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EXCEPTIONS TO LAYTIME

E.D. & F Man Sugar Ltd
– v –
Unicargo Transportgesellschaft mbH
[2012] EWHC 2879 (Comm).

INTRODUCTION

The present economic crisis and the ferocity with which owners and charterers are fighting charterparty disputes have recently increased the instances of scrutiny by the courts of numerous charterparty clauses. We are also seeing a number of new situations where the application and scope of particular clauses are being tested.

A recent example of the scope of an exception to laytime clause being tested is the case of E.D. & F Man Sugar Ltd ("Charterers") – v – Unicargo Transportgesellschaft mbH ("Owners") [2012] EWHC 2879 (Comm). This was an appeal from an arbitration award in relation to a claim by Owners against charterers for demurrage in the sum of US$397,912.77.

FACTS

The Charterers had chartered the vessel to carry a cargo of sugar and, on the date of the fixture (9th June 2010), declared Paranagua as the loading port. In an email dated 4th June 2010 the local agents advised the parties that a fire had occurred at the Compania Brasilliera Logistica A/A terminal ("CBL"), which was normally used by the Charterers to load the cargo. On the 15th June 2010 the agents instructed the Parties to change the vessel's berthing programme to the Pasa terminal in Paranagua, although they were also told that the contemplated berthing programme for this terminal would be revised involving a long waiting time.

The vessel arrived on 20th June 2010 and tendered notice of readiness to load at 2330 hours. The Statement of Facts showed that in the absence of an available berth the vessel remained off the port until 14th July 2010, when she weighed anchor and entered the inner roads of the port awaiting berthing instructions.

One of the relevant clauses under consideration in this case was clause 28 which states as follows:

"Clause 28: In the event that whilst at or off the loading place…the loading…of the vessel is prevented or delayed by any of the following occurrences: strikes, riots, civil commotions, lock outs of men, accidents and/or breakdowns on railways, stoppages on railway and/or river and/or canal by ice or frost mechanical breakdowns at mechanical loading plant, government interferences, vessel being inoperative or rendered inoperative due to the terms and conditions of appointment of the Officers and crew time so lost shall not count as laytime."

A number of conclusions in the Tribunal's award were challenged by the Charterers on

appeal, one in particular was the Tribunal's finding that clause 28 made no mention of "fires" as an excepted peril and "in common sense terms", the inoperability of the conveyor belt appeared to have been the result of physical damage due to the fire rather than any mechanical breakdown. The Charterers sought to appeal this finding.

JUDGMENT

The arguments turned on the proper construction of the words in clause 28 which exclude laytime time lost as a result of loading being prevented or delayed by *"mechanical breakdowns at mechanical loading ports"*.

Owners argued that as an exception to laytime clause, inserted for the benefit of Charterers, the clause should be construed *contra proferentem* against the Charterers based on the statement of Lord Sumner in *USSB v Strick [1926] AC 545 at p. 576*. Charterers countered this argument submitting that the court should adopt the court's approach in the Carboex v Louis Dreyfus Commodities Suisse [2011] 2 Lloyd's Rep 177, [2012] 2 Lloyd's Rep 379 (CA) ("Carboex case") that the clause should be read "*naturally according to their wording and not be over-restrictive"*. The judge in this case adopted this latter approach but did acknowledge that the former method of interpretation may well be appropriate in these circumstances.

The arguments in relation to the construction of the clause were finely balanced, the Charterers submitted, inter alia:

1. In the case of "*The Afrapearl" [2004] 2 Lloyd's Rep 305*, the approach of the court was that the cause of a breakdown is immaterial and there is a '*breakdown*' if the equipment does not function or if it malfunctions;

2. It would be odd, unreasonable and uncommercial, if one had to distinguish between *types* of mechanical breakdowns according to their cause which might require difficult and expensive investigations. For example, if a mechanical breakdown caused overheating which caused the fire which caused the destruction of the conveyor system; and

3. The reference to "*mechanical breakdown"* is wide enough to include destruction.

The judge, despite acknowledging the force of these submissions, did not accept them. He accepted the Tribunal's finding that the fire had destroyed the conveyor belt system linking the terminal to the warehouse and held that as a matter of ordinary language, the destruction of an item (or even the partial destruction) is not within the scope of the term *"breakdown"*, still less in the term *"mechanical breakdown"*. In support of this finding the judge cited the case of *"The Thanssis A" (1982 unreported)*, referred to with approval by Clark L J in "*The Afrapearl"*, in which Robert Goff J stated that "*'breakdown of machinery and equipment' cannot, even with the most generous of constructions, be regarded as the same as a complete destruction of part of the facility"*.

The judge also drew a distinction between clauses that refer only to *"breakdown"* and those, such as in the present case, which refer to "*mechanical breakdown*". The difference, in the judge's view, was significant and required, in the latter case, the nature of any malfunction to be mechanical in the sense that it is the mechanism for the mechanical loading plant which ceases to function or malfunctions and causes prevention or delay to loading. The implication here, as commented on by Robert Goff J in *"The Thanassis A"*, is that in the absence of the word "*mechanical*" the cause of a breakdown is immaterial, it could be some external agent or internal defect, if the machinery does not function or malfunctions then there is a '*breakdown of machinery*'.

Finally, in the absence of any words, such as 'fire' or 'accident', the scope of the exception should not be broadened beyond the meaning of a plain reading of the exception outlined above.

Other issues were considered in the judgment including: (i) whether the vessel had to be an arrived ship in order for clause 28 to apply, this was due to the inclusion of the wording *"at or off the loading place"* in the beginning of clause 28; and (ii) whether the refusal of permission by a Port Authority to load at the CBL terminal constituted *"government interferences"* for the purposes of clause 28. Both issues were answered in the negative by the judge.

COMMENTARY

This case provides a clear demonstration of the level of scrutiny applied by the courts, in this case the inclusion of one word ('*mechanical*') determined the applicability of the clause to a breakdown of a conveyor belt, part of which had been destroyed by fire. It would appear from this judgment that when faced with a similar situation it will be necessary to obtain time consuming and expensive evidence to determine the exact chain of causation leading to the inoperability of machinery or equipment. For example, whether a mechanical mechanism malfunctioned that caused the fire which destroyed the conveyor belt as opposed to a fire causing damage to the proper functioning of the mechanical components causing the machine to breakdown.

This article is intended only to give general guidance and you should always consult a lawyer with any particular problem you may have.

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