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Argentina - Farmers' Protests & Loading Delays - Who Bears the Costs?

April 2008

The well publicised strikes and roadblocks set up by Argentinean farmers in response to the Government raising export duties on agricultural commodities have prevented and delayed cargoes reaching their ports of shipment. The Club's defence lawyers have been advising both owner and charterer members on who bears the time lost and the options available to them under their charterparties and otherwise.

This article seeks to set out the position under the charterparties most commonly used for the shipment of bulk cargoes and to provide general guidance. Any specific queries should be directed to the Club for comment, as many of the forms mentioned below are often amended or have incorporated into them rider clauses which address these particular issues.

By way of background, the protest activities reported are presently limited to farmers; port facilities remain fully operative. It is solely the lack of cargo which is preventing loading from taking place with the consequence that many vessels remain stationary at the Argentinean roads.

Voyage Charters

Strike Clauses

In the context of voyage charters, the fact that the port is still operational raises questions as to the applicability of the GENCON 94 and Centrocon Strike Clauses, or any variations thereof. Charterers have an absolute duty to have cargo available for loading and if, as in Argentina, the delay is caused by the cargo not reaching the port, clear words are required for that delay to constitute an exception to laytime, or to prevent the accrual of demurrage.

As stated by Lord Dunedin in *Arden Steamship v Mathwin* (1912 SC 215):

"*It is amply settled by authority that loading is one thing and providing cargo is another; and an accident which may prevent a cargo coming forward is not to be construed as an accident which delays loading…*"

In both the Centrocon and GENCON forms it seems sufficiently clear that the incident causing delays must be connected to the actual loading/discharge.

As such, riots and civil commotions affecting the supply chain and ultimately preventing cargo from reaching the port facilities do not seem to be encompassed by these clauses as these are events prior to the loading operations.[1]

A further argument could be raised in respect of the GENCON clause as the wording of its first paragraph reads ". . . *preventing or delaying the fulfilment of any obligations under this contract*". At first sight, it appears that this clause has a broader meaning and should apply to any obligation under the contract including the charterers' duty to provide cargo.[2]

In *The Saturnia* ([1987] 2 Ll. Rep. 43), however,it was decided that in the context of laytime and demurrage the role of paragraph 1 of the GENCON clause is mainly residual as these points are expressly dealt with by paragraphs 2 and 3 which expressly include a reference to the loading/discharge operations.

Force Majeure

It must be mentioned initially that the concept and the scope of *force majeure* is not well developed under English law. Thus its applicability to a contract is subject to a provision expressly incorporating the principle. (By contrast, in most civil law systems *force majeure* will apply as a matter of public law regardless of its express incorporation into a contract.)

For the current purposes, it suffices to note that when the *force majeure* provision is incorporated by a clause which enumerates other risks (i.e. ice, floods, fire, quarantine, etc), it will refer only to events of a similar type - the *ejusdem generis* rule. Whenever the parties intend to overrule this general principle of interpretation the word "whatsoever" is normally included in the clause.

This preliminary understanding seems to gather further support from the fact that, as is the case with every exception clause, the *force majeure* provision tends to be subjected to a *contra proferentem* interpretation by the English courts. This means that in the case of ambiguity, the interpretation least favourable to the party relying on the clause will be preferred.

Therefore, more probable than not, the *force majeure* provision will not encompass the situation in Argentina as it seems to fall outside the events generally enumerated by the incorporating clauses. This is obviously subject to the peculiarities of the *ejusdem generis* rules mentioned above.

Responsibilities and Immunities Clauses (General Exclusion Clauses)

As is generally the case, voyage charters will include a general exclusion clause for delays or failure in performance resulting from, amongst others, civil commotion, strikes and lockouts. This kind of provision is normally under the head of "Responsibilities and Immunities".

However broadly worded, its application to laytime and demurrage is suppressed by the *prima facie* rule (See *The Onisilos* [1971] 2 Q.B. 500, *The Saturnia*, sup., fn. and *Bunge y Born v. Brightman*, [1925] A.C. 799) that general exception clauses do not operate in relation to the latter events.

These clauses themselves often seem to recognise the stated rule as they normally have a proviso worded: "*Save to the extent otherwise in this Charter Party expressly provided . . .*".

Time Charter

In respect of time charters the relevant question in this case seems to be whether the vessel can be considered off hire during the idle period. For the purpose of this article the point will be considered taking clause 15 of the NYPE 1946 form as its basis.

A simple reading of the mentioned clause seems to indicate that all the enumerated off-hire events are related to the suspension of the use of the vessel by the charterer which should not sound as a surprise as this is the essence of this type of charter.

Therefore the impossibility to load in a specific port due to the lack of cargo by no means can be considered a *"cause preventing the full working of the vessel"* which indicates that hire should continue to be paid even though vessel is not able to proceed on her charterers' intended business

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Obviously the conclusion above must be subject to any specific clauses dealing with hire counting in the context of strikes.

Frustration

Strikes in general, and the events in Argentina in particular (which have already been suspended and restarted), are of uncertain duration and as such are unlikely to be held to be sufficient to frustrate a charter.

Conclusion

The peculiarity of the factual circumstances taking place in Argentina imposes an interesting difficulty to the interpretation of charterparties in general.

Nonetheless, with regards to time charters it seems roughly clear that the vessel will not be considered off-hire during the idle period under discussion. It also seems more probable than not that laytime will keep running and that demurrage will accrue in the usual way.

1. Support to this interpretation can be found in the *Grant v Coverdale [1884] 9 App Cas 470* where the House of Lords drew a distinction between delays to "loading" and delays to "providing the cargo".

2. This duty is considered absolute and non-delegable under English law. *The Nikmary* 2004 1 Lloyd's Rep. 55 p. 11