Force Majeure: Contractual Performance When the Dam Bursts

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PRACTICES Litigation, Shipping

Classic Maritime Inc. v Limbungan SDN BHD & Anor [2018] EWHC 2389 (Comm)

This case arose out of a dispute relating to the correct interpretation of an "exceptions clause" which excused non-performance of a contract in circumstances that are usually described as *force majeure*.

The central issues in the case related to:

1. Whether there were alternative methods of performance
2. Whether, but for an event of *force majeure*, the charterers, would have performed the contract

Facts

The dispute arose out of a contract of affreightment between a shipowner, Classic Maritime, and the charterer, Limbungan Makmur. Limbugnan failed to provide cargoes for seven shipments of iron ore pellets to Classic. Five of these instances occurred after a major dam burst in Brazil which halted production of iron ore pellets at a mine in the area. Prior to the dam burst, Limbugnan had predominantly sourced iron ore pellets from two suppliers. One supplier was unable to provide iron ore pellets following the dam burst, the second supplier was not affected but was unable or unwilling to provide iron ore pellets to Limbungan.

One of the issues that was considered by the court was whether the existing relationship between Limbungan and the two suppliers constituted "arrangements" that were affected by the *force majeure* event or whether it was possible for Limbungan to fulfil its obligations through alternative method of performance. The court looked at whether the second supplier affected Limbungan's ability to perform such that the dam burst could properly be said to be causative of the non-performance. This was, in the judge's view, tied to the question of whether, but for the dam burst, Limbungan was ready or willing to perform the contract.

Judgment

The judge found that on the facts, Limbungan was not ready or willing to perform the contract, regardless of the dam burst. It was clear that some contractual arrangements had been made with the second supplier, but it was clear that for commercial reasons, Limbungan would be unable to source iron ore pellets from them. As such, the dam burst was not the cause of their failure to perform the contract and therefore Limbungan was in breach of contract.

However, when it came to compensating Classic for failure to provide the cargoes, the judge held that the compensatory principle of damages meant that Classic should be put in the position it would have been in but for the breach. On the particular facts of this case, but for the breach, Limbungan would not have been able to provide cargoes due to the dam burst and had Limbungan been ready and willing to provide cargoes, it would have been able to rely on the *force majeure*

provision in the contract. For that reason, the judge found that Classic was not entitled to substantial damages in respect of the five cargoes that Limbungan failed to provide after the dam burst.

This is an interesting case because despite not being excused from performing the contract, the *force majeure* event nevertheless had the practical effect of excusing Limbungan from compensating Classic for the breach of contract. It serves as an important reminder that both questions of causation and damages are very fact sensitive.

The issues considered in this case are similar to those that were before the same judge, Mr Justice Teare, in *Seadrill Ghana Operations Ltd v Tullow Ghana Limited [2018]* earlier this year and in which this firm acted for the successful claimants. The contractual framework and factual circumstances of these two cases were significantly different however it is clear from both cases that where a party seeks to rely on a *force majeure* event that it must show causation and establish that it would have performed the contract but for the *force majeure* event...