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SCOPE OF A DEMURRAGE EXCEPTION CLAUSE IN A SUGAR CHARTER-PARTY

E.D. & F MAN SUGAR LTD -V- UNICARGO TRANSPORTGESELLSCHAFT MBH [2013] EWCA CIV 1449

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INTRODUCTION

This is a case examining the interpretation and burden of proof in a demurrage exception clause in a Sugar Charter-party 1999 Form. ED & F Man Sugar Ltd (the "Charterers") appealed to the Court of Appeal submitting that as a result of the fire occurred in Paranagua Terminal, the machinery no longer functioned as a conveyor-belt system and Owners were not entitled to claim for demurrage in the sum of US$397,912.77 for a period from 25th June 2010 to 20th July 2010.

This appeal raises the interesting question as to whether or not Charterers could rely upon an exception clause by simply arguing that the destruction of machinery by fire did, without more, amount to a 'mechanical breakdown'. This article proposes to examine the scope and interpretation of such exception clause to laytime and the correct view of the law, as previously highlighted in our article dated 5th November 2012.

BACKGROUND

On the day of the fixture, the Charterers nominated Paranagua as the load port, where the dispute arose as to Charterers' liability for demurrage. Unicargo's (the "Owners") claim for demurrage was upheld in Arbitration. Further, on an appeal brought pursuant to s.69 of the Arbitration Act 1996, Mr Justice Eder, sitting in the Commercial Court, upheld the award. The question of law upon which the Charterers were granted permission to appeal was:

"Whether the delay in loading caused by and/or in consequence of a fire which destroys mechanical loading equipment (and/or a port authority's re-scheduling of loading following such destruction) counts as laytime under the Charter-party and whether the fact that loading thereunder at "1-2 safe berths" is lawfully relevant to the operation of Clause 28 of the Charter-party"

The relevant clause scrutinised by the arbitrators and relied upon by the Charterers, stated as follows:

"In the event that whilst at or off the loading place or discharging place the loading and/or discharging of the vessel is prevented or delayed by any of the following occurrences: strikes, riots, civil commotions, locks out of men, accidents and/or breakdowns on railways, stoppages on railway and/or river and/or canal by ice or frost, mechanical breakdown at mechanical loading plants, government interferences, vessel being inoperative or rendered inoperative due to the terms and conditions of employment of the

Officers and Crew, time so lost shall not count as laytime".

The Charterers appealed to the Court of Appeal in respect of the 'mechanical breakdown' point only and framed in the way in which the issue was put to the Commercial Court.

JUDGMENT

In the arbitration proceedings, Charterers had argued that as a result of the fire the conveyor-belt system at the load port no longer functioned and that they were entitled to rely upon Clause 28. Charterers based their argument on two cases, *Portolana Compania Naviera Ltd v Vitol S.A., Inc and Another* '*The Afrapearl'* [2004] EWCA Civ 864 and *Olbena SA v Psara Maritime Inc* '*The Thanassis A'* (unreported 22nd March 1982), to hold that destruction of machinery by fire amounts to a 'mechanical breakdown'. However, the Court of Appeal disagreed principally on the basis that the nature of the breakdown was relevant in view of the fact that the malfunction had to be mechanical and none of the judgments relied on by the Charterers cast light on what Charterers needed to prove to show "*mechanical breakdown in mechanical loading plants*".

In '*The Thanassis A'* the oil pier at the loading port was damaged by a tanker resulting in a "*complete destruction of part of the facility*". The clause in the relevant Charter-party referred to a "*breakdown of machinery or equipment in or about the plant of the charterer, supplier, shipper or consignee of the cargo*", whereas the clause in dispute was only concerned with "*mechanical breakdown at mechanical loading plants*". Furthermore, Lord Justice Tomlinson, in his leading judgment, could see no reason why this case assisted Charterers not just because the precise cause of breakdown was regarded as irrelevant as complete destruction of part of a facility is something more than a 'mechanical breakdown' and hence different in kind. The judge considered that the nature of the malfunction must be mechanical as opposed to a malfunction by any other cause. Further and of rather more relevance, is the manner in which Lord Justice Tomlinson emphasised the fact that "*a mechanical breakdown might lead to complete destruction of all or part of a mechanical loading plant, whether through fire or through some other mechanism*". However, Charterers made no attempt to suggest and/or establish that the cause of delayed loading of the vessel was a 'mechanical breakdown' as defined by Clause 28. Additionally, neither the cases relied on by Charterers was concerned with 'fire' nor did Clause 28 make any mention of 'fire' to cover an excepted peril.

In respect of the second case submitted by Charterers to support their submission, Lord Justice Tomlinson considered '*The Afrapearl'* as inappropriate and not relevant. The case concerned a breakdown as a result of a gap in a flange connecting two sections of a pipeline. The material terms of the Charter-party provided that "*If, however, delays occur and/or demurrage shall be incurred at ports of loading and/or discharge by reason of. . .breakdown of machinery or equipment in or about the plant of the charterer*". As with the '*The Thanassis A',* the cause of the breakdown and/or malfunction in the '*The Afrapearl'* was

considered irrelevant. Consequently, the '*The Afrapearl'* was not an authority for the proposition that it was sufficient to suggest that Clause 28 would operate if the mechanical loading plant simply no longer functioned after the fire occurred and/or that a fire would be enough to suggest that there was a 'mechanical breakdown'.

The Court of Appeal therefore came to the conclusion that, on the facts of the present case, there was no 'mechanical breakdown' of the conveyor-belt system. However an investigation by the Charterers might have revealed that the 'fire' had itself been caused by a 'mechanical breakdown'. Notwithstanding this fact, Charterers advanced no evidence before the arbitrators to establish that this was the case. Indeed, as it was pointed out by Lord Justice Tomlinson, Charterers had asserted in the arbitration proceedings that the cause of the fire was irrelevant.

CONCLUSION

In essence the question was whether Charterers could rely upon the exception clause such as Clause 28 of the Charter-party to avoid paying demurrage as a result of the destruction of the conveyor-belt system been destroyed by 'fire'. The Court of Appeal has ruled that the nature of the 'breakdown' must be mechanical i.e. an inherent mechanical problem. Therefore, Charterers had to prove in the arbitration proceedings that it was the mechanism of the mechanical loading plant which ceased to function and caused loss of time at the load port.

Therefore the phrase "*mechanical breakdown at mechanical loading plants*" could not protect Charterers when the inoperability of the conveyor-belt was caused by fire, which was an external cause. The Court of Appeal decided that the precise cause of breakdown must be regarded as relevant and the Charterers should have adduced enough evidence to enable the arbitrators to make a finding as to the cause of the 'mechanical breakdown'. Otherwise, the Charterers would be precluded from adducing further facts of evidence at a later stage, jeopardising their defence in respect of the demurrage claim.

This article is intended only to give general guidance and reference in respect of the law. You are recommended to always consult a lawyer with any particular problem or query you may have.

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