

**NORTON WHITE**

LAWYERS & NOTARIES

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# Legal Aspects of Shipping

## FOB, Force Majeure, and Laytime

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INDUSTRY UNDERSTANDING

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- FOB Contract Risks
- Force Majeure
- Laytime and demurrage

## Force Majeure Clause - Basics

- Define the force majeure events
- GTA FOB Contract
  - *fire, strikes, lockouts, riots, differences with or between work-men, accidents to or break-down of machinery, plant or equipment, civil commotions, policies or restrictions of governments, including restrictions of export and other licenses, or any cause comprehended in the term Force Majeure*

- Specify where the events may apply - particularly critical in FOB contracts were there may be up-country and port related events
- GTA FOB Contract
  - *at the port or ports of loading or elsewhere preventing transport of the goods to such ports*

- What does the force majeure clause do? Defer or discharge obligations?
- *Performance of the Sellers' obligations (including but not limited to laytime) is suspended to the extent to which they are affected by the Force Majeure Event and for the duration of the Force Majeure event.*
- *If a Force Majeure event continues for 30 days then the Buyers have the right to extend the Shipment Period by a further 30 days.*

- *If the Force Majeure Event continues after the expiry of these further 30 days then the contract shall be terminated automatically and neither party shall have a claim against the other for delay or non-performance provided that satisfactory evidence justifying the delay or non-performance be presented to the other party.*

- Is there a “trigger” eg written notice?
- *The Sellers must use their best endeavours to remove, overcome or minimise the effects of that Force Majeure event as quickly as possible. The Sellers must give prompt notice to the Buyers of its nature, likely duration, the obligations affected by it, the extent of its effect on those obligations, and the steps taken to rectify it.*

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*Has the alleged event really caused the delay?*

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## Case Studies

- *Hyundai Merchant Marine v Dartbrook Coal*

Charterparty cancelled because Buyer in underlying CFR sale contract reneged.

Held that impracticality of performance was not force majeure

- *Classic v Lion and Limbungan*

Severe congestion at the discharge port may be grounds for force majeure and cancellation of COA.

- *Kronos v Sempra* - importance of the letter of credit

## The Contract

- Contract of sale of Gasoil, FOB Constanza
- Kronos as Seller and Sempra as Buyer
- Payment by letter of credit
- Sellers “to declare cargo availability, namely one cargo or two cargoes each month ....”, together with a fifteen day loading range for each cargo, by the fifteenth day of the month preceding each month of delivery. The fifteen day loading range so declared was “to be mutually narrowed to three days loading range (always minimum five days between liftings)”.
- “PAYMENT
- .....
- PAYMENT TO BE SECURED BY AN IRREVOCABLE LETTER OF CREDIT TO BE OPENED PROMPTLY THROUGH A FIRST CLASS BANK.....
- LAYTIME
- AS PER CHARTER PARTY AND TO BE DIVIDED BY TWO PLUS 6 HOURS NOR SHINC, BOTH PRORATA FOR PART CARGO, UNLESS SOONER BERTHED, BOTH SHINC, OTHERWISE CALCULATED AS PER CHARTER PARTY TERMS, CONDITIONS AND EXCEPTIONS.

## The Contract

- DEMURRAGE
- IF ANY, WILL BE CALCULATED IN ACCORDANCE WITH THE CHARTER PARTY RATE, TERMS CONDITIONS AND EXCEPTIONS (EXCEPT AS INDICATED UNDER ABOVE CLAUSE). VALID CLAIM(S) SHALL BE PAYABLE AS AGAINST BUYER'S CLAIM. DULY SUPPORTED BY THE NOR STATEMENT, CHARTER-PARTY, TIMESHEET OR STATEMENT OF FACTS, DEMURRAGE CALCULATION AND INVOICE, PROVIDED SAME IS RECEIVED WITHIN 90 DAYS FROM B/L DATE, OTHERWISE CLAIM WILL BE NULL AND VOID.....”
- The Charterparty terms provided for NOR to be served after the vessel had arrived in Constanza at the customary anchorage, berth or no berth, and for laytime to run 6 hours after such service or from when the vessel was ready to load, whichever first occurred.

## The Facts

- 8 May – Kronos declare second cargo for loading 20-30 June.
- 29 May – loading narrowed to 25-30 June.
- 15 June – Kronos requests extension of shipment to 1 July.
- 18 June – Sempra nominate “Spear 1” and rejects request for extension.
- 28 June – Spear 1 arrives and tenders NOR.
- 5/6 July – Kronos call for L/C which is opened immediately
- 9 July – loading commences
- 11 July – loading complete
- Sempra claims 11 days demurrage, or US\$160,265.26

## The Dispute

- What was the effect of Sempra's failure to open an L/C "promptly"?
- Kronos claims that laytime did not commence until a reasonable time after opening of the L/C.
- Opening of an L/C a condition precedent to the obligation to load – *Trans Trust v Danubian Trading*
- L/C must be opened a reasonable time before the commencement of the shipment period – *Ian Stack*

## The Judgment

- At First Instance, the judge had accepted that while the opening of an L/C could be a condition precedent, it had a retrospective effect once the L/C was open.
- The Court of Appeal rejected this approach.
- The opening of an L/C was an unqualified condition precedent to the commencement of laytime, just as it was to the seller's obligation to load the ship.

## The Judgment

- Sempra accepted that the opening of the L/C was a condition precedent to Kronos' obligation to load, even though Kronos did not treat the failure to provide the L/C as repudiatory.
- “There should in my view be a clear rule governing such situations (as contemplated by the last sentence quoted above from Diplock J's judgment in *Ian Stach Ltd. v. Baker Bosley Ltd.*). The clear rule is in my judgment that laytime is the time allowed for the loading operation, while the provision of a letter of credit is a condition precedent to the seller's duty to perform any part of the loading operation. The two, in other words, bear on the same subject-matter. To try to distinguish the physical parting with possession of the cargo from other aspects of the loading operation such as berthing, as Sempra does, is artificial and wrong in principle. Until the appropriate letter of credit is to hand, a seller is not obliged to perform any part of the loading operation.” per Mance LJ