Making sense of Classic Maritime v. Limbungan: untangling force majeure and causation

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Two closely related areas of uncertainty

- Is it necessary to prove that, “but for” the force majeure event, you would in fact have performed the contract, in order to obtain the protection of the force majeure clause?
- Is it necessary to prove that, “but for” the breach, the contract could actually have been performed, in order to recover damages for lost profits etc.?
- Both issues addressed in Classic Maritime v. Limbungan [2019] EWCA Civ 1102.

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The facts of Classic Maritime (1)

- Long-term COA entered into in June 2009: Classic = shipowner / Limbungan = charterer.
- For carriage of iron ore pellets from Brazil to Malaysia.
- 05.11.15: Fundao dam in Brazil burst, stopping production at the mine.
- Classic claimed in respect of 5 shipments which should have taken place between Nov 2015 and June 2016: losses of US$20m because of huge differential between COA freight and market freight.

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The facts of Classic Maritime (2)

- Limbungan relied upon dam burst as force majeure event.
- No doubt that effect of the dam bursting was to prevent supply of iron ore pellets for shipment from Brazil.
- But – unusual feature of case – Limbungan would not in fact have performed these 5 shipments even if there had been no dam burst (e.g. numerous shipments had not been performed even before dam burst).

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Clause 32 of the COA

- Reliance placed upon clause 32 (emphasis added):

*"**Exceptions***

*Neither the vessel, her master or Owners, nor the Charterers, Shippers or Receivers **shall be Responsible for** loss of or damage to, or failure to supply, load, discharge or deliver the cargo **resulting from**: Act of God, …floods … **accidents at the mine** or Production facility … or any other causes beyond the Owners' Charterers' Shippers' or Receivers' control; always provided that such events directly affect the performance of either party under this Charter Party … "*

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First instance decision: Teare J (1)

- In relation to force majeure:
  - Drew distinction between exception from liability and "contractual frustration" clause.
  - In former, the words "resulting from" meant that party relying upon exception had to show that, **but for** the FM event, would have performed.
  - So clause 32 (exception from liability) required Limbungan to prove that would have shipped cargo.
  - Could not do so.
  - Overlap with his decision in Seadrill Ghana v. Tullow [2018] EWHC 1640 (Comm)

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First instance decision: Teare J (2)

- In relation to causation:
  - Comparing Classic's position if no breach with actual position: i.e. counterfactual.
  - If Limbungan had been able and willing to ship iron ore, still no cargo shipped and would have been excused from liability by clause 32.
  - So Classic not entitled to substantial damages.
- Classic called this "*an impermissible sleight of hand*"…

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The Court of Appeal (1)

- No challenge to judge's factual findings
- Approach to force majeure:
  - All about construction of clause, without any predisposition one way or another.
  - Did not consider "profitable" to look at previous cases concerning slightly different wordings.
  - But clause 32 = exception from liability, rather than force majeure clause.
  - So says not helpful to import general considerations which often apply to force majeure clauses.

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The Court of Appeal (2)

- Close reading of what clause 32 required:
  - Actual cargo which might be lost or damaged.
  - Some of events need performing vessel etc.
  - Words like “resulting from” suggesting that is why loss/ damage/ failure to load happened.
- But maintaining Judge’s distinction between:
  - “contractual frustration clause” which brings contract to an end forthwith; and
  - “Exceptions clause” which relieves from responsibility for breach.

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The Court of Appeal (3)

- Identifying error in Judge's approach to causation:
  - Normal measure of loss places the innocent party in the same position as if the contract had been performed.
  - So counterfactual should assume that cargo shipped and freight earned.
  - Unless clause 32 operates, no defence that obligation breached was impossible to perform.
- Distinguishing anticipatory breach, where necessary to consider whether might have been excused from performance by later events.

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Since the Court of Appeal decision…

- Supreme Court refused appln for permission to appeal.
- Limbungan has gone into insolvency.
- Trial on quantum of further claims for later voyages with only Classic in attendance: [2020] EWHC 619 (Comm).

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Where does this leave us on FM clauses?

- Satisfactory end result?
  - Is this a windfall for Classic?
  - Alternative would be that dam bursting operates as "Get Out of Jail Free" card for Limbungan?
- Hard to argue with CA's logic on causation: if Limbungan cannot rely upon clause 32, hard to see how can be rescued by it when calculating damages.
- Frustration?
- Perhaps surprising that could not rely upon clause 32.
- Focus on wording of clause creating uncertainty?

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Fine distinctions?

- Would result be different if clause had said:

  In the event of failure to supply, load, discharge or deliver the cargo resulting from: Act of God, …floods … accidents at the mine or Production facility, that shipment shall be automatically cancelled and neither the vessel, her master or Owners, nor the Charterers, Shippers or Receivers shall be Responsible for any loss or damage.

- If so, hard to see how that distinction makes any sense.
- Not easy to see commercial logic for requiring proof that would have performed, as well as proof that prevented from performing by FM event.

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Better to have presumption?

- Might be more satisfactory if starting presumption that no need to show that FM event is “but for” cause.
  - Avoids fine distinctions: is this a “contractual frustration clause” or not?
  - Avoids disputes about proper construction of clause (well, perhaps…).
  - Avoids investigation into hypothetical scenarios: what would have happened if no FM event.
  - Focus simply on whether FM event has prevented performance, which is risk for which parties have provided.

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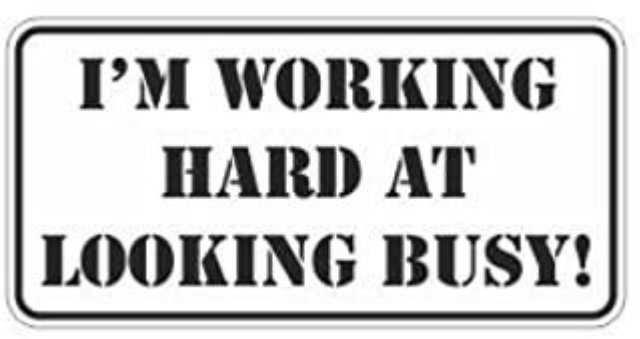
Takeaway (1): Gather evidence of ability to perform

- Likely that many FM protections will be held to require proof of “but for” causation.
- Best to have that in mind as give notice of FM event.
- Should be easy to evidence in most cases: party in control of evidence about state of mind etc.
- But Classic Maritime illustrates that can have tricky cases. Might result have been different if Limbungan had taken early steps to gather evidence of ability/ intention to perform?



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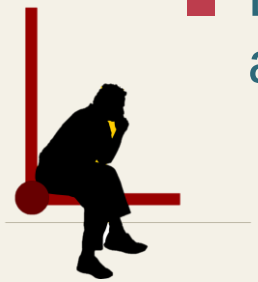
Takeaway (2): In face of repudiation, sometimes better to wait and see?

- Helpful reminder of the special nature of claim for anticipatory repudiatory breach/ renunciation: impact of future events as in The *Golden Victory* [2007] 2 AC 353.
- Query what would have happened if Limbungan had repudiated, and repudiation accepted, before dam burst:
  - Assume would have been willing to perform, so that now will be protected by clause 32?
  - Or is it necessary to ask whether Limbungan would actually have been able to rely upon clause 32?
- Even if latter, evidential risk associated with accepting repudiation.



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