Commodities

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COMMODITIES BULLETIN

Shifting sands – frustration and force majeure in Singapore

Sand is a valuable commodity in Singapore. While some nations stock up on oil and gold, Singapore has its sand reserves. Sand is used in Singapore to manufacture concrete and for land reclamation. Singapore has grown from 581.5 km^2 in 1960 to 710 km^2 today and there are plans to expand by another 100 km^2 by 2030. Two types of sand are used: sea sand, primarily used for land reclamation, and river bed sand for concrete. Both are equally important.

Traditionally, Singapore imported most of its sands from its neighbours, Malaysia and Indonesia. However, in 1997, Malaysia banned the export of sand to Singapore for environmental reasons. Indonesia followed suit in 2007. The authorities in Singapore swiftly released sand from the national reserves to avoid disruption in the building industry. Nevertheless, the bans sparked disputes between suppliers of concrete and building contractors in relation to their supply contracts. A number of these have worked their way through the Singapore courts. This article considers the latest judgment, in *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Ptd Ltd* (5 July 2013).

Facts

The case involved a dispute between Alliance, a manufacturer of ready-mixed concrete (RMC) and Sato Kogyo (SK), a building contractor, in relation to the supply of RMC under three contracts (the Contracts).

One week after the Indonesian authorities announced the ban on exports of sand to Singapore in late January 2007 (the Sand Ban), Alliance decided it was no longer bound by the original terms of the Contracts and sought to increase the price of RMC *"in view of the sharp prices in raw materials"*. This was done notwithstanding that the Building and Construction Authority of Singapore (BCA) had

announced that it would implement measures to mitigate any adverse effects arising from the Sand Ban, including the release of sand from its stockpile to contractors with ongoing projects.

Although Alliance continued to supply RMC to SK intermittently, it eventually stopped altogether in late February 2007. Alliance then sued SK for failing to pay for the RMC it had supplied. SK disputed the amounts owed and counterclaimed for losses it had incurred by reason of Alliance's failure to supply RMC.

The issues considered by the Singapore High Court included whether the Contracts were frustrated by the Sand Ban and whether the force majeure clauses allegedly contained in the Contracts were triggered by the Sand Ban.

Frustration

The Singapore Court held that the Sand Ban had not frustrated the Contracts. It merely made it more expensive for Alliance to manufacture RMC. The Court observed that each claim for frustration depended on its own facts and distinguished this case from previous Sand Ban cases where frustration arguments had succeeded. Alliance was in a position to continue supplying RMC to SK but was unwilling to do so unless SK agreed to pay a higher price. By contrast, in a previous case[1] the contractor had failed to assist the supplier to obtain sand from the BCA. In another[2], the contract would have been frustrated because it was impossible for the supplier to meet orders of RMC within two days as required by the terms of the particular contract.

Force majeure (FM)

The Singapore Court found that the Contracts did not contain the relevant FM clauses but nevertheless considered the arguments and applied the Court of Appeal decision in the Precise case, that the effect of a FM clause depended on its precise language: the precise construction of the clause is paramount as it defines the precise scope and ambit of the clause itself.

Although one of the alleged FM clauses in this case was quite similar to the FM clause previously considered in the Precise case, the Court ruled that the clause would not be applicable. First, unlike the supplier in the Precise case, Alliance appeared to have had access to other sources of sand and second, unlike the contractor in the Precise case, SK was willing to (and did) procure sand from the BCA for Alliance, but Alliance had refused to take delivery because of alleged logistical difficulties.

Conclusion

The Sand Ban has provided a number of opportunities for the Singapore High Court to consider issues relating to frustration and FM. In this decision, it has reaffirmed the principle that for frustration to occur, contractual obligations must be radically altered and impossible to perform, not merely made more expensive. Further, each case will be decided on its own facts.

The decision has also demonstrated that even if FM clauses are similar and the alleged FM event relied upon is the same, parties cannot take it for granted that the Court will reach the same decision in every case. In particular, the Court will take into account all factors, such as the reasonableness of each party's conduct in light of their contractual arrangements.

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Court of Appeal decision: a warning to CIF buyers and sellers

In July 2012, following the High Court's decision in *Great Elephant Corporation v Trafigura Beheer BV & Ors* (27 June 2012), we considered the rights of a buyer to pass demurrage liabilities on to its seller. The recent Court of Appeal decision in the same case, on 25 July 2013, raised the same issues but reached different conclusions.

The case concerned a cargo of crude oil loaded at the AKPO FPSO Terminal in Nigeria. The terminal was operated by Total Upstream Nigeria Limited (Total). The Seller was Vitol, who had bought from China Offshore Oil (Singapore) Pte Limited (COOSL). COOSL had in turn bought from Total. The FOB buyer, Trafigura, had chartered a vessel to carry the cargo.

Total obtained clearance to load from the local Department of Petroleum Resources (DPR) representative. However, this was revoked by the Minister in Lagos, who refused to issue the necessary documentation. The vessel was therefore unable to leave after loading as to have done so would have been an offence under local law. Following a 45 day delay and

1. *Holcim (Singapore) Pte Ltd v Kwan Yong Construction Pte Ltd* [2009] 2 SLR(R) 193

2. *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd and another application* [2011] 2 SLR 106 ("the Precise case")

payment of a US$12 million fine by Total, the Minister released the vessel with the necessary paperwork. The vessel owner claimed demurrage from Trafigura under the charterparty and Trafigura sought to pass that liability on.

First instance

At first instance, the Court held that the first week's delay was caused by lack of documentation. Demurrage payable during that period could be passed to Vitol. Thereafter, the delay was caused by abuse or arbitrary exercise of power by the Minister amounting to *"arrest or restraint of princes"*. Demurrage counted at half the full rate under the terms of the charter and since that element of the delay was not within Total's reasonable control, neither was it within the charterer's reasonable control and it could not be passed to Vitol.

Trafigura argued that Vitol was in breach of section 12 of the Sale of Goods Act 1979 (SOGA) under which there is an implied term that the seller has the right to sell the goods. The Court disagreed: Vitol always had the right to sell the oil. The lack of documents causing the first seven days' delay was a breach of the implied term of quiet enjoyment under section 12(2)(b) of SOGA. Thereafter, the delay was caused by the Minister's unlawful demand and section 12(2)(b) did not cover this. In any event, Vitol could rely on the force majeure clause in the sale contract and was not liable to Trafigura after the first seven days' delay.

Court of Appeal

The Court of Appeal agreed with the first instance decision in relation to the breach of contract issues and the application of section 12 of SOGA.

The Court of Appeal went on to say that "if every arbitrary exercise of power in any country of the world where ships come and go were sufficient to displace serious breaches of contract, that might be an encouragement to lawlessness".

The remaining issues were:

1. Whether the delay was caused by an unforeseeable force majeure event beyond Total's control (for the purpose of the Trafigura / Vitol contract).
2. If not, whether Vitol could say that the delay was beyond its own control, or reasonable control.
3. Whether, as the judge had held, the Minister's unlawful act in imposing a "fine" of US$12 million broke the chain of causation so that any liability of Vitol should be limited to the first seven days' delay.

The Court of Appeal disagreed with the lower court on these issues.

First, the delay was not beyond Total's control or its reasonable control. In reaching this conclusion, the Court of Appeal focussed on Total's decision to communicate with the local DPR representative rather than going through the DPR in Lagos. That choice – and the associated risk - was within Total's control. "Culpability" in these circumstances was not a determinative criterion.

Second, Vitol could not take advantage of the force majeure clause in its contract with Trafigura. To do so would be to allow the clause to excuse Vitol's own breach, which had in fact caused the alleged force majeure event.

Third, the chain of causation was not broken by the Minister's abuse or arbitrary exercise of power. A review of previous cases showed that the original cause must be obliterated or wholly supplanted to establish a break. In this case, Total could not say it was beyond their control that loading took place in the absence of authority from the DPR in Lagos. The fact that the DPR imposed a fine was *"little to the point"*.

The Court of Appeal went on to say that *"if every arbitrary exercise of power in any country of the world where ships come and go were sufficient to displace serious breaches of contract, that might be an encouragement to lawlessness"*.

The owners' demurrage claim succeeded in full and could be passed to Vitol by Trafigura and to COOSL by Vitol. This was a complete reversal of the finding at first instance. The implications for buyers and sellers in CIF contracts are clear.

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Brazil - delivery without an original bill of lading

On 6 May 2013, Normative Instruction 1356/2013 came into force in Brazil. This makes substantial changes to the customs clearance and cargo release procedure in Brazil. One of the most significant changes is that it exempts importers and consignees from presenting the original bill of lading to customs authorities, terminals and bonded warehouses, for the release of cargo.

In Brazil, carriers do not deliver cargo directly to the importer or consignee but to the port or terminal instead. It is the importer or consignee who must arrange cargo clearance with Customs. This process begins with registration of the Import Declaration (the ID) by the importer or his legal representative with an integrated computerized system known by its acronym, SISCOMEX. The ID should contain the complete names and addresses of the importer and exporter, a description of the goods with their product classification numbers, customs value and the origin of the goods.

The importer should then present supporting shipping documents to the Customs officials. Prior to the new rule described above, these documents included the original bill of lading, original commercial invoice signed by the exporter, the packing list where applicable and other documents required by virtue of international agreements or specific laws. SISCOMEX then calculates import taxes as well as other federal taxes applicable to the goods. Since all importers are registered on the SISCOMEX system, the system debits the importer's bank account for the amount due.

In a departure from standard practice around the world, Normative Instruction 1356/2013 has now dispensed with the requirement for importers and consignees to present the original bill of lading in order to obtain the cargo.

The full effect of how the new rule will impact contracts between carriers and importers bringing goods into Brazil is yet to be felt. However carriers and freight forwarders are seeking to reduce any potential liability they may have by inserting carefully drafted wording into their bills of lading confirming that they will not be held responsible for any misdelivery of the cargo in circumstances where an original bill of lading has not been presented.

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Conferences and Events

Commodities Breakfast Seminars: Autumn series

Friary Court, HFW London
1, 16 and 29 October 2013

Commodities trading in China and Asia Pacific

Metropole Hotel, Geneva
1 October 2013
Attending: Peter Murphy & Andrew M Johnstone

3rd Annual China Trade and Export Finance Conference

Beijing
16 and 17 October 2013
Attending: Brian Perrott

ICC ISBP Workshop

Friary Court, HFW London
17 October 2013
Attending: Robert Wilson

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