When is an appeal under section 69 of the Arbitration Act 1996 not a section 69 appeal?

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Overview

It is a truism that appeals under section 69 of the Arbitration Act 1996 can only be brought in respect of questions of law put to the arbitral tribunal. ***Laysun Service Co Ltd v Del Monte International GmbH*** [2022] EWHC 699 (Comm), is a rare example of a case where permission was granted to appeal against an award in relation to questions of law which were ultimately held not to be questions of law at all, or premised on non-existent factual findings. In the course of reaching this decision, the Court also made some notable *obiter* observations as to the nature of the charterers' obligation to discharge cargo and the operation of *force majeure*.

Background to the dispute

The appeal arose out of a Contract of Affreightment between Laysun Service Co Ltd ("**Owners**") and Del Monte International GmbH ("**Charterers**") for the carriage of refrigerated bananas from the Philippines to Bandar Bushehr in Iran between 1 January 2018 and 31 December 2018 for a total of 36 voyages.

Charterers performed the first 17 shipments by carrying bananas sold by Charterers' sister company, Del Monte UAE, to two UAE companies, Prime and Marhaba, who, in turn sold the bananas to Iranian receivers. Charterers then stopped providing fruit for loading and Owners sued for their losses arising out of the remaining 19 unperformed shipments. Charterers denied liability under the *force majeure* provision at Clause 8 of the COA, relying on two grounds.

First, it was impossible to receive payments outside Iran with an Iranian link due to the Trump administration's increasingly hawkish stance against Iran, culminating in the US imposing sanctions against Iran (the "**Payments Issue**"). Prime and Marhaba were thus unable to make payments to Del Monte UAE. Absent payment, there would be no receiver able to present the bills of lading required for the cargo to be customs cleared before discharge.

Second, it was impossible to import bananas into Iran due to the Iran Government's imposition between April and at least June 2018 of various import permit restrictions (the "**Import Permits Issue**"). This prevented Charterers from discharging to Prime and Marhaba (and the Iranian receivers), and it was not an option for Del Monte UAE to find alternative customers in time to enable Charterers to continue to perform the COA before its expiry.

The Tribunal held in Charterers' favour on both the Payments Issue and the Import Permits Issue. Owners thereafter obtained permission to appeal under s.69.

Payments Issue

In relation to the Payments Issue, on appeal, Owners posed the question whether Charterers could invoke the *force majeure* clause because, due to payment difficulties, bills of lading might not arrive at the discharge port so that Owners could decline to permit delivery. Calver J gave this question short shrift, noting that it was based on *"an entirely false factual premise"* and that Owners were *"shooting at an imaginary target"*, since the Tribunal had held that the goods could not be discharged without the bills of lading: [19].

Owners argued that since Charterers were responsible for the discharge of cargo, if bills of lading were critical to discharging, this was something for which Charterers also bore contractual responsibility. Owners sought to draw a novel analogy with the charterers' absolute, non-delegable duty to provide cargo per ***The Nikmary*** [2003] EWCA Civ 1715, to which charterparty exceptions do not normally apply. They submitted that if this was so in relation to the precursor to loading of providing cargo, the same was true of the precursor to discharging of ensuring bills of lading were presented at the discharge port.

Though the point did not need to be decided as there was no real question of law in relation to the Payments Issue, Calver J nonetheless held that the analogy Owners sought to draw with the absolute and non-delegable duty to provide cargo for loading was false. The correct analogy was between the duty to load, to which charterparty exceptions do normally apply, and the duty to discharge. Accordingly, Charterers did not have an absolute duty to discharge the cargo regardless of whether they could establish they were affected by *force majeure* events: [41].

Import Permits Issue

In relation to the Import Permits Issue, Owners raised three questions of law, none of which actually arose in Calver J's judgment: [23]-[27]. The Court observed that Owners had constructed false factual findings and then impermissibly sought to challenge the same, which was presumably why Owners' criticisms of the Award – which included charges that the Tribunal's conclusions were *"rationally bizarre and commercially absurd"; "unintelligible to any shipping lawyer"; "simple and utter nonsense as a matter of English law"* – were *"somewhat hyperbolic"*: [27].

What is of general interest is the way in which the Court dealt with Owners' approach to the *force majeure* provision in the COA. As is commonplace, the provision had two limbs:

a. Clause 8.1 defined *force majeure* and spelled out the consequences thereof, i.e. *"any circumstances beyond the reasonable control of that party that prevents such party, practically or legally, from performing any or all of its obligations under this Agreement…"*;

b. Clause 8.3 then dealt with mitigation and provided that the party *"affected by a force majeure event will use all endeavours to mitigate the effect of the force majeure event to carry out its obligations under this Agreement in any way that is reasonably practicable and to resume the performance of its obligations as soon as reasonably possible."*

Before the Tribunal and again on appeal, Owners argued that Clause 8.3 only operated if the *force majeure* event was continuing under Clause 8.1. If it was over, i.e. if the import restrictions had expired, Charterers had to resume performance. The Tribunal rejected this submission: once Clause 8.1 had been triggered by a *force majeure* event, Clause 8.3 addressed the period of interruption to Charterers' performance. The interruption could continue once the *force majeure* event had ended if the effects of that event continued (in this case, it was not possible for Charterers to find new Iranian receivers even once import restrictions were relaxed). Owners did not seek permission to appeal from this, but Calver J expressed the *obiter* view that the Tribunal's construction of Clause 8 was correct at [33], finding that:

a. Clause 8.1 describes what constitutes a *force majeure* event.

b. Clause 8.3 then prescribes the steps a party affected by the event must take to mitigate its effects. Even though the *force majeure* event itself may be over, its effect may continue to prevent the resumption of performance.

Calver J's judgment confirms that a party may, subject to the wording of the *force majeure* provision, continue to be excused from non-performance if the *force majeure* event is outlasted by its effects. This is an unsurprising outcome. To illustrate, if a port is shutdown as a result of a *force majeure* event taking the form of a riot by the workers at the port, and the port is damaged as a result, the effects of that damage may continue to prevent performance even after the riot has ended. On the correct construction of Clause 8, Charterers would be excused from non-performance at that port provided they could not mitigate the after-effects of the riot in the necessary sense.

Conclusion

Calver J's judgment sounds a cautionary note against seeking to dress up an appeal against a tribunal's factual findings as an appeal on questions of law, but also clarifies in *obiter dicta* that (i) the charterers' duty to discharge is not absolute and non-delegable, unlike the charterers' duty to provide cargo for loading, and (ii) depending on the wording of the *force majeure* provision, a party may be excused from failing to perform even after the *force majeure* event has elapsed, provided the effects of the event persist.

Yash Kulkarni QC and Andrew Leung were instructed on behalf of the successful respondent by Rob Collins and Natalie Johnston of Preston Turnbull LLP.

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