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INTERNATIONAL LAW SEMINAR 2009

How lawyers can effectively assist owners and charterers improve their bottom line in a weak economy.

Termination of Contract, whether the economy can create a force majeure solution, enforcement of contracts, collection of freights, security and related issues.

We will separate the subjects proposed for this session and deal with them independently, always with reference to the Maritime Business and considering the ultimate goal of the Seminar, since these topics may be addressed from the point of view of the General Law (Our Civil and Commercial Code).

Termination of a Shipping Contract

Our Navigation Law Nº 20.094 classifies contracts for the use of vessels according to the following criteria:

a) Bare-boat Charter Contract
b) Time Charter Contract
c) Total or Partial Charter Contract
d) Special Charter Contract

The general criteria is that the contract shall be formalized through a written document which, in order to be effective against third parties, shall be registered with the National Vessel Register and with the competent authority, i.e. “Prefectura Naval Argentina” (Coast Guard).

In several sections the Law determines that actions resulting from contracts for the use of vessels terminate after one (1) year, to be counted as from the later of either the expiration, rescission or termination date of the contract, or from the date the vessel is returned, and in the event of loss, from the date she should have been returned.

In general, and unless otherwise specified, contracts may be terminated by written notice, subject to the applicable compensation, according to the circumstances of the specific case. This principle is valid both for the Time Charter and for the Total or Partial Charter.

The sale of the vessel is not a ground for termination of the Total or Partial Charter Contract. These contracts shall survive and their obligations shall be met by the new owners.

With reference to the Total or Partial Charter Contract, the charterer may, before expiration of the lay days, terminate the contract by paying, unless otherwise specifically stated, half the gross freight and, if applicable, unloading and demurrage expenses. If the charter is for a round voyage, he shall pay half the one-way freight.

Our legislation considers the event of blockade in the destination Port. Section 256 determines that if, after voyage has started, the blockade of the destination port is declared, the owner shall forcefully request the charterer to indicate, within 48 hours, the port for unloading the goods. This port shall be in the route the vessel had to follow to arrive at her original destination. If these instructions do not arrive in time, the owner or the master shall establish the Port of unloading.

Outside the already mentioned contracts for vessel usage, and with respect to contracts for the transportation of general cargo, the charterer may terminate the contract according to Section 263, which provides that, after the cargo has been loaded, the charterer may terminate the contract during the time the vessel remains in the Port, provided this situation does not produce delays in the departure of the vessel, paying freight and unloading expenses.

Title III, Chapter II, Section V, Part V, specifically refers to the termination of the contract, upon the request of either party and with no right to make claims to each other, provided any of these situations arise before the voyage starts:

a) Departure of the vessel is prevented by an unforeseeable event or force majeure, without any time limit;

b) Prohibition to export or import the goods;

c) The country under which flag the vessel sails is at war;

d) A declaration of blockade is notified at the loading or destination Port;

e) Trade with the country the vessel is bound to is prohibited;

f) The vessel or the cargo ceases to be considered neutral property, or it is included in the contraband of war list by any of the countries at war.

In these cases, both loading and unloading expenses shall be borne by each shipper, and the freight paid in advance shall be reimbursed.

Whether the economy can create a *force majeure* solution

In order to address this topic we have to refer to force majeure and unforeseeable event as terms closely related to the Law.

The unforeseeable event is considered one level beyond force majeure, that is the event that could not be anticipated and, had it been, could not have been prevented. In general, both concepts have a similar treatment under the law, and both situations are sometimes confused, despite their differences. Although both concepts are vague and on many opportunities the legislation misinterprets them, textbooks and Legal opinions agree that, although a debtor may be sometimes forced to meet an obligation the debtor did not fulfill due to an unforeseeable event, he many never be forced to meet an obligation not met due to force majeure.

The law normally exempts both cases, but allows the contract to establish responsibility before an unforeseeable event.

General Characteristics:

a) Inevitability

The event cannot be prevented by exercising normal attention, care and effort with respect to such an event, considering the specific circumstances of place, time and person. Note that if we consider guilt as the omission of steps that should have been taken to anticipate or prevent damage, there will be no guilt but an unforeseeable event when, despite the adoption of the required steps, the event is still inevitable. The fact that an event is extraordinary or out of the normal is not a distinctive feature of unpredictability and inevitability; but rather it specifically points to the circumstances that do not allow the event to be anticipated or prevented. What is out of the normal and of the ordinary course of events may not be anticipated.

b) Alien Event

The event shall be alien to the alleged responsible person, or alien to the defect or risk of the good. Otherwise, we would face a hypothesis that is not exactly “alien cause”, and which the Romans used to call `*casus dolus vel culpa determinatus*`.

From very remote times the Argentine Law has been discussing the difference or, rather, the equivalence of the “unforeseeable event” and “force majeure” concepts.

Those who have taken the first stance have resorted to several criteria to highlight the difference, namely:

a) To the cause of the event, that is, the unforeseeable event refers to facts produced by man; whereas force majeure relates to events produced by nature;

b) To the conduct of the Agent, that is, that the unforeseeable event is the relative impotence to overcome the situation, while force majeure is the absolute impossibility;

c) To the importance of the event; therefore, the most outstanding and significant events constitute events of force majeure, and those less important are unforeseeable events;

d) To the element that constitutes it, whereas the unforeseeable event implies the event is unpredictable and, on the other hand, force majeure points to the irresistibility of the event; and

e) To the externality of the event; so, the unforeseeable event is the internal event which, therefore, occurs within the scope of the debtor's or agent's activity; force majeure consists of the external and purely objective event.

Practical Argentine Cases:

In the last years Argentina has suffered (among others) two relevant events that affected our economy, and that may be studied in order to avoid negative consequences to the maritime business.

The first event that affected our economy and of which we have will be still suffering important effects and consequences, was the Agricultural Strike, which nearly caused shortage of supplies to the City of Buenos Aires and the total interruption of deliveries of agricultural products (commodities) to Port Terminals for export operations.

The second and most recent event refers to the measures that affected the Ports of Buenos Aires. This event, of union origin, was that the workers used the Work-to-Rule action as a method of protest, resulted directly in severe delays throughout the Port activity, with a significant economic damage to the local market.

With respect to Agriculture Strike, the concept of the Right to Go on Strike, is well established in our National Constitution (Section 14 bis), and since the requirements in our legislation are not very strict, in general terms it turns to be more difficult for strikers to fulfill minimum requirements / services when the decision is taken in order not to turn it illegal.

However, this Strike, also known as work stoppage (Paro in Spanish), was accompanied by other restrictive measures that produced the direct consequence of that freeze the International Trade. And, although there are special clauses included in charter party for these situations (strike clause), there were different interpretations on this particular situation.

In this specific case, the agricultural strike did not affect the Port activity directly, since this activity could develop normally by itself. But what the strike did affect was the supply of the export merchandise and/or goods, because there was no way of procuring them beyond the storage capacity of the Ports Terminals. And, having no cargo, the assumed commitments could not be fulfilled. The agricultural strike interrupted / blocked the roads and railway traffic that had access to all Ports, and therefore supply was totally discontinued.

Our opinion was to extend and/or include in the usual clauses strike clause in the Charter Parties a phrase providing for this situation - the impossibility to procure the goods / cargo through regular or normal means -. Avoiding further ambiguities.

The second concept, Work-to-Rule, used by the Port workers Union, posed important problems to international trade, and its immediate effect was the sudden reduction of the operational activities of the Port.

Work-to-Rule is the adjustment of all employee tasks to the internal labor Regulations and/or Collective Agreements, which are set of strict rules that determine the conditions and terms to which both the employer and the workers should be subjected to in their work relation.

From a practical point of view, this can be summarized as the reduction on the performance of the tasks inherent in a job for union reasons. Generally, the delay results from the strict fulfillment of the regulatory provisions and terms.

This situation, Work-to-Rule, caused very significant delays in lay days and deferments in loading and unloading operations and vessels could not fulfill their commitments in time towards their next Port schedules. During this use of this protest method, port workers observed strictly all breaks as well as the number of operational movements per hour established by the regulations.

Due to this situation, carriers, before arriving to Argentinean Ports, in fulfillment of their duties (notifications), decided to unload the goods at the nearest Port, Montevideo, Uruguay with the economical damages for all local consignees.

Enforcement of Contracts, collection of freights:

When we talk about enforcement of contracts we are restricting ourselves to the scope of contracts for the use of vessels, and said enforcement relates to the freight collection itself.

The Navigation Law provides for enforceability when the cargo is at the port of destination at the disposal of the legitimate holder of the bill of lading, unless otherwise specifically stated.

It is important to remember that the non payment of the freight, does not allow the carrier to withhold the cargo on board the vessel as guarantee of its credit. However, he may file for a Court attachment of the cargo to obtain a guarantee.

If cargo does not arrive at destination, the freight is not owed, unless full collection has been established regardless of the circumstances or if the cargo has not arrived due to the carrier's fault or due to a defect inherent in the goods.

If the voyage is excessively delayed and in the event of unseaworthiness due to unforeseeable events or force majeure, and if the goods remain at the carriers' disposal at a Port of call, the freight shall be owed proportionally to the distance covered by the vessel up to the place where the unseaworthiness occurred.

Security and related issues:

The carrier has the right to arrest the cargo as preventive measure while they are under Customs jurisdiction or in the hands of the Consignee, and even to request to the Court to sell them immediately if the cargo can be easily deteriorated or is difficult to preserve.

The cargo has legal privileges set forth in the Navigation Law (Section 494), which also establishes the order the legal priority. Furthermore, privileges over the cargo expires if the action is not enforced / promoted within 30 days following unloading, and provided they had not been legitimately transferred to third parties.

From a procedural point of view, an Executive Action should be filed in order to be able to collect the freight as established by the Navigation Law itself against the holder of the bill of lading who used it to request delivery of the goods, or, if applicable, against the shipper.

The Executive Action is also required to collect freights against the lessee or time charterer. The contract that originates the executive proceeding should be submitted.

Furthermore, in the event of a contract for hiring a vessel, the lessor may – in order to obtain restitution – use the eviction proceedings set forth by the ordinary procedural law. The same applies to the judicial sale of the boat, which should comply with the same formalities established for real property. Therefore, both proceedings are very long and complex.

Conclusions:

It is not easy to provide a useful conclusion to such brief description of the topics on this session, but, referring to our Argentinean Jurisdiction we can be somehow proud of our

Federal Judges who understand the way Maritime business is performed (informality) considering the formalities of our legal system (Napoleonic Code origin). Having mentioned that, our Navigational Law follows the International lines and we, Maritime Lawyers try to be well updated in our profession with in the coming new Conventions. Notwithstanding, our Political events affect our development causing damages to our specific area that, in fact, is one of the most important tools for a National growth, the International Trade.

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