Sanctions, Force Majeure and s69 of the Arbitration Act appeals

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With the ever increasing list of sanctions more critical than ever to global shipping, the recent decision of Laysun Service Co Limited v Del Monte International GMBH [2022] has confirmed that a well-drafted force majeure clause can, when unforeseen events take place such as sanctions, provide relief from contractual obligations. **The decision also provides some interesting lessons for those seeking to appeal an arbitral award.**

Background

Laysun Service ('the Owners') and Del Monte International ('the Charterers') had entered into a Contract of Affreightment ('the COA') for the carriage of refrigerated bananas from the Philippines to Iran. When the Charterers stopped delivering fruit for loading, the owners sued for their losses. The Charterers denied liability under the force majeure provision in the COA.

The arbitral tribunal held that the Charterers were entitled to rely on the force majeure clause to excuse performance finding, as a fact, that there had been two events triggering the force majeure clause in the contract: a payments issue, as payments from Iran to another country became impossible due to US sanctions; and an import permits issue, due to restrictions to import bananas into Iran.

The Appeal

The Owners appealed the matter to the High Court on the basis that the arbitral tribunal had erred in its findings on issues of law, as opposed to fact. The court disagreed, holding that the Owners were seeking to attack the tribunal's findings of fact which could not be re-opened to challenge under Section 69 of the Arbitration Act 1996 ('section 69'). Ultimately, no errors of law were established by the Owners and the appeal was constructed on a false factual premise.

Key Takeaways

1. **The judgment is a reminder that the English courts will not permit appeals based on findings of fact dressed up as appeals of law so do not waste the cost and time trying.** The basis of a Section 69 appeal and the reasoning supporting the permission, is not immune from examination at the hearing of the appeal. Where the appellant is seeking to unpick findings of fact by the tribunal, which cannot be appealed simply because the appellant has been granted permission to appeal, their arguments are likely to be closely scrutinised and rejected by the English courts.
2. **The permission stage of a Section 69 appeal is only the first hurdle in the battle to overturn an arbitral award.** Appellants should not assume that once they have been granted permission to appeal an arbitral award under Section 69 that the court will consider only whether the tribunal's answers to the questions of law raised are correct. Whether the questions actually arise from the award may be revisited, even if the judge who granted permission was satisfied that they did.
3. **The effectiveness of a force majeure clause depends on the meaning of the wording used. They can be useful in providing a reasonable defence.** In this case, sanctions were being used as a reason not to pay and were held to a force majeure event under the contract. Calver J clarified in obiter dicta that the charterers' duty to discharge is not absolute and non-delegable, unlike the charterers' duty to provide cargo for loading, and depending on the wording of the force majeure provision, a party may be excused from failing to perform even after the force majeure event has passed, provided the effects of the event continue.
4. **Carry out a detailed assessment to untangle findings of fact and law before making a Section 69 challenge.** Analyse the particular risks of any charterparty, trade or contract so that the force majeure event and the mitigation requirements are sufficient.

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