NORTON WHITE
LAWYERS & NOTARIES

transportbriefcase

April 2008

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Welcome to Norton White's Transport Briefcase for April 2008.

The IPART report on improving the efficiency of Port Botany has just been released. Its key recommendation is for the introduction of a vehicle booking systems with guaranteed slots allocated using a market-based price mechanism, and unguaranteed slots allocated as at present. IPART believes that if this system is introduced it will create efficiency improvements at Port Botany, and across related supply chains. The proposed system is certainly innovative, and should attract international attention. We will keep you updated on progress.

I would also like to welcome Abby Millerd to the Norton White Team. Abby joins us as a graduate.

Happy reading,

Geoff Farnsworth

article

Geoff Farnsworth | Partner

Force Majeure - Beware Before you Declare

Force majeure clauses in contracts are devices that only a lawyer can love. At least, that is, until "unexpected" events prevent a party from complying with its contractual obligations and send both parties searching through the boilerplate clauses in the contract to see whether there is a "force majeure" clause and if so, whether the relevant events fall within it so as to give the "victim" some relief.

Most people have a general idea of what a "Force Majeure" clause is. It is a clause that relieves (permanently or temporarily) a party from performance of its contractual obligations on the happening of some uncontrollable event, often described as an "Act of God".

However (as with many things) the devil is in the detail so here are some "tips" for drafting and relying on a force majeure clause.

Say what you mean

Force Majeure clauses are rarely negotiated and are usually "slipped" into a contract as one of the "standard terms and conditions". Because the clause usually isn't drafted with particular circumstances in mind, it is something of a lottery as to whether relevant events fall within the clause and the construction of clauses may be stretched to attempt to fit events within the clause. The clause should ideally list the type of events whick will constitute "force majeure". They usually include strikes and stoppages but can be extended to such things as mechanical breakdowns. You can afford to be generous as the clause is usually for the benefit of both parties. Simply referring to "force majeure" will be ineffective as unless it is given some definition, it is too broad to have meaning. The same probably applies to clauses which say (for example) "unexpected events beyond the control of either party".

What protection?

What relief does the clause give and when? Assuming a party can bring the relevant events within the clause, it must still be able to prove that the "force majeure" events prevented performance under the contract. This may depend in part on whether the clause refers to delays "caused" by "force majeure", or simply "contributed to".

Particular consideration should be given to the geographical location of the events. If (for example) a FOB seller wishes to rely on flooding at the mine site many hundreds of kilometres from the port as a reason for failing to load a vessel on time, make sure the clause expressly extends to delays etc occurring outside the port area.

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Force Majeure Clauses continued

Is the clause intended to extend to laytime and/or demurrage? If so, it must say so.

"Force majeure" should not be invoked lightly and certainly not without evidence to back it up. If for example a Charterer wishes to rely on flooding as the reason for its failure to load a cargo within a particular laycan, it must be able to prove that it owned or at least controlled the relevant cargo and that "but for" the flooding it would have had the cargo at the port in time. It will therefore need to be able to produce ownership and/or production records for the cargo as well as details of its transport arrangements to move the cargo to the port.

Take Notice
"Force Majeure" clauses often require notice to be given of the force majeure events. Some clauses require the notice to be in writing and given "as soon as practicable". Even valid reliance on an event of force majeure may be rendered ineffective if the requirement to give notice is not complied with.

Conclusion
Most contracts for the sale of goods, and many (but by no means all) charterparties contain "force majeure clauses", and for good reason. A well drafted clause can be a God-send for a party affected by unforeseen events.

article

Nathan Cecil | Associate

Criminalisation of Seafarers - The Requirements to Submit to Questioning vs The Right Against Self-Incrimination

Increasingly, prosecuting authorities are charging individual seafarers as well as corporate vessel Owners in response to marine pollution incidents. It is now almost inevitable that seafarers and the Owning corporation will be subjected to criminal investigation and potentially prosecution in response to any marine pollution incident. Where responses given in such investigations are increasingly used in evidence against seafarers in criminal prosecutions, it is alarming to realise that in many cases, potential criminal suspects are interviewed without first being "read their rights".

Each Australian jurisdiction has enacted MARPOL-implementing legislation empowering investigators of the relevant Authority to require a person to answer questions in relation to a suspected pollution incident. It is an offence to fail to comply with this requirement. A seafarer should be entitled to refuse to answer any question if that answer might tend to incriminate or expose him or her to a penalty (the "right against self-incrimination").

However, unlike the position under the corresponding Australian land or inland waterway pollution legislation, there does not appear to be any requirement for the interviewing Authority to read the seafarer their rights before eliciting responses which will in all likelihood be used in evidence against the seafarer. Accordingly, P&I Clubs and vessel Managers should make seafarers aware of their rights to refuse to answer on the grounds of self-incrimination.

Due to the gravity of potential criminal consequences, it is strongly recommended that at the time of reporting any pollution incident to the P&I Club or Manager, seafarers be advised to request that any interview be scheduled to take place with legal representation in attendance and made aware of the general principles of the right against self-incrimination:

- The right is only available to natural legal person and not to corporations;
- The right is only available in respect of the risk of self-incrimination and is not available in order to avoid disclosing information which might tend to incriminate any other person (or corporation);
- The right must be invoked before any statement is made. It is not possible to invoke the right retrospectively;
- The right cannot be invoked as a blanket claim to refuse to respond to all questions. The seafarer must separately invoke the right only in respect of specific responses which might tend to incriminate the seafarer;
- The right can only be invoked where the response might tend to incriminate the seafarer or expose them to a penalty and cannot be invoked to avoid providing responses which might be prejudicial but not to the extent of being incriminating.

In almost all cases the responses of the seafarer will be used in the prosecution of the Owner or Manager of the ship. Seafarers should be mindful of providing hasty responses to questions which might tend to incriminate Owners/Managers where an interview is conducted before the full facts and circumstances of an incident have been investigated and determined by the crew. In such circumstances, it is acceptable for a seafarer to respond to the effect that an answer is "not known at the time" or "still under investigation" and will be provided at a later time.

article

James Tomlinson | Solicitor

Dasvidanya Arbitration Clause Ambiguity - Charterparty Agreements, Arbitration Clauses and the House of Lords

Premium Nafta Products Ltd & Ors -v- Fili Shipping Co Ltd & Ors [2007] UKHL 40

In a decision that will provide greater legal certainty to parties entering into charterparty agreements, the House of Lords determined that arbitration clauses within a charterparty should be construed as the rational businessmen engaged in the international commercial transaction had intended them.

In so doing the House of Lords unanimously upheld the Court of Appeal's decision in *Fiona Trust v. Privalov [2007] EWCA Civ 20*, which clarified the law in respect of arbitration clauses and dismissed a complex web of past authority sought to distinguish arbitration clause disputes based upon linguistic nuances.

Facts

The issue at trial was the scope and effect of arbitration clauses in eight charterparty agreements which Owners (eight companies forming the Russian state owned Sovcomflot) sought to rescind on the grounds of fraud and bribery on the part of the charterers.

Owners had commenced court proceedings seeking a declaration that the charterparty agreements, and therefore the arbitration clauses, had been rescinded due to fraud.
The Charterers argued for a stay of the legal proceedings on the basis that the parties had agreed to arbitration by the Shelltime form 4 clause providing that any party could elect to refer any dispute "arising under" the charter to arbitration.

Held

In determining the scope and the effect of the arbitration clauses the House of Lords identified two issues for determination:
(1) What did the parties intend in respect of the construction of the arbitration clauses; and
(2) Whether or not arbitration clauses could be rescinded due to fraud.

Construction of the Arbitration Clause

On the issue of construction Lord Hoffman said that the time had come to break with past authorities which had tried to differentiate arbitration clause disputes between those "arising under" and those "arising out of" the agreement, previous authority stated that the latter had a wider meaning than the former.

According to Lord Hoffman in an opinion which with the other Law Lords concurred;

"The construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with the presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction."

On this basis Owners and Charterers had entered into the present charterparty agreements with the intention that disputes between the parties were to be determined by arbitration and not by court proceedings. As the Court of Appeal indicated: "If any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so."

Rescission of the Charterparty Agreements

On the question of whether or not the arbitration clauses could be rescinded due to fraud, the House of Lords dismissed Owners argument that the arbitration clause was invalid, as the arbitration clause is a distinct and separate agreement from the contract as a whole thus the arbitration clause remained sound despite the fraud of the charterparty. This principle of separability is enshrined in section 7 of the *Arbitration Act 1996 UK*.

"The House of Lords considered that the facts arising here were the reason for legislating section 7: "a section intended to enable the courts to give effect to the reasonable commercial expectations of the parties about the questions which they intended to be decided by arbitration."

A Decision Good for Business

By clarifying the issue of the construction of arbitration clauses, the decision has brought English law into line with other international jurisdictions and will undoubtedly benefit international business by providing businessmen with greater certainty of the scope of the arbitration clauses when entering into charterparty agreements.

"As Lord Walker stated: "The decision marks a fresh start, leaving behind some fine verbal distinctions (on the language of particular arbitration clauses) which few commercial men would regard as significant."



news bites

Shipping Emissions

The International Maritime Organisation "IMO" Sub-Committee on Bulk Liquids and Gases is revising the marine pollution regulations to reduce the emissions of sulphur oxide, nitrogen oxides and particulate matter from ships. The Sub-Committee has narrowed down the options for improving fuel standards and are discussing requiring stricter technical standards for engines, both new and those already in use.

A study by Intertanko and leaked by the IMO has found that ship's emissions are three times higher than previously calculated. Annual emissions from the world's merchant fleet have already reached 1.12 billion tonnes of carbon and are set to rise a further 30 per cent by 2020.

A number of environmental groups have petitioned the US Environmental Protection Agency "EPA" to regulate emissions from marine shipping causing climate change. The petitions came in the wake of a US Supreme Court judgment confirming that the EPA has jurisdiction to regulate in the field of climate change.

Queue Management System (QMS)

The ACCC has granted authorisation to Dalrymple Bay Coal Terminal to extend its QMS for a limited time only. The ACC is concerned that allowing the QMS to continue indefinitely will impact upon investment in the coal chain and reduce incentives for the industry to develop a long-term solution. The ACCC is also likely to approve an extension of the capacity balancing system in place at the Port of Newcastle until December 2008 but remains concerned that industry has failed to address ongoing capacity issues within a reasonable amount of time.

Recent AMSA Marine Notices

Marine Notice 5/2008 reminds owners and operators that Australia has given effect to the IMO Code of Safety for Special Purpose Ships. A special purpose ship is a mechanically self-propelled ship engaged in research, expeditions, survey and training involving special personnel. Special personnel are not members of the crew but do not require all of the safety provisions accorded ton passengers on passenger ships.
Marine Notice 6/2008 alerts masters, owners and operators of Australian flagged vessel of the imminent introduction of long range identification and tracking requirements. The ship must be capable of generating an automatic position report "APR" four times per day transmitted to the Australian National Data Centre.

IPART Final Report Released

The Independent Pricing and Regulatory Tribunal ("IPART") of NSW's Report on the interface between the road transport industry, rail operators and Port Botany stevedores has been released. IPART made a number of recommendations to improve the efficiency of Port Botany's containersed freight supply chain.

Link to Report
Link to Newsletter



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