



Covid restrictions and force majeure

The Commercial Court considered the validity of the Buyer's termination of a vessel sale contract on the basis that Covid lockdown restrictions constituted a force majeure event preventing the Seller from transferring title in the Vessel. Review by [Lucinda Roberts](#), Senior Associate, CJC.

NKD Maritime v Bart Maritime (No. 2) Inc (The Shagang Giant) [2022] EWHC 1615 (Comm)

The facts

Bart (the “**Seller**”) entered into a Memorandum of Agreement dated 5 March 2020 (the “**MOA**”) to sell the SHAGANG GIANT (the “**Vessel**”) to NKD (the “**Buyer**”). After the sale, the Vessel, a very large ore carrier, was to be recycled.

The MOA specified a “Delivery Location” at clause 2(a):

“The Vessel shall be delivered and taken over safely afloat at outer anchorage Alang, West Coast India ... If... the Delivery Location is inaccessible for any reason whatsoever ... the Vessel shall be delivered and taken over by the Buyer as near thereto as she may safely get ... The delivery of the Vessel according to this paragraph shall constitute full performance of the Seller's obligations and all other terms and conditions of this Agreement shall apply as if delivery had taken place.”

Clause 10 of the MOA included the following force majeure provision:

“Should the Seller be unable to transfer title of the Vessel ... due to...restraint of governments ... then either the Buyer or the Seller may terminate this Agreement...”

In March 2020, before the Vessel had reached the outer anchorage at Alang, the Indian Government issued a Covid lockdown order, which prevented the Vessel from reaching the Delivery Location stipulated at clause 2(a). The Buyer did not agree to the Seller's request to nominate an alternative delivery location.

The Buyer sought to terminate the MOA in reliance on clause 10 of the MOA, asserting that the Government-imposed lockdown constituted a “restraint of governments”. The Buyer denied that a valid NOR could be tendered, such that the Seller could not transfer title in the Vessel in accordance with the MOA terms, and sought recovery of the USD 4.2 million deposit already paid.

The Seller denied the occurrence of any force majeure event and disputed the Buyer's entitlement to cancel the MOA. The Seller argued that it had not been unable to transfer title in accordance with the MOA, as transfer of title did not require ‘delivery’ of the Vessel. Even if delivery was a necessary feature of transfer of title, the Seller argued that it had not been unable to deliver the Vessel due to the alleged force majeure event. Rather, the Vessel had arrived at the Delivery Location, or “as near thereto as she could safely get” in accordance with clause 2(a), such that the Seller had fully performed its obligations under the MOA, and the Buyer's notice of termination was a repudiation of the MOA, entitling the Seller to retain the deposit and claim any further losses.

Issue

The issue before the Commercial Court was whether the Buyer's notice of termination was valid. If it was, then the Buyer was entitled to the release of the deposit. However, if it was not, the Buyer had breached the MOA, entitling the Seller to retain the deposit and potentially recover further losses.

Judgment

Butcher J identified several relevant questions requiring consideration:

- (1) The proper construction of transfer of title and whether it requires delivery of the Vessel;
- (2) If 'transfer of title' does import the notion of delivery, was there a requirement that delivery should have been at a particular place; and
- (3) Was there inability on the Seller's part to transfer title in accordance with the MOA due to restraints of governments?

On the **first** issue, the Judge found in the Seller's favour: 'delivery' was not a necessary requirement of 'transfer of title', which only required (in this case) payment of the price, delivery of the Bill of Sale and deletion from the relevant ship's register. Consequently, the force majeure clause could not be invoked on the basis of an inability to deliver the Vessel in accordance with the delivery provisions of the MOA, because it remained possible to transfer title.

On the **second** issue, it was the Buyer's case that the MOA required 'delivery' at the 'outer anchorage Alang'. The judge accepted that the Vessel never arrived at this location – indeed, the vessel anchored some 100 nm away. However, clause 2(a) of the MOA required that where the delivery location was inaccessible, the Vessel should be delivered as near to the specified delivery location as possible. The Judge found that where the Vessel in fact waited was the convenient and obvious place to do so, given the lockdown restrictions. Where the vessel anchored was therefore to be considered the Delivery Location, and anchoring the Vessel therefore constituted "*full performance of the Seller's obligations*", in relation to delivery. The Seller accordingly succeeded on this point also.

On the **third** issue, the question was whether the Seller was unable to effect transfer of title by reason of "*restraint of governments*", in this case in accordance with the relevant Indian lockdown provisions. It was not strictly necessary for the Judge to decide this point, as (in accordance with the findings on issues 1 and 2) the Judge had already held that the transfer of title to the vessel was not prevented by "*restraint of governments*". Nevertheless, the Judge also decided this issue in the Seller's favour.

The Vessel could not obtain clearance to proceed to the defined delivery location, or be boarded by officials, due to the (temporary) Covid restrictions. However, this did not mean the Seller was rendered 'unable' to transfer title. 'Inability' differs from mere hindrance or delay. Even the fact that the delay may have extended past the cancelling date was insufficient for it to be said that the Seller was rendered 'unable' to perform its obligations. For delay to constitute an 'inability' to perform would necessitate a delay so long as to materially undermine the commercial adventure in a manner akin to the doctrine of frustration.

On the facts, the Court did not consider that the delay constituted an 'inability' on the Seller's part to perform the MOA for the purposes of Clause 10. The vessel was being sold for recycling rather than trading, and some delays to the beaching of the vessel were inevitable given its size. Nor did the temporary nature of the particular Covid restrictions materially undermine the commercial adventure.

Butcher J held that the Buyer was not entitled to terminate the MOA, and the Defendant was entitled to retain the deposit, which the Judge found to be sufficient to cover the Seller's losses such that the Seller was not entitled to recover any further amount.

CJC Perspective

1. The case is a timely reminder that a party's reliance on force majeure provision will depend both on the wording of the relevant clause and its application to the specific facts. It is an important decision which scrutinises the general construction of a force majeure clause, as well as the specific distinction between the 'delivery' of and 'transfer of title' to a vessel in the context of an MOA. In the scrap market, where sellers often face re-negotiation demands as a consequence of attempting delivery in compliance with regional rules/practices at the buyer's homeport, this is a valuable precedent.
2. A party's ability to perform its contractual obligations, particularly in relation to the direct impact of Covid lockdown restrictions, has also been clarified. While such restrictions do constitute "restraint of governments" within the context of a force majeure clause, they do not automatically release a party from its contractual obligations, particularly where the restrictions are temporary and do not undermine the commercial arrangement. The Courts will not allow a party to invoke a force majeure provision lightly, and care should always be taken when a party wishes to rely on any such provision.

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