> "The vessel concerned arrived at the loading port and commenced loading a cargo of bulk sulphur via a conveyor belt with the vessel being anchored offshore. Owing to bad weather, the vessel had to leave the loading point but returned when the weather improved. An additional clause in the charter provided that time lost by reason of bad weather should not be computed in the loading time. However, the arbitrators held that whilst it was true that, indirectly, the loading operation was suspended because of the bad weather, nevertheless the effective cause of the cessation of loading was the vessel having to leave the loading point because of its unsafety. No evidence had been produced to show that the bad weather actually prevented the loading of sulphur through the conveyor belt, and the weather exclusion clause was therefore held inapplicable."

The owners used that arbitration summary to address the charterers' point that the severity of the weather was also a factor to be taken into account. The owners said that the severity of the weather might be important if considering bad weather itself, but it did not hold good if the action was precipitated by the anticipation of bad weather (and not bad weather itself). To illustrate the point, the owners said that the worse the weather that was threatened, the more likely it was that leaving in advance of what was to come was leaving due to safety rather than bad weather. Indeed, the further in advance that a vessel left berth the more likely it was that the effective cause was safety rather than actual bad weather. Consequently, the owners maintained their position that "anticipation of bad weather" did not equate to "bad weather".

On the authorities, the owners had made out their case that the charterers had to prove that the suspension of loading was caused by bad weather; and in that regard, a suspension in anticipation of bad weather was not enough. However, it was clear from *Watts v Mitsui* that it was not possible to define precisely the imminence of peril which would make the restraint a present fact as contrasted with a future fear. In the circumstances, the tribunal had to look at the facts to determine whether or not the exception was engaged.

It was worth taking a snapshot of what the situation was when the vessel was ordered off the berth by the terminal at 15.30 on 26 August. The hurricane was approaching the coast. At 09.30 on 26 August the US Coast Guard predicted gale force winds at South West Pass in 48 hours – setting "port condition X-ray". Port Condition X-Ray gave a situation report (when pilots suspending operations etc) and set out sensible precautionary measures, but gave no indication that loading needed to cease. The vessel continued to load. As at 10.59 on 26 August the projected time of completion of the cargo/departure of the vessel was 17.00/19.00 on Monday 27 August. The terminal at that time indicated:

> "Terminal presently has no intention to shut-down due to the uncertain landfall of TS/Hurricane [X]; unless USCG issue condition status all facilities in ... Parish ... must make preparation for the TS/Hurricane."

The US Coast Guard set "port condition Yankee" at 13.00 on 26 August, which predicted gale force winds within 24 hours. Port Condition Yankee introduced a more detailed regime than Port Condition X-Ray, including allowing for vessel traffic control measures in the future as the weather worsened and wind got up, but it did not actually specify any current restrictions so that loading needed to cease.

At some unknown time thereafter, the terminal decided to order the vessel off the berth. It ordered a pilot for 16.00 on Sunday 26 August, but he arrived at 15.15; loading ceased at 15.30 and the vessel vacated the berth. A later message, apparently from the terminal, stated:

> "Due to Bar Pilots shutting down later tonight anchorages will begin to fill. This leaves [the terminal] no alternative but to vacate the vessel from our berth for the safety of our dock, fleet and terminal."

The letter from the terminal dated 27 August was instructive. It stated:

> "[The terminal] was forced to cease vessel loading operations at approximately 1200 hours [yesterday] and vacate its berth in anticipation of the vessel anchorages becoming full."

The above snapshot did not indicate to the tribunal that the vessel was ordered off the berth by the terminal due to bad weather. The hurricane was still approximately two to two-and-a-half days away, the weather at the berth was benign and there could have been no concern for the immediate safety of the vessel. The tribunal also considered that one of the key reasons behind the terminal's decision was an apprehension that the anchorages were all filling (indeed, the vessel got the only anchorage left in the area) and that the terminal had to consider the safety of their barges. Whilst taking the charterers' point that, particularly with a hurricane, one could not wait until the hurricane actually hit, the tribunal found that the terminal's order to vacate the berth was made in anticipation of bad weather and not due to bad weather.

Accordingly, the charterers were not entitled to rely on the "bad weather" exception.

(b) The "for other reasons" exception

The wording of clause 44.2 was addressing the situation where berthing or loading did not start or was suspended. The parties agreed in the COA that time elapsed should not count as laytime in three circumstances – fire, bad weather or any other reason not attributable to the charterers or their shippers. The first two exceptions were not of the same genus and so they did not limit the third exception which was a much more general exception. There was no requirement for the third exception to be read in conjunction with the first two exceptions. The third exception either applied or did not apply on its own words.

The charterers argued that the ordering of the vessel off the berth was a reason not attributable to them or their shippers.

The owners said that it was for the charterers to prove that the actions of the terminal were not attributable to charterers or their shippers. The terminal was carrying out the functions of the charterers or their shippers in and about the loading of the vessel within the allowed laytime. Their actions (in ordering the vessel off berth) were "attributable" to the charterers for the purposes of the clause. It was not necessary to find formal "agency" relations: the clause only looked for reasons "attributable" to charterers or their agents.

Loading was suspended because the vessel was ordered off the berth by the terminal. The owners pleaded initially that the actions of the terminal were attributable to the charterers, without giving any details. In response, the charterers had confirmed that the charterers, the shippers and the terminal were three separate legal entities. In the tribunal's view, there was little doubt that legally the charterers, the shippers and the terminal were separate, independent legal entities. The charterers had thus discharged the prima facie burden of proof on them to bring themselves within the exception by demonstrating that the companies were legally distinct, and further that there was no direct agency or other arrangement between themselves, shippers and terminal. The terminal was not the charterers' agent, nor was it the shipper's agent.

The terminal's order for the vessel to leave the berth was, therefore, the charterers said, a reason "not attributable to Charterers or their shippers/receivers". The owners' case was that even if the charterers could demonstrate that the terminal was a separate legal entity and that there was no formal contractual or agency relationship between them, the charterers had to go one step further and demonstrate that the actions of the terminal were not "attributable" to charterers and/or their shippers.

The various dictionary definitions of the word "attributable" produced by the charterers did not really take the matter further. Essentially, the charterers summarised them by saying that the words "attributable to" were a contractual synonym for "due to" or "caused by". The tribunal did not consider that it was necessary for the owners to show that the events happened solely "due to" the charterers or shippers or alternatively that the charterers or shippers positively "caused" the event to take place in order for the event to be "attributable" to them. The word "attributable" did not connote any positive action or causation by the charterers or the shippers. It was possible for something to be "attributable" to someone without them having taken positive steps to cause it. Thus, the submission that neither the charterers nor the shippers had any control over the suspension of loading by the terminal did not assist the charterers. An act could be attributable to a party even if they had no control over whether it happened or not.

The owners then argued that, under the broader liability regime of the COA, the vessel was an arrived ship and so the risk of delay at the load port had passed to the charterers or their shippers. Consequently, delay caused by the terminal, who the owners said were carrying out the "functions of the charterers or their shippers in and about the loading of the vessel within the allowed laytime", was attributable to the charterers.

It was true that the vessel was an arrived ship and that the risk of delay had passed to the charterers or their shippers. However, although the risk of delay had passed to the charterers or their shippers, that was subject to certain express exceptions. The tribunal considered that the owners' argument based on the broader liability regime of the COA was putting a gloss on the wording of clause 44.2 which was not justified. The clause did not say "for other reasons not attributable *as between owners and charterers* to charterers or their shippers/receivers". A plain reading of the words required the tribunal to decide that the charterers could rely on the exception as expressed in the words actually used in the COA. If they could show that events on which they relied were not attributable to them, they were entitled to rely on the exception. The tribunal did not have to consider whether the words agreed between the parties would "subvert the allocation of time for loading between Owners and Charterers" as argued by the owners. If the parties had wished to limit the exceptions clause so that the wording caught events or circumstances which were attributable to the charterers rather than the owners under the liability regime of the COA, they could have specified it. They did not.

In the tribunal's opinion the charterers had demonstrated that the action of the terminal, in ordering the vessel off the berth, was not attributable to the charterers and their shippers, by showing that they had no connection with the terminal beyond the terminal being the owner of the terminal at which the ship chartered by the charterers was loading. Merely because the vessel was sent to a particular berth by the charterers and/or shippers did not give the owners the right to claim that the

terminal owner was carrying out the functions of charterers in and about the loading of the vessel. That was stretching the meaning of the word "attributable" excessively. The tribunal had seen cases where terminals such as the terminal had in fact, entirely for their own purposes, ordered vessels to leave a berth for a time, contrary to the wishes of shippers and charterers.

In the circumstances, the charterers had made out their alternative case, namely that under clause 44.2, loading was delayed or suspended for a reason not attributable to the charterers or their shippers/receivers, ie the order from the terminal to cease loading and vacate the berth at 15.30 on 26 August. Accordingly, the charterers were entitled to rely on the "other reasons" exception.

Clause 44.17 – "Force Majeure"

"Force Majeure Event" was defined in clauses 50.1 and 50.5. The charterers needed to show: "any event or circumstance whatsoever" occurring after the date of the charter; which was beyond the reasonable control of the charterers, their affiliates, the operator of the relevant port and any servant or agent of the charterers; and which prevented, restricted or delayed the charterers' performance under the COA.

There was no all-inclusive definition of a Force Majeure Event, but clause 50.1 provided that it included without limitation various events listed in five categories. The only category which could possibly apply in the present case was:

> "a) fire, flood, lightning, storm, typhoon, tornado, tidal waves, low water, drought, earthquake, landslide, perils of the sea, soil erosion, subsidence, washout, epidemic or other acts of God;"

The charterers argued that, in the present case, the "event or circumstance" in question that prevented or delayed performance was the imminent arrival of the hurricane. As the owners had pointed out, the charterers had to rely on the arrival of the hurricane because they could not rely upon the order by the terminal that the vessel should leave the berth when arguing force majeure. Such an order could not be a Force Majeure Event under clause 50.5(b) because it was not "beyond the reasonable control of the operator of the relevant port".

In the circumstances, the tribunal agreed with the owners that the charterers' reliance on force majeure failed for the same reason that their reliance on the bad weather exception in clause 44.2 failed. Anticipation of a Force Majeure Event was not force majeure. The question was whether a Force Majeure Event under clause 50 of the COA was triggered on the terms of the clause at the time that the vessel was ordered from the berth at 15.30 on 26 August. The tribunal decided that it was not.

In so deciding, the tribunal had in mind the charterers' argument that a number of the other force majeure events or circumstances listed in clause 50.1(a) would require action to be taken before the "event or circumstance" actually took place: for example it would not be necessary to wait until terminal workers started to fall ill before determining that an epidemic was a Force Majeure Event. The tribunal further rejected the suggestion of the owners that somehow 'bad weather' was covered by clause 44.2 so that, if particular weather did not engage clause 44.2, it could not engage clause 50.1. The correct position was that clause 44.17, read alongside clause 50.1, set out a separate laytime exception to clause 44.2.

In the light of the tribunal's decision on the charterers' alternative argument under clause 44.2, namely that laytime was interrupted for some other reasons not attributable to charterers or their shippers, the tribunal did not have to decide at what time there was a Force Majeure Event at the terminal under clause 50 of the COA.

Issue (2) – what obligations did the charterers have to minimise the effects of the hurricane on the vessel? Did they fulfil them?

Had the charterers been able to bring themselves within clause 44.17 and the force majeure provisions of clause 50, it was expressly provided by clause 50.3 that they had to "use reasonable endeavours to mitigate and overcome the effects of the Force Majeure event". The owners claimed that the charterers had not used reasonable endeavours to mitigate and overcome the effects of the Force Majeure Event. Having decided that the charterers did not succeed on clauses 44.17 and clause 50, the tribunal did not have to decide whether the charterers would have demonstrated that they had taken reasonable steps to mitigate for the purposes of those provisions. However, the owners had argued that the charterers had a duty to mitigate under clause 44.2 which was similar to the specific duty to mitigate set out under clauses 44.17 and 50. The tribunal did not agree. It accepted in general terms that if it was reasonably open to a party to avoid the consequences of an exception, they had to do so. However, the tribunal did not elevate the duty to mitigate any higher than that in the light of the distinction between clauses 44.2 and 44.17 (and clause 50). Clause 44.17 contained, by virtue of clause 50.3, an express requirement to mitigate. Clause 44.2 contained no such express requirement.

Under clause 44.2 the charterers needed to show that loading was delayed or suspended due to a reason that was not attributable to them. They had done so and it was difficult, if not impossible, to see what they could or should have done to avoid the suspension of loading. The tribunal did not accept that, under clause 44.2, the charterers had some separate, higher obligation to mitigate. Contractual laytime was simply interrupted for the period of the "time elapsed".

Conclusion

The accounting position between the parties at the commencement of the arbitration was neutral, but for the demurrage claim. The owners claimed demurrage of US$330,494.79. The charterers admitted, and paid, demurrage of US$9,661.46, leaving the owners with a net claim of US$320,833.33. As a result of the award, the owners were entitled to recover only a small amount of demurrage from the charterers.

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