



# COVID-19 – Contract issues in shipping and trade

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# Wide range of issues for shipping and trade

2020 – year of the lockdown

Most economies shut down for periods – wide ranging effect of pandemic on trading operations

- Seminars and articles – on possible effects on contracts - shipping arrangements and contracts of supply/sale
- 2020 – 2021 – recovery?



# What has happened?

- Global pandemic – resultant government regulation preventing movement economic activity
- In NZ – exercise of statutory powers – Public Health Act 1956 - shut downs
- Global effect on all aspects of supply chain in world where ninety percent of trade is seaborne – provision of essential shipping services kept world and NZ going
- But sense of new normal

# Effects of pandemic

- Mostly contract performance is delayed or has to be varied.
- Even a year ago thought that focus would be on contract terms which may apply rather than doctrine of frustration which discharges contract
- Overview of some relevant contract law with comments on shipping contracts

# Since March 2020

- As yet not that many cases – on the way perhaps?
- But perhaps not as many as might think because contract provisions address the questions and shipping people work things out and keep things moving.
- Largely looking at pandemic possibly hindering and delaying shipping and trade
- Possibly dollar consequences are being worked through

- In seminar in the early days after lockdown two main areas of contract law came to mind where unusual events stop performance of economies and contracts under which commerce operates
- Force majeure and frustration
- For maritime lawyers – more specific provisions in shipping contracts allocating financial consequences of events, delay come to fore – charterparties/ contracts of carriage – wide range of circumstances.



# Frustration and Force majeure

- Global pandemic has caused range of issues – reaction to think of two main areas – frustration and force majeure
- Doctrines which offer possible relief from impact of an external event which affects contract.
- But important to set them both in common law context

# Common law basics

- Common law operates in particular circumstances and particular contract
- Most disputes about interpretation
- Common law generally insists on performance – force majeure or frustration relied on to avoid liability for non – performance so represent exception from norm.
- If parties provide for circumstances with sufficient certainty, law will enforce



# Interpretation

- What contract means and covers is central to operation of any force majeure clause and important aspect of operation of doctrine of frustration.
- Familiar exercise of contract interpretation at common law – in both areas have to work out what the scope and meaning of bargain was - clauses not read up or down – but interpreted.
- Approach has been too much debated but hopefully back to simpler times - courts can state principles briefly and get on with the job – see the UK SC in one paragraph on construing insurance policies to determine business interruption coverage under insurance contract – *FCA v Arch* [2021] UKSC 1 at para 47 – test case arising from pandemic

# Force majeure

- In common law systems this refers to contract provisions which relieve from consequences of particular events – name from civil law but not free-standing independent principle as in civil law - depends on contract.
- Force majeure clauses common feature particularly of longer term commercial contracts- wide range of clauses from basic to highly sophisticated – tendency to be added as boiler plate.
- Contract clauses to provide for relief from breach where force majeure events prevent (or hinder or delay – depending in words) performance.
- Application depends on interpretation of clause – do the provisions provide relief from particular event?

# Various forms - requirements of clauses

- Usually broad list of events will appear in clause but absent express provision financial downturns etc not force majeure – operation of clause depends on words.
- To rely on clause, party will generally have to show: event within clause and beyond control performance affected as required ( sole cause); ready, willing and able to perform; and all steps to mitigate taken
- So disputes will involve evidence as to cause of failure to perform, ability to perform and steps to mitigate effects
- Clauses often provide for termination after a period of relief from breach by way of suspended performance
- Clause may contain notice provisions – strict compliance.

# Force Majeure – Two Commercial Cases

- Two recent examples of force majeure clauses in commercial contracts
- *Classic Maritime v Limbungan* [2019] 2 All ER 622
- *Force majeure/* exception provision in long term contract for supply of iron ore
- Evidence did not establish that performance prevented by event and clause not construed as providing for automatic frustration

# Classic Maritime – Force majeure/Exception

- Long – term COA shipments iron ore from Brazil to Malaysia.
- Charterer claimed had defence to large claim for not providing seven shipments over 2015-2016.
- Charterer -an absolute duty to supply cargoes- claimed protection of COA clause headed exceptions – neither owner nor charterer responsible for loss or damage to or failure to supply, load, discharge, or deliver the cargo resulting from: Act of God, long list..... Accidents at the mine or production facility ... or any other causes beyond control.....etc

# *Classic Maritime v Limbungan*

- Catastrophic floods at mine meant that charterer could not supply cargo
- Event was within clause – accident at mine – beyond charterer’s shipper’s control
- All shipments had been from mine. Not possible to ship iron ore from port as a result of flood. Other supply not available to Charterer on evidence. But also found on evidence that collapse in demand from before flood meant charterer would not have been willing to ship cargo if iron ore available.
- Charterer had to show would have performed to rely on clause as interpreted interpretation in order to show causation. Argument for charterer that clause provided for automatic frustration - rejected.
- CA reversed High Court that damages should be reduced to zero because if charterer had been in able to provide cargo it would have been entitled to rely on clause. Leave to SC declined no point of general importance.

# *Force majeure Case Example*

- *Seadrill Ghana Operations Ltd v Tullow Ghana* [2019] 1 All ER 34
- Force majeure clause in contract for hire of drilling rig – whether hirer entitled to rely on clause.
- Held not established on evidence and where force majeure event only one cause of non-performance force majeure clause could not apply had to be sole cause
- Obiter – reasonable endeavours by parties to circumvent force majeure – not reasonable endeavours to say not in my financial interest to circumvent
- And on requirement that event is beyond control – mere difficulty or expense does not show beyond control

# Other clauses

- Exclusion clauses – excusing non- performance – can see what are really force majeure clauses in mutual exclusion clauses – see *Classic Maritime v Limbungan*
- Hardship, good faith negotiation clauses – can come into play
- Contractual discretions may be applicable in changed circumstances
- All separate seminars but point is that it is about seeing how the particular contract operates where an external event impacts performance



# Relationship – Force majeure and Frustration

- If contract covers the risk of external event by force majeure or other clauses, contract governs and frustration not available
- Contract may not cover event or extent of event so frustration still available – depends on construction of contract

# Frustration

- Common law doctrine – relief from general rule that no excuses for non-performance
- Developed mid-nineteenth century – in part from writing of civil lawyers on *force majeure*
- Few cases in NZ – largely developed and applied in shipping cases from UK courts
- Common law tests in UK cases adopted NZ SC in *Planet Kids*

# Frustration – Tests

- Leading NZ case *Planet Kids Ltd v Auckland Council* [2013] NZSC 147
- Few NZ cases – *Karelrybflot CA* [2000]– employment contract on chartered fishing vessel forfeit to Crown not frustrated.
- NZ SC in *Planet Kids* adopts “tests” in UK cases – Lord Radcliffe in *Davis Contractors* p693 at 729 – circumstances make performance radically different; Lord Simon in *National Carriers* [1981] AC 675 at 800
- Also “ multi-factorial” approach to whether frustrated set out by Rix LJ in *The Sea Angel* – shipping case
- All tests lead to a practical approach where judge or arbitrator examines effect of new events on contractual performance – objective consideration but evaluation underpinned by understanding that discharge is drastic at common law.

# Nature of frustrating events

- Fact that contract provides for events so that they are foreseen - can prevent application but not necessarily so – whether contract provides for contingency matter of interpretation – *Bank Line v Arthur Capel* 1918-1919 All ER Rep 504.
- Several well- known UK shipping cases – doctrine of potential application to time and voyage charterparties, COA and carriage contracts.
- Requisition (WWI cases) different from detention, delay – delay may be frustrating– even if provision for delay in contract, if delay exceptional
- Compare *Tatem v Gamboa* and *The Sea Angel* – depends on particular circumstances.

# Frustration

- Sale of goods – where seller contracts to sell/supply unascertained goods frustration not usually available because even if supplier does not provide obligation under contract is to procure and sell – for example *The Mary Nour* (2009) 2 All ER
- UN Convention on International Sales –force of law in NZ CCLA – force majeure defence where international sale – article 79

# Effect of frustration

- Common law blunt effect of discharge - mitigated by statute s 61-69 CCLA
- Return of money paid and account for benefits conferred at time of frustration
- Not applicable to contracts for carriage of goods and voyage charterparties – only time and demise.

# Recent common law cases

- All underline frustration a very difficult plea
- For example *Salam Air SAOC v Latam Airlines Group SA [2020] EWHC (Comm)* - lessee of planes could not show fraud to stop lessor claiming under performance bonds under lease and *obiter* the leases were not frustrated by government travel restrictions imposed after outbreak of COVID-19. Restrictions curtailed commercial airline of lessee 3 years into 6 year leases and no sign that would be lifted.
- Other UK case declaration that long term lease not frustrated by UK withdrawal from EU. Extensive review of authorities.

# Shipping contract provisions

- Difficult to generalise – many different situations and contracts in shipping – read and interpret the contract – charterparties force majeure provisions
- Safe port and berth obligations in time and voyage charterparties – absolute or due diligence
- Classic test for unsafety *The Eastern City* - “port will not be safe unless in the relevant period of time the particular ship can reach it, use it and return from it, without, in the absence of some abnormal occurrence being exposed to danger which cannot be avoided by good navigation and seamanship” Physical and non-physical safety covered – risk of quarantine/ detention



# Safe port

- Depends on facts – danger to crew or risk of long term quarantine
- Unlikely to be breach of warranty in many circumstances – owner will have to accept order to go to port – indemnity issues
- Note specific clauses giving owner rights avoid calling at ports affected by infectious disease
- BIMCO Infections and Contagious Diseases clause 2015 for Time and voyage charters

# Contracts of affreightment

- Various bill of lading provisions
- HVR Article IV r 2 (g) restraint of princes etc, (h) Quarantine restrictions – exception for loss or damage
- Incorporated into CPs

# Time and voyage charterparties

- Off hire in time charter – depends on wording off hire clauses in form – generally “deficiency of men” or say, obtaining medical advice etc added words - “any cause whatsoever” different from say “ other causes”
- Voyage Charter – demurrage exceptions depends on words– free pratique and giving notice of readiness to start lay time
- Some contain force majeure
- COVID-19 and charter parties – frustration very unlikely but depends on terms/ circumstances - famous cases in the books

# Ship building contracts

- Force majeure clauses in standard forms
- No doubt negotiated – depends on words used in clause
- Sale contracts – force majeure may be included by amendments - depends on what parties have agreed
- Many commercial contracts in shipping will have *force majeure* and exceptions clauses

# Specific BIMCO clauses

- 2015 Infectious or Contagious diseases clause
- For charterparties - may be incorporated into bill of lading contract
- Also note BIMCO working on standard *force majeure* clause for charterparties – likely to see much more attention to such clauses in both voyage and time charters – indeed more generally in the future.

# Future

- Coming out of the great lockdown of 2020
- Perhaps not likely to lead to rush of cases - in part because event will not discharge contracts and contracts often likely to address the risk and economic consequences with clear provisions.
- Also maritime interests generally very good at working out position under contracts in an efficient manner.
- But even if don't see many maritime cases – good to do some revision

# Future

- Future will see better planning in supply chains – better awareness of risk and where a business's contracts allocate commercial risk – suspect many commercial parties have learned lessons
- Not time to abandon global interconnectedness even if you could
- Make it more efficient – invest in things like digitisation

# Any questions

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