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Case No: CL-2018-000263

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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Before:

MR. JUSTICE ROBIN KNOWLES CBE

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Between:

SUCDEN MIDDLE-EAST	**Claimant (Charterers)**
- and -	
YAGCI DENIZCILIK VE TICARET LIMITED SIRKETI	
	Defendant (Owners)

"The MV Muammer Yagci"

- -

MR. SIMON RAINEY QC and **MR. ANDREW CARRUTH** (instructed by **Holman Fenwick Willan LLP**) for the **Claimant (Charterers).**

MR. ROBERT BRIGHT QC and **MS. RANI NOAKES** (instructed by **Hill Dickinson LLP**) for the **Defendant (Owners).**

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Approved Judgment

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MR. JUSTICE ROBIN KNOWLES:

1. The question of law on this appeal under section 69 of the Arbitration Act 1996 has been framed in this way:

> "where a cargo is seized by the local customs authorities at the discharge port causing a delay to discharge, is the time so lost caused by 'government interferences' within the meaning of clause 28 of the Sugar Charter Party 1999 form?".

2. In giving permission to bring the appeal on this question, Butcher J identified the question of law as one of general public importance relating as it does to a standard form contract in wide commercial usage.

3. Clause 28 of the Sugar Charter Party 1999 form has a side heading: "Strikes and Force Majeure". The clause itself is in these terms:

> "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, lockouts 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 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 or time on demurrage or detention …"

4. By a partial final award dated 23rd March 2018, Arbitrators concluded that the answer to the question was "No". The circumstances of the case as found by the Arbitrators involved in summary the submission of false import documents to local customs authorities in relation to a cargo of sugar for discharge in Algeria. The local authorities responded by seizing the cargo exercising powers given to them under customs laws and regulations. A delay to discharging the cargo of four and a half months ensued.

5. In more detail, the circumstances of the case as found by the Arbitrators were principally set out at paragraphs 15, 18, 19 and 20 of the Award. Those paragraphs are as follows:

> "15. On the basis of the Charterer's evidence, which was to a large extent not disputed but in fact confirmed by Owner's evidence – we have taken fully into account the evidence from both sides – and on the basis of the underlying documents, the tribunal accepts and finds as fact that:
>
> (1) On 13 January 2015 the receiver of the cargo submitted import documentation to the Annaba Customs Directorate ('ACD') for clearance and for the assessment and payment of customs duties on the cargo.

(2) On inspection of the cargo and relevant documents, the ACD noted a discrepancy between the invoice price of the cargo and the authorized or market price – we will refer to the market price;

(3) This undoubted discrepancy led the ACD to believe that there was a false declaration with a view to an illegal attempt to transfer capital abroad on this false basis, in breach of the Foreign Exchange Regulations;

(4) In consequence, and after consultation with the central Customs Administration in Algiers, the ACD were given the 'green light' to take formal steps and the cargo was seized by the ACD on 28 January 2015 at 14.00 hours;

(5) A report was passed to the Public Prosecutor who issued an order on 2 February 2015 for, at least, the transfer of the cargo to the State Property Directorate ('the SPD') and, it seems, its sale with the proceeds to be held by the Treasury.

(6) The cargo was put under the control of the SPD, a matter formally recorded on 5 February 2015;

(7) The cargo was then placed under the control of the Port Authority of Annaba;

(8) Because the cargo was perishable, on 23 February 2015 the Governor of the Trade and Commerce Directorate confirmed (or if a direction had not been given on 2 February, gave) permission to the SPD to sell the cargo by auction and for the proceeds to be held by the Treasury;

(9) On 16 March 2015 the receiver brought an action for an interim order for release of the cargo against the ACD and the SPD and for its re-export; the application was rejected on 30 March 2015 by the court.

(10) There were four unsuccessful attempts to sell the cargo by the SPD. It was eventually sold on 1 June 2015 and discharged between 15 June 2015, 13.30 hours and 8 July 2015, 14.20 hours.

(11) A prosecution against the receiver (described as Mediterranean Compound Company LLC in the court proceedings) and two individuals failed after a trial in March 2016. There was an appeal which was dismissed and, at the time of the expert evidence, a case was pending before the Supreme Court, following a further appeal by the Public Prosecutor.

> 18. Thus it was said that ACD is an agency of Algeria and is 'part and parcel' of the Ministry of Finance and that its activities and powers fall within the scope of the Ministry of Finance; the same evidence was given about the SPD. For the Owner it was said that both the ACD and SPD are run under the administrative supervision of the Ministry of Finance. We do not detect much difference in these positions. The Customs operate under the umbrella of and are supervised by the Ministry of Finance and thus to some extent can be equated with it: for example in the proceedings brought by the receiver to release and re-export the cargo the Ministry of Finance was the second Defendant (the ACD being the first) as legally representing the SPD.
>
> 19. There was evidence from the Charterer that Customs are responsible for enforcing all laws concerning cross-border transactions and for acting against commercial fraud and entrusted with a public right of action in relation to fraud and Foreign Exchange Control violations, amongst other things. The General Director of Customs is a high ranking government officer and customs officers are described by law as civil servants entrusted by law to initiate prosecutions. This was not contradicted by the Owner and is not surprising.
>
> 20. The Public Prosecutor became involved following the report by Customs and it is said by the Charterer that the authority to issue this report and to prosecute came from the General Director of Customs. This was not contradicted by the Owner".

6. It will be see from that more detailed narrative that authorities higher than the local customs authorities were also involved.

7. As Mr. Robert Bright QC and Ms. Rani Noakes identify, the appeal concerns two words, "government interferences". One of those words is about the actor and one is about the act(s). The two words inform one another, submits Mr. Bright QC, without controversy. Mr. Bright QC says that the present case involves a government entity, even if one focuses only on the local Finance Authority.

8. I accept additionally, however, the submission of Mr. Simon Rainey QC and Mr. Andrew Carruth that the government entity in the present case was acting in a sovereign capacity.

9. On all sides of the argument, as it seems to me, the most important word is the word "interference" or "interferences".

10. The question put to the court concerns expressly and only the seizure of cargo - in the present case a seizure by local customs authorities at the discharge port. The ordinary meaning of the word "interference" is, in my judgment, apt to include an intervention in this specific form, that is, by way of seizure. This

action on the part of local customs authorities is, in this context, the action of government through its appropriate arm or agency.

11. Mr. Bright QC emphasises that the clause in question is a clause concerned with laytime. A range of routine tasks will be involved in that context, he submits, including for example, the submission of documents or perhaps an inspection by surveyors. Those would not, he urges, represent any interference with the process of discharging cargo but rather are the process of discharging itself. The question, urges Mr. Bright QC, is not just whether the Government was involved but whether it was interfering. That is what, it is argued, the Tribunal was getting at.

12. I follow the argument; but, in my judgment, the argument has to be applied to the specific circumstance of the seizure and not to the wider examples given by Mr. Bright QC.

13. Further examples of when authorities may undertake routine tasks can perhaps be derived from the treatment of the subject by Eder J in *The Ladytramp* [2012] EWHC 2879 (Com), [2012] 2 Lloyd's Reports 660. There, and in particular at paragraphs [29] to [35], examples were given of activity that, if it involved a port authority, would not or might not amount to government interference.

14. Another example was identified in Mr. Bright QC's skeleton argument as the routine nomination of a surveyor to sample and analyse cargo.

15. Mr. Bright QC recognised throughout these examples that Eder J was not embarked on an attempt to define the complete ambit of the words "government interference". What was happening was that some examples were being given of what would not amount to government interference. However, for the purpose of the present case, the important thing is that seizure is not one of the things that, in my judgment, can be treated as routine.

16. In an effort to help the analysis of what is and what is not government interference, the Arbitrators asked themselves whether the actions of the local customs authorities were "ordinary". At paragraph 46 in the last sentence they stated:

> "We consider the key point would be that all the steps taken were in fact ordinary".

17. That line of inquiry introduces a gloss on the words of the clause. Even if the inquiry was nonetheless helpful, I respectfully disagree that seizure, which is a significant exercise of executive power, can be regarded as "ordinary", or as the way things could be expected to work out, to use another form of phrasing used in the course of argument.

18. The Tribunal pointed out that seizure was to be expected when false documents are presented; but, in my judgment, expected consequences are not the same as ordinary actions. In the usual course of things cargo is not seized and property rights are not invaded in that way, and that remains the case even

if seizure is experienced frequently, perhaps in one part of the world or another, or even when the seizure is predictable as when, for example, there is a suspicion of forged documents. Indeed in the present case the point is reinforced because the seizure stems from false documents.

19. Elsewhere Mr. Bright QC draws a distinction between, "(i)… a government entity interfering in a manner that is unanticipated, officious and beyond the control of the parties and their proxies", and, (ii) "the expected and routine application of pre-existing legislation to the cargo and cargo documents".

20. The former, (i.e. (i)), he terms government interference "in a force majeure sense". I can see the distinction but it is not one that the wording of the clause requires. I also consider the latter, (ii), under-describes the circumstances to which the question on this appeal is directed, that is seizure of cargo by local customs authorities at the discharge port. "Force majeure", of course, are words that appear in the marginal heading to the clause.

21. It appears that those words did influence the Tribunal though not over-strongly as Mr. Bright QC accurately submits; but, in my judgment, Mr. Rainey QC, is correct in his submissions. In the present context "force majeure" is simply a label for a list, and the list that appears within the clause includes a mixture of matters. This is not a surprising usage of the term "force majeure", for that term is not a term of art: see, for example, Chitty on Contracts, 33rd Edition, 2018, paragraph 15-162. The present case is more a case of the list informing the meaning of the marginal heading rather than the other way round.

22. The conclusion that I reach on the language does not produce an outcome that, in my judgment, in any way offends commercial common-sense; nor is that conclusion difficult to apply (a consideration that is of real importance).

23. With respect, I do not consider that the same can be said of the conclusion urged by Mr. Bright QC. At paragraph 57 of his skeleton argument the conclusion contended for is in these terms:

> "… only time lost because of seizure by customs, which happens as a result of matters outside the ordinary workings out of the application of law and regulations pre-existing the conclusion of the fixture, will constitute 'government interference' within the meaning of Clause 28 of the Sugar Party 1999 form."

24. I do not see that as in any way easy to apply and nor, in agreement with Mr. Rainey QC, do I see how that formulation can be derived from the words "government interferences".

25. In arguing that a conclusion that the seizure of cargo by local customs authorities falls within the language of the clause was, indeed, a conclusion that offended commercial common-sense, Mr. Bright QC described such seizure in written submissions as, "a run of the mill trade event".

26. This was a call to view a seizure in the same way as when a vessel was ordered off-berth by reason of poor weather or where there was an administrative re-scheduling of the cargoes due to a fire. Again, both are situations identified by Eder J in *The Ladytramp* (above, at [32] to [33]). I do not consider Mr. Bright QC's description apposite or that the circumstances here and those identified by Eder J are comparable.

27. Indeed, at paragraph [33] in his judgment Eder J made clear that the distinction that he was drawing was between:

> "… a State sponsored port authority acting in the ordinary course of discharging its port or berth administrative function (in the same manner as any other, private, port authority), as distinct from a government entity acting specifically/peculiarly in a sovereign capacity which is independent of that ordinary administrative function".

28. Mr. Bright QC had a further tack to his argument. This involved relying on the submission of the false documents as the cause of the delay rather than the seizure by local customs authorities.

29. I do not consider that further tack assists with the question on this appeal. The clause and the question are directed to the seizure. The seizure caused the delay, even if the submission of the false documents caused the seizure. A local customs authority or other government agency does not have to seize. Seizure involves a decision, even if it is the case that seizure could be expected in the circumstances.

30. With gratitude for the careful arguments deployed on both sides, I allow the appeal. However I wish to make clear, given the range of some of the arguments, that the answer given to the question is only a narrow "yes". It is "yes" where the circumstances are as in the present case. The answer does not address all of the circumstances that may come within or fall outside clause 28. The answer is concerned only with the seizure of a cargo and with that seizure by a customs authority that is a State revenue authority acting in a sovereign capacity.

31. These cases are, as has been said in the course of argument, fact specific, although the present case does generate the point of law found in the terms of the question.

32. I am prepared to say that I found the present case a particularly strong example of circumstances that would fall within the clause, the more so given the presence emphasised by Mr. Rainey QC, of involvement of higher level government agencies as well as the local customs authorities.

33. In the event, however, the same substance would, in my judgment, apply in the present case even had there been no involvement by higher level government agencies. This, shortly expressed, is because I do not believe it can have been intended that the parties should have to ask how high up the

chain of government command the action was authorised or would need to be authorised in order to come within the clause.