Sugar & Fire - a bitter combination for charterers?

Earlier this month Copesucar's sugar terminal at Santos was burned to the ground together with 180,000 tons of sugar. Thankfully no deaths nor serious injuries were reported. Estimates are that it will take at least six months to restore operations. Other terminals in the port were not affected.

The consequence of the fire is severe delays to vessels at Santos port affecting both owners and charterers who have agreed to carry sugar from the Copesucar terminal. In most cases this will be under the Sugar Charter Party 1999.

Charterers will want to know: may they cancel the charterparty and, if not, will they be liable for demurrage?

The relevant clauses are:

"Clause 6 – Exceptions …… The Act of God, perils of the sea, fire on board, in hulk or craft, or on shore, crew, enemies, pirates and thieves, arrests and restraints of princes, rulers and people, collision, stranding and other accidents of navigation excepted, even when occasioned by negligence, default or error in judgement of the Pilot, Master, masters or other servants of the Shipowners. Not answerable for any loss or damage arising from explosion, bursting of boilers, breakages of shafts, or any latent defect in the machinery or hull, not resulting from the want of due diligence by the Owner of the Ship, or any of them, or by the Ship's Husband or Manager.*

"Clause 28 – Strikes and Force Majeure …… 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 inoperable or rendered inoperable 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.*

May a charterer cancel the charterparty?

The Sugar Charter Party 1999 does not provide an express right to cancel in these circumstances. The charterer will therefore have to consider whether the charterparty can be said to be frustrated.

Frustration of contract is summarised as the legal termination of a contract due to unforeseen circumstances that (1) prevent achievement of its objectives, (2) render its performance illegal or (3) make it practically impossible to execute.

In order to rely on frustration, the charterer would have to show there is an unforeseeable change of circumstances which either makes the contractual obligation incapable of being performed, or which renders performance radically different from that which was envisaged. Mere inconvenience, hardship, additional expense or delay will not amount to frustration. In general, it's very hard for a party to demonstrate frustration.

In this case, where the Copesucar terminal is likely to be reinstated at some point and where there are other terminals where sugar may be loaded at Santos, it does seem unlikely that a charter can be said to be frustrated.

Will a charterer be liable for demurrage?

Clause 6 is an exceptions clause. As stated in a decision concerning the earlier version of the Sugar Charter Party, the "SOLON" [2000] 1 Lloyd's Rep. 292.

"an....exceptions clause excepts [or] what would otherwise be a breach and [is] not .... a clause that provide[s] for an extension of time for performance.*

Clause 28 was considered in the recent case of the "LADYTRAMP" [2012] 2 Lloyd's Rep. 660. In that case the Court was asked to decide whether delays due to a fire at the terminal destroying the conveyor-belt system linking the terminal to the warehouse fell within Clauses 26 of the Sugar Charter Party.

Charterers in that case argued that the destruction of the conveyor-belt system comprised "mechanical breakdowns at mechanical loading plants".

The Court disagreed, noting
“As a matter of ordinary language and common sense the destruction of an item (or even its partial destruction) was not within the scope of the term ‘breakdown’, still less within ‘mechanical breakdown’. It was not enough that the mechanical loading plant simply no longer functioned or malfunctioned (irrespective of the cause of the malfunction). The nature of the malfunction had to be mechanical in the sense that it was the mechanism of the mechanical loading plant which had ceased to function, or malfunctioned, and caused the prevention of or delay to loading (and the consequent loss of time). That connoted an inherent mechanical problem, as distinct from a wider or external cause. It followed that clause did not apply in relation to the fire damage at the CBL terminal.”

In this regard the Court pointed out that Clause 6 expressly provided for an exception in the case of fire while Clause 28, which contained no reference to fire, could not be intended to cover fire. Fire was therefore not an event which interrupted the running of laytime.

It therefore seems unlikely that the events at Santos would stop the running of laytime or relieve Charterers of their obligation to pay demurrage under a standard Sugar Charter Party 1999.

In our experience Owners and Charterers will often amend clauses 6 and 28 in which case a different conclusion may be reached.

An Owner will need to consider whether the rate of demurrage will be adequate compensation for the expected period of delay. If not, he may be more amenable to reaching an agreement with Charterers to bring the charter to an early termination.

For these reasons, the fire at Copersucar’s sugar terminal is likely to leave a bitter taste in the mouth of many charterers. This may be avoided by amendment of the standard Sugar Charter Party 1999 form.

with thanks, accreditation and consent to publish this article to Mr Jeb Clulow, Partner, Reed Smith.