

Force majeure clause interpretation is “sensible and pragmatic approach”

By admin On December 16, 2022 In Insurance Marine News, Keep, Legal

In the case of **Shagang Giant** – NKD Maritime Limited v. Bart Maritime (No 2) Inc [2022] EWHC 1615 (Comm) the interpretation by the court of a force majeure clause under the MOA was described by Standard Club as a sensible and pragmatic approach to the wording.

This case involved a dispute regarding the validity of the termination of a ship’s sales contract (MOA) and came about as a result of the global Covid-19 pandemic and its impact on business dealings.

On March 5th, 2020, Bart Maritime (No 2) Inc (the sellers) sold the MV Shagang Giant (the vessel) to NKD Maritime Limited (the buyers) for scrapping in India. The MOA contained the following two relevant clauses:

- Clause 2 (Delivery): ‘The Vessel shall be delivered and taken over safely afloat at outer anchorage Alang, West Coast India, which shall be the “Delivery Location”. If, on the Vessel’s arrival, the Delivery Location is inaccessible for any reason whatsoever including but not limited to port congestion, the Vessel shall be delivered and taken over by the Buyer as near thereto as she may safely get at a safe and accessible berth or at anchorage which shall be designated by the Buyer always provided that such berth or anchorage shall be subject to the approval of the Seller which shall not be unreasonably withheld. If the Buyer fails to nominate such place within 24 hours of arrival, the place at which it is customary for vessel (sic) to wait shall constitute the Delivery Location’.
- Clause 10: ‘should the Seller be unable to transfer title of the Vessel or should the Buyer be unable to accept transfer of the Vessel’ due to (among other things) ‘restraint of governments, princes, rulers or people of any nation’, either party was entitled to terminate the MOA without further liability.

In March 2020 the vessel arrived in India but was unable to reach the ‘Delivery Location’ due to Covid-19 restrictions. Although the sellers requested the buyers to nominate an alternative location, the buyers did not do so, and instead, on April 14th, 2020, they sought to terminate the MOA under clause 10. The sellers did not consider this as a valid termination, but rather a repudiatory breach of the MOA.

The parties' arguments

The buyers argued that the Covid-19 restrictions fell under the 'restraint of governments' provision in clause 10, preventing transfer of title. The sellers argued that:

- clause 10 was not applicable and
- (ii) the transfer of title did not require delivery of the vessel. In any event, the location the vessel was anchored at was as near as the vessel could safely get and thus the vessel had validly arrived at the 'Delivery Location', as stated in clause 2.

The court dealt with the below key issues:

1. *Construction of transfer title in accordance with this contract*
- 2.

Although the MOA referred both to 'transfer of title' and 'delivery', the terms were not used interchangeably. Transfer of title, as mentioned in clause 10, required (i) payment of the price, (ii) delivery of the bill of sale and (iii) deletion from the vessel's register. Delivery was not required for the purposes of clause 10 and, therefore, the buyers could not validly invoke the force majeure clause (i.e., clause 10) to terminate the MOA.

3. *Was there delivery in accordance with the contract?*

The vessel was not at 'outer anchorage Alang' as required under clause 2. However, the court held that the vessel had got 'as near' to the original 'Delivery Location' as [the vessel] could safely get', considering that the 'Delivery Location' was inaccessible due to the applicable local regulations. The court held that the vessel was an arrived vessel under clause 2 and therefore the sellers had fulfilled their obligation under the MOA.

3. *Was there inability to perform by reason of restraint of governments?*

The reason for which the vessel was prevented from proceeding to Alang outer anchorage was attributable to the Covid-19 restrictions, which can be described as a 'restraint of governments'. However, the court sought to interpret whether this essentially rendered the sellers unable to transfer the vessel's title.

The court distinguished (i) inability from (ii) hindrance or delay and held that the delay that there had been and that which could reasonably be expected did not constitute an 'inability' on the part of the sellers to perform the MOA as per clause 10; nor had the temporary nature of the Covid-19 restrictions materially undermined the commercial adventure.

All in all, the court held that the buyers had wrongfully terminated the MOA. Accordingly, the sellers were entitled to retain the deposit, but were not entitled to further damages.

Standard Club said that the case offered valuable guidance on the distinction between

- delivery and
- transfer of title.

In addition, although it was confirmed that Covid-19 restrictions could be considered as 'restraint of governments', in the absence of clear wording, this would not automatically entitle a party to terminate the contract, especially where the relevant restrictions are temporary in nature.

The Club noted that "it must be remembered that each case will turn on the precise wording of the contract and clauses in question". However, notwithstanding that, "the decision provides clarity regarding the construction of a force majeure clause and a party's ability to perform in the context of the transfer of title over a vessel."

The Club concluded by saying that the court seemed "to take a sensible and pragmatic approach of the wording in clause 2, in that when an intervening event makes access impossible, an obvious and sensible place 'as near as' should be sufficient".

<https://www.standard-club.com/knowledge-news/case-law-the-shagang-giant-nkd-maritime-limited-v-bart-maritime-no-2-inc-2022-ewhc-1615-comm-4683/>