| Adv. Yoav Harris |

Against the generally accepted concept whereby calamities and accidents resulting from forces of nature; as such are circumstances beyond the control of human endeavour, English law tends not to excuse from responsibility the party which did not fulfil its obligations because of such a circumstance, accordingly it is advisable to carefully draft contracts of carriage/affreightments.

In the commercial word generally and the shipping world in particular "Time is Money". A ship which is delayed at a berth or outside a port attracts operating expenses and delays to its schedule and the possibility of losing subsequent employment. Cargo which is not discharged delays the supply chain and production and distribution lines.

Accordingly, within the framework of charter parties and contracts of affreightment the parties attempt to "divide" responsibility/liability, and to define in advance, which party will bear responsibility for the financial consequences for events resulting from such delays.

"Force Majeure" is a circumstance where the parties agree in advance that certain events are beyond their control and accordingly in these circumstances, the contract is "Frozen".

The effect of a "Force Majeure" circumstance is that the non performing party will not be in breach of the contract.

The expression "Force Majeure" first appeared in clause 1148 of the Napoleonic Code, which under a free translation states: "There will not an enforceable action for damages, when in circumstances of force majeure one of the parties is prevented from performing that which he had undertaken to so do under the contract or did not perform an action imposed upon him under the contract, or performed an action which was not permitted".

It is important to note that "Force Majeure" is not a legal concept under English Law, however under English contract law, if the parties had agreed on "Lawful excuse" under force majeure provisions, an English court will give force and effect to such agreement, if the drafting of the clause permits of such interpretation.

Leaving berth due to apprehension

In arbitration 21/19 the following was considered. Under a contract of affreightment (COA) the vessels charterers undertook to load an agreed quantity of cargo and the owners undertook to affect the carriage in one of their vessels without stating which of their vessels would affect the carriage. The vessel nominated by owners presented itself for loading at the agreed terminal in the Mississippi River in order to commence loading a coal cargo of 60,000 tons intended for Mexico. During loading it became known that a severe storm was approaching the area.

The Terminal Operators advised that in view of the threat of the storm they did not intend to complete the loading but that there was no necessity to leave the berth unless the United States Coast Guard would issue a directive ordering the terminal to prepare for the hurricane. However shortly thereafter the Terminal Operators ordered the vessel to leave the berth and after a pilot was ordered the vessel left the berth.

At this time only half the cargo had been loaded. After the vessel left the berth, the Terminal issued a further notice to the effect that "as the Bar Pilots are due to be closed that night, a shortage of anchorages is expected and the Terminal has no alternative but to order the vessel to leave berth" for the safety of the quay, the vessel and the terminal. The following day the Terminal stated "The Terminal was compelled to stop loading at 12.00 hrs. and to evacuate the berth in anticipation that the Terminals anchorage places would be fully occupied."

The vessel managed to anchor at the last anchorage available. It therefore transpired that the vessel's leaving berth was not a direct consequence of the anticipated storm, but rather if the hurricane would "hit" the terminal and it was necessary to evacuate vessels from the berths, there would not be any anchorages available. Accordingly, the vessel was ordered to leave the berth in order to have a place of anchorage, if the storm were to "hit" the area. The following day the Coast Guard, in a directive to the port captain, ordered the closure of the port to all traffic.
The hurricane "hit" the terminal the following day and the vessel eventually re-commenced loading one month thereafter, completed loading in two days and sailed.

The vessels owners claimed US$ 330,494 demurrage. The charterers attempted to rely on the clauses in the contract of affreightment, one being that "exceptions to loading time and demurrage time" – under which – if loading or discharge is delayed because of bad weather or any other reason beyond charterers control, laytime shall cease. The other clause was the Force Majeure clause, being any circumstance beyond the control of either of the parties preventing the performance by a party of its obligations, including fire, flooding, storms, typhoons, tornados, high seas, low waters, earthquakes, perils of the sea, plagues and any circumstance of force majeure.

Bearing mind that an English court when considering a charter party, has held that an "Act of God" does not exempt liability, it is necessary to consider the effect of the above "exculpatory" statements in the charter party in question.

The charterers contended that under either of the two "exculpatory" clauses they are exempted from paying demurrage for the period during which the vessel was requested to leave the loading berth and waited until it returned and completed loading.

The arbitrators' decision was that in relation to the first clause, the vessel did not leave the berth as a direct consequence of the anticipated hurricane which reached the area two days thereafter. The vessel was ordered to leave the berth, the vessel left "in anticipation" of the bad weather and not due to the bad weather itself.

For this reason, it was determined that the charterers could not rely on the force majeure clause – "anticipation of a storm does not constitute force majeure." However, the charterers were "saved" by the "basket" provisions of the other clause "for any other reason."

It was held that the vessel left the berth was because of the Terminals' instruction to this effect and there was no connection between the Terminal's operators apart from the fact that the vessel was loading at the terminal. The charterers did not even instruct the vessels owners to a specific berth for loading.

Accordingly, it was held that the exception to the loading period or delay in loading applied and the owner's demurrage claim was rejected save for US $9,661 which the charterers had agreed to pay. Accordingly, although the force majeure clause did not apply the charterers were exempted from payment of demurrage in hundreds of thousands of U.S. dollars in view of the clause "complementing" the Force Majeure clause.

"Act of God" or "Force Majeure"?

Considering now, "Act of God" or "Force Majeure", Arbitration no. 13/19 was concerned with a chartered vessel which presented itself for the loading of a cargo of soya at a terminal on the Mississippi for carriage to Casablanca. The vessel was under a time charter sublet. The head charter contracted with the sub-charterer for the execution of the voyage. Also, in this matter a hurricane warning was given.

However, in this matter the vessel was damaged by the effect of the hurricane after, arriving at the load port, had given "notice of readiness" and had received permission to dock. Fifteen days elapsed from the time that the vessel was damaged until it could resume its pre-damage position.

During this period until the arrival of the hurricane – it was discovered that the vessels holds were not suitable for the carriage of soya because of rust and patches of paint on the hatch-covers and a number of hours elapsed before the inspector passed the inspection of the vessels holds, so that by the time of arrival of the hurricane the vessel was suitable for the loading of the cargo.

However, the cargo which was to have been loaded from a barge was damaged by the hurricane and the charterers were unable to provide substitute cargo.
Under clause 36 of the charter party the parties agreed that "either party will not be responsible for loss or damage or for delay in providing, loading, discharging resulting from an "Act of God".

After the effect of the impact of the hurricane had passed the charterers contended that the vessel was not cargo-worthy as it's holds had flooded. Accordingly the vessel underwent a further examination having left the berth for this purpose. This examination established that the vessel was cargo-worthy and the vessel returned to the berth.
Following an exchange of messages the charterers advised that they were cancelling the charter party and the head charterers redelivered the vessel to its owners.

The owners demanded demurrage in the sum of US $372,746 – and the charterers claimed damaged from the owners resulting from the sale of the soya at a loss and for demurrage paid to the barge arising from the fact that the vessels holds were not clean and thereby were unsuitable for the loading of the cargo of soya.

The charterers contended that an occurrence whereby the cargo was ready for loading but was prevented from doing so was an "Act of God" entitling them to rely on "Force Majeure". This contention was rejected. It was held that if the contract had stated that damage to the cargo occurring whilst awaiting loading had been defined as a circumstance excusing performance it would have been possible to accept charterer's above contention if the contract had provided that damage or loss to a cargo awaiting loading excuses the parties from their obligations.

However, as the cargo had been described in the agreement as "soya beans", under English law, in the absence of a specific description of the cargo of soya beans to be loaded it was charterers obligation to provide an alternative cargo of soya beans. In the result, the arbitration determined that the vessels owners were entitled to demurrage calculated from a few days after the hurricane until the cancellation of the charter party, in the sum of US$ 354,109.

However, under French law, in a contract for the supply of wine, the seller undertook to supply "until the end of February" when the seller and supplier of the wine encountered a flooding of roads in February, this was held to be "force majeure" freeing the seller from his obligation to deliver "until the end of February".

However English Law would have obliged the seller to find an alternative means of supplying the quantity of wine the seller had contracted to supply as the contract to supply did not state a specific wine and spoke of

"wine" without any qualifications and in general terms. If the arbitration 13/19 mentioned above had been determined by French Law, the charterers in that matter would have been entitled to rely upon "force majeure" for the damage caused to the cargo which was "available for loading."

The accident compensation

In the case no. 1102 (Classic Maritime Inc. vs Limbungan Makmur Sdn Bhd. and Others, Court of Appeal [2019] (EWCA Civ, 27 June 2019)), The English Court of Appeal considered a Contract of Affreightment. In this matter the charterers agreed with the vessels' owners, in a long-term engagement for the carriage of iron ore purchased by the charterers from two Brazilian mining companies, known as Samarco and Vale for carriage from two Brazilian ports to Malaysia. However, The Fundao Dam at which the Samarco mine was located collapsed resulting in substantial flooding preventing mining activity there and the production of iron ore and it's shipment.

The vessels' owners claimed damages for the freight income due to them from the time of the flooding from the end of 2015 until mid-2016 representing freight lost to them in the sum of 19.8 million U.S. Dollars. The charterers/sellers of the iron ore contended that the collapse of the mine constituted "Force Majeure", relying on the "Exception" clause in the contract between them and the owners, stating "No party will be responsible for damage or loss or for failure to load or discharge or to deliver the cargo as a result of an "Act of God" including flooding, accidents of the mine or to production or any other circumstance beyond the control of the parties, provided that the occurrence directly influences the performance of the party of the charter party.

It was not disputed by the parties that the collapse of the dam was an "accident of the mine" and as a consequence thereof production of the iron ore at this mine was halted however the vessels' owners contended that in the relationship between the charterers and the additional supplier Vale, the latter did not agree to supply the charterer.
Accordingly, the Court held that charterers were obliged to prove that if the dam had not collapsed, the charterers could have provided the cargoes of iron ore until mid-2016 and the collapse of the dam prevented this. As the charterer failed to provide such proof the Appeal Court awarded the owners 19.8 million US$, the freight due for five shipments.

The aforegoing illustrates that, a hurricane which caused the closure of a shipping route, a hurricane which damaged a cargo intended for loading and the collapse of a dam causing the flooding of the mine intended for the supply of a cargo – were not considered to be Force Majeure by English courts and Arbitration Tribunals excusing the vessels charterers from their obligations to supply, the cargoes in the agreed quantities. (with the one exception where the charterers were "saved" by another clause in the charter party, not being the "Force Majeure" clause).

It should be borne in mind that each of the above circumstances preventing loading was beyond the control of the Charterers and in "layman's language" would be thought to be "Force Majeure".

The above concept "Force Majeure" under English Law applies to both charter parties and sale contracts.
On the other hand, shipowners and operators acting as "carriers", under the terms of Bills of Ladings issued by them or under the provisions of clause IV(2)(a)-(q) of the Hague-Visby Rules rely on the fact that they will be exempted from damage or delay occurring during the performance of the sea carriage flowing from circumstances beyond their control (including "Restraints of Princes and Rulers…" and also "Perils of the Sea", "Act of God") or any other Cause which is not attributable to the actual fault of the carrier, his agents or servants.

As a substantial portion of international trade is subject to English Law, it is necessary to understand the manner in which "Force Majeure" is or is not recognized thereby and to draft the "Force Majeure" clause accordingly.

The author is the managing partner at Harris & Co. Maritime Lawyers.
yoavh@maritime-law.co.il

Contents of the article are only for general information and do not constitute a legal opinion.