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ARTICLE

Force Majeure and International Supply Contracts

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1. Introduction

For the purposes of this article, the expression 'international supply contracts' has been chosen so that two contractual instruments can be run together, namely the contract of sale of goods and the voyage charterparty contract. As distinct as they are, they share certain features, notably a commitment to the market rule of damages assessment[1] and to the strictness of the duty bearing upon the seller to deliver goods and the charterer to provide a cargo. Moreover, when the doctrine of frustration of contract comes into play, it may well do so in circumstances affecting both types of contract. When the Suez Canal was blocked in 1956, the effect of the governmental action in question was felt in both charterparty[2] and sale of goods contracts.[3]

The commitment of English common law[4] to the binding force of contract can be seen in two of its features often closely associated in practice. First, there is the strict duty of performance in those cases where the promisor is not undertaking to exercise care and skill. This is evident for both the seller's duty to deliver and the charterer's duty to provide a cargo. If obligations of this type were subject to a standard of due diligence or even best efforts, it is very likely that this would encourage more, and more prolonged, litigation and arbitration than is currently the case. Secondly, there is the stringent character of the doctrine of frustration, which

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[1] *Rodocanachi Sons and Co v Milburn Bros* (1886) 18 QBD 67; *Williams Bros v Edward T Agius Ltd* [1914] AC 510; MG Bridge, 'Markets and Damages in Sale of Goods Cases' (2016) 132 *Law Quarterly Review* 405.

[2] For example, *Ocean Tramp Tankers Corp v V/O Sovfracht (The Eugenia)* [1964] 2 QB 226.

[3] For example, *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93.

[4] It is increasingly difficult to refer to *English* common law given the uniform court structure accommodating English and Welsh courts, but also difficult to figure out how Northern Ireland is to be taken into account. The common law alone will not suffice given the various contenders for that title (Australia, New Zealand, United States, most of Canada, Singapore, Hong Kong etc with their national variations on content). Consequently, the expression 'English common law' is used *faute de mieux*.

discharges contracts as a matter of law in the limited instances of supervening illegality, physical impossibility, and commercial impossibility, the last of these being very tightly controlled.[5] A loosening of the test for commercial impossibility would have the potential for compromising the strict duty of the promisor's undertaking. The same can indeed be said for those contractual clauses that dispense with the strictness imposed by the common law of frustration or provide exceptions against liability. Here, nevertheless, we are dealing with the expressed will of the contracting parties and are increasingly operating in a legal environment that, as between commercial parties engaged in allocating commercial risks, shuns forced interpretations of exception clauses even to the point of questioning the very existence of a *contra proferentem* rule of construction.[6]

When the Convention on the International Sale of Goods (CISG) was concluded in 1980, the same strict approach to the performance of the seller's duty to deliver was adopted. This amounted to a significant concession by civil law countries, for which fault, whether presumed in certain cases or proven, was necessary for a damages claim. Nevertheless, an approach to changed circumstances was adopted in the CISG that on its face is significantly less exacting than the test for frustration at common law. The provision in question, Article 79, is not as such a frustration provision. Instead, it functions as a not-overly generous exception clause, freeing from liability in damages a party who finds that performance has become impracticable as a result of an impediment. In its ability to deal with partial[7] and temporary impracticability, it has some advantage over a more rigid common law doctrine of frustration that copes badly with such instances of non-performance.[8] It

[5] *Krell v Henry* [1903] 2 KB 740; *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93.
[6] See for example *Bates v Post Office Ltd* [2019] EWHC 606 (QB) [637-638]; *Motortrade Ltd v FCA Australia Pty Ltd* [2018] EWHC 990 (Comm) [112].
[7] See for example the difficulties caused by a charterparty calling for seven separate voyages in the 1979 season, disrupted by a strike in 1979 that led to voyages being carried over into 1980, which yielded the conclusion that the contract was divisible between 1979 and 1980 and frustrated as to the 1979 part: *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724.
[8] See GH Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014), 5-008: 'There is no such concept [in English law] as partial or temporary frustration on account of partial or temporary impossibility.' Reference, however, is made to the defendant's plea in *Classic Maritime Inc v Lion Diversified Holdings Bhd* [2009] EWHC 1142 (Comm) [3], [2010] 1 Lloyd's Rep 59 that a contract

is left to a provision that deals with all cases of non-performance, Article 25,[9] to determine when a contracting party is entitled to avoid (ie terminate) a contract. This dilution of liability lessens the need for a *force majeure* or related clause to abate the strictness of the seller's duty to deliver, but it is surely as true here as under the common law that a legal adviser who recommends or condones entry into a contract of sale without the protection of such a clause courts a real risk of a professional negligence action. That said, there is little or nothing in the decided cases under the CISG that instructs us about the fate of such clauses. We have little to go on apart from the accepted view that the provision dealing with the construction of a party's words or actions[10] applies equally to the construction of the contract as a whole.

Much has been written and said in recent years about transnational law. It is doubtful that an exact definition can be given for such a phenomenon, not least because it is an expression that expresses a wide variety of hopes and aspirations of people with widely divergent aims and interests.[11] In that anarchic vein, I propose to add my own view that a body of law that operates widely outside the sovereign boundaries of the State that embraces it can claim recognition as transnational law. This is notoriously the case with English law that has become the applicable law in a vast array of contracts that on their face have little or nothing to do with their performance as far as England and Wales are concerned, ranging from shipbuilding contracts to syndicated loans, to dealings in securities, to international sales, to international charterparties, and so on. This is not a recent phenomenon but it has been reinforced by the high level of commitment across the world in modern times to the principle that contracting parties should be free to choose, with only minimal restraints, the law applicable to their contracts.[12] The case that lies at the heart of this

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can be 'frustrated in part' but the judgment in that case takes the matter no further. There is no reason, however, why a contract that is severable might not be frustrated as to one or more of its severable parts.

[9] Couched in the language of fundamental breach and misleadingly so, since it also applies where a non-performing party is excused from having to pay damages as a result of Article 79. Cf. the notion of 'fundamental non-performance' in the Unidroit Principles of International Commercial Contracts (4th edn, 2016), Article 7.3.1.

[10] Article 8 CISG.

[11] If it were thought to be principally about international commercial law, a superficial examination of the internet would soon dispel that impression. Compare for example the interests of the Transnational Law Institute of King's College London and the QMUL-Unidroit Institute of Transnational Commercial Law.

[12] See for example the Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual relations (Rome I); Hague Conference on Private International Law, *Principles on Choice of Law in International Commercial Contracts* (2015), Article 2.

paper, *Classic Maritime Inc v Limbungan Makmur Sdn Bhd*,[13] had no connection with England. It concerned the chartering of a vessel by a Malaysian company, from a Monaco-based shipowner incorporated in the Marshall Islands, in the expectation of receiving instructions from a parent or associated Malaysian company, which in turn would be receiving iron ore from a Brazilian mine.

Extensive attention is paid to this case because it poses fundamental questions about frustration of contract, strict contractual performance, exceptions clauses and damages, and about their relationship *inter se*. The dispute in *Classic Maritime* arose between the Malaysian charterer (Limbungan) and the Marshall Islands shipowner (Classic Maritime). The charterparty for multiple voyages, referred to as a contract of affreightment, depended for its performance upon a contract for the sale of iron ore between a Brazilian mine owner (Samarco) and Malaysian buyers (Lion DRI and Antara) and upon instructions being given or contracts concluded between one or other of these Malaysian companies and Limbungan. As stated above, charterparty and sale contracts possess similar features. In both instances, non-performance of the contract may turn upon non-performance of one or more earlier supply contracts in the chain. In the present case, Samarco could as well be restyled as the head seller, Lion DRI/Antara as the intermediate sellers, Limbungan as the immediate seller and Classic Maritime as the buyer, so that the resolution of the issues could be equally intelligible to a sales lawyer. The particular issues presented by the *Classic Maritime* case will be considered after a preliminary survey of the law relating to *force majeure* clauses and frustration.

1.1 The strict duty to deliver

The strictness of a seller's duty to deliver is brought out in case law where the seller is seeking to shelter behind the failure of a supplier or expected to provide the goods for export. We begin with a case where the seller was excused from its duty to

[13] [2018] EWHC 2389 (Comm), [2019] 1 Lloyd's Rep 349; reversed in part [2019] EWCA 1102, [2019] 2 All ER (Comm) 592. Leave to appeal to the Supreme Court was refused.

deliver. In *Société Co-opérative Suisse des Céréales v La Plata Cereal Co SA*,[14] the contract was for a quantity of 'Plate maize new crop' FOB Buenos Aires. The seller had in fact stocks in hand available for shipment when the Argentinian government issued a decree investing a state agency with the exclusive right to sell maize for export. This agency declined to supply maize for export during the contract period notwithstanding the seller's reference to its pre-existing commitment with the buyer. The court ruled in favour of the seller on the basis of a prohibition clause in the contract[15] but in the alternative held that the contract was frustrated at common law.[16] In the circumstances, the court should have held that the prohibition clause ousted the application of the doctrine of frustration. More will be made of this point below. A further point, which we shall also come to again, is that the seller was in fact ready and willing to perform at the time of the decree, but this fact seems only to have played a part in the narrative of events.

A contrasting case is *Atisa SA v Aztec AG*.[17] It concerned a cargo of sugar the subject of an FOB Mombasa contract. The monopoly supplier for export was the Kenyan government, with which the seller had a supply contract, negotiated through a local agent, that matched its FOB commitments. In its commercial capacity as a private trader, the Kenyan government declined to perform its contractual obligation to supply the goods, which resulted in an arbitral finding, concurred in by the court, that there was no 'Government intervention' within the meaning of a *force majeure* clause. This was despite the government's action being a politically-inspired one, reached after a resolution in the legislature that no surplus food should be exported without the consent of either the President or the Cabinet. No distinction was to be drawn between the conduct of a private and a public monopoly supplier, which must be correct. Moreover, the court declined to overturn the decision of arbitrators that the contract had not been frustrated,[18] despite the seller's having made preparations in advance to put itself in a state of readiness and willingness to perform. The court

[14] (1946) 80 Ll L R 530.
[15] 'Should the fulfilment of this contract be rendered impossible by prohibition of export, blockade, or hostilities, this contract, or any unfulfilled part thereof, to be cancelled.'
[16] '[T]he parties must have made their bargain on the footing that the law of the Argentine would not be so altered as to prevent the contracts being fulfilled'; (1946) 80 Ll L R 530, 542.
[17] [1983] 2 Lloyd's Rep 579.
[18] '[T]he Court will only interfere with the decision in an arbitration if it is satisfied that the wrong test has been applied or that, albeit the right test was applied, no reasonable person could on those facts have reached the arbitrators' conclusion' [1983] 2 Lloyd's Rep 579, 584.

was furthermore disposed to arrive at the same conclusion. This was also despite its being in the common contemplation of buyer and seller that the source of the goods was the Kenyan government. Why was this not sufficient to release the seller from its contractual commitment?

In the court's view, the seller was caught by an adaptation of Morton's Fork.[19] Either it had entered into a binding commitment with the Kenyan government, in which case it could, when sued by the buyer, claim over against the Kenyan government for its repudiation of the anterior contract; or it had failed to obtain a binding commitment, in which case it had not protected itself by concluding a proper contract of supply, thus disqualifying itself from relief.[20] But in so far as the sellers' permissible source of supply dries up, the decision seems on its face a hard one in taking perhaps an overly sanguine view of what might have been achieved by the seller in its contractual dealings with the Kenyan government. *Atisa* is however distinguishable from *Société Co-opérative Suisse* on a further ground, in that there was a supervening change in the local law after the contract date in the latter case. Moreover, the seller had also assumed the risk of failing to obtain an export licence, which the court considered a relevant factor. Now, a failure to obtain a licence, whether in breach of a strict undertaking or one of reasonable endeavours, is a quite separate breach of contract from a failure to deliver the contract goods.[21] Doubtless, it would have been futile even to apply for a licence in this case since it was the Kenyan government that was declining to perform, but the failure to obtain the licence was not the cause of the seller's failure to deliver. It is therefore questionable for a contractual provision dealing with export licences to colour the determination of an anterior frustrating event.

[19] Archbishop Morton was King Henry VII's Lord Chancellor charged with increasing tax revenues and the author of the following statement: 'If the subject is seen to live frugally, tell him because he is clearly a money saver of great ability, he can afford to give generously to the King. If, however, the subject lives a life of great extravagance, tell him he, too, can afford to give largely, the proof of his opulence being evident in his expenditure.'
[20] [1983] 2 Lloyd's Rep 579, 585.
[21] *Johnson Matthey Bankers Ltd v State Trading Corpn of India Ltd* [1984] 1 Lloyd's Rep 427, 434; *Toprak Mahsulleri Ofisi v Finagrain Cie Commerciale et Financière* [1979] 2 Lloyd's Rep 98, 108.

Above all, *Atisa* demonstrates how very difficult it is to invoke successfully frustration in a contract for the supply of generic, unascertained goods. For a seller to be successful, there would have to be an export ban or a complete drying up of the source of such goods,[22] as where the goods are to come from a particular plant or mill which burns down before performance of the contract.[23] In so far as the goods are to be supplied to the seller by a third party, the seller would be driven to prove that the third party likewise could claim frustration of the contract. This notion is sometimes referred to as attribution, to which the third case in our sequence refers. Before we turn to that case, attribution, it should be noted, appears in Article 79 of the CISG, where a seller delegating performance to a third party is only exempted from liability in damages if that third party in its turn could claim to be exempted from liability in damages. Delegating performance and contracting for supply from a third-party source so as to effect personal performance are not the same thing but a broad reading of Article 79[24] should lead to the same result in this case too.[25]

The supplier that failed the seller in *CTI Group Inc v Transclear SA (The Mary Nour)*[26] was a private Taiwanese supplier that buckled under pressure from an outside entity. The defendant seller contracted to supply a large quantity of cement FOB a vessel in Taiwan to a buyer whose purpose was to use the vessel when it arrived in Mexico as a floating silo for the supply of cement to domestic sub-buyers. A Mexican cartel had previously disrupted the buyer's plans and on the present occasion was able also to prevent shipment from the Taiwanese port later selected by the contracting parties by bringing pressure to bear on the Taiwanese supplier. Despite this intervention rendering performance of the FOB contract impossible, the contract had not been frustrated because it had not been fundamentally changed by the intervention of the Mexican cartel.[27] No reference was made in the Court of Appeal to the

[22] *Genus numquam perit* is a common saying expressing the difficulty of concluding that a contract for unascertained goods has become frustrated as a result of physical or commercial impossibility.
[23] *Sanschagrin v Echo Flour Mills Co* [1922] 3 WWR 694. According to *Intertradex SA v Lesieur-Tourteaux SARL* [1978] 2 Lloyd's Rep 509, the doctrine of frustration is capable of applying to contracts for unascertained goods.
[24] As is permissible with a provision in an instrument not drawn with the exactitude of a statute of the Westminster Parliament (*Fothergill v Monarch Airlines Ltd* [1981] AC 251; *Stag Line Ltd v Fosco Mangolo & Co Ltd* [1932] AC 328), and in an instrument moreover that exhorts the inference of general principles forming its base in order to fill gaps in coverage (CISG Article 7(2)).
[25] See AH Hudson, 'Exemptions and Impossibility under the Vienna Convention', in E McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, LLP 1995) 279-80.
[26] [2008] EWCA Civ 856, [2008] 2 Lloyd's Rep 526.
[27] [2008] EWCA Civ 856 [27], [2008] 2 CLC 112. See also *Intertradex SA v Lesieur-Tourteaux SARL* [1978] 2 Lloyd's Rep 509 which concerned difficulties in the prior supplier's factory.

foreseeability of the Mexican cartel's intervention, which, despite an arbitral finding to opposite effect,[28] appeared to be high enough to exclude the operation of frustration. As expressed by the first instance judge, the seller had assumed the risk by undertaking to supply the goods from a particular source.[29] As the judge at first instance noted, the seller could have protected its position either by obtaining a binding commitment to deliver from its own supplier (thus echoing *Atisa*) or by contracting with the buyer on terms, making its liability dependent upon due performance of the prior supply contract.[30]

Another interesting feature of the first instance decision was its reliance on attributed fault, with express reference being made to Article 79 of the UN Sale Convention. Attributed fault was expressed as an alternative approach to assumption of risk approach taken in *Atisa*. According to the notion of attributed fault, it was not enough for the seller to point to its own supplier's non-performance. If that supplier could not invoke frustration against the seller, then the seller could not invoke frustration against the buyer: the supplier at fault in not delivering to the seller was to be treated as the seller's delegate for the performance of the FOB contract.[31] For a seller to be in a position to satisfy this test, it would first be necessary to have a binding contract with its supplier, absent in this case, as opposed to a hope or expectation of obtaining such a commitment. A supplier with whom no binding contract had been made could not be at fault in failing to deliver.[32] One might add that, for attributed fault to be workable, no account should be taken of relieving clauses, whether exception clauses or cancellation (or frustration) clauses, in the contract between supplier and seller. Finally, it is not clear whether the supplier could be seen as a delegate for FOB performance even if a binding supply contract had existed since that performance requires the goods to be put on board by the supplier and not merely delivered to the seller that the seller might then put them on board.

[28] [2008] EWCA Civ 856 [6], [2008] 2 CLC 112.
[29] [2007] EWHC 2070 (Comm) [38], [2007] 2 CLC 518.
[30] ibid.
[31] [2007] EWHC 2070 (Comm) [30] et seq, [2007] 2 CLC 518.
[32] [2007] EWHC 2070 (Comm) [36], [2007] 2 CLC 518. On which see *Re Thornett and Fehr and Yuills Ltd* [1921] 1 KB 219 and *Lebeaupin v Richard Crispin and Co* [1920] 2 KB 714.

Attributed fault is of course another way of explaining the absence of a frustration defence available to the prior party. A version of attribution is evident in the notorious Mississippi floods cases,[33] where intermediate sellers of soya on CIF terms were affected by a partial governmental embargo on all shipments of soya over a stated period. They were operating in string trading conditions, reliant upon the receipt of a notice of appropriation that linked contracts in a sequential series stretching back to the original shipper, so that all the contracts thus connected concerned the same goods. The embargo was directed at original shippers and its effect was to prevent them from appropriating a substantial portion of each contract quantity to their various buyers.[34] This in turn meant that those buyers, in their character as sellers, could not pass on notices of appropriation in the requisite amounts to their sub-buyers and so on. It also meant that sellers who could not establish an immediate contractual connection with shippers had first to identify all possible shippers during the period in question. The sellers succeeding in doing this would then have to show that no goods were available to reach them via a chain of notices of appropriation so as to put them in a position to perform the delivery duties they owed to their buyers. The governmental bulletins concerning the partial embargo had recognised certain exemptions for goods in silos or earmarked for loading at the loadport, or in lighter vessels, or in transit to the loadport, and it was these so-called 'loophole' goods that had to be demonstrated as unavailable to reach defendant sellers. The sellers' task was therefore to trace back up non-existent strings in order to show that the governmental embargo 'prevented' fulfilment of their contracts. To that extent, it might be said, the test for invoking successfully such prohibition clauses in the contracts required sellers to show an absence of fault on the part of all remote shippers with whom they, the sellers, had no contractual nexus. As a result of the vast number of reported decisions and arbitral awards, the prohibition clause in the standard form contracts concerned with this trade was later modified so as to alleviate the burden on sellers of having to show what is referred to here as an absence of fault.

[33] See generally MG Bridge, 'The 1973 Mississippi Floods: 'Force Majeure' and Export Prohibition', in E McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, LLP 1995).
[34] Permission to export was given only in respect of 40% of the contract amounts.

2. The *Classic Maritime* Case

2.1 Factual background

To understand the issues raised in the *Classic Maritime* case, a quite detailed explanation of the facts is necessary. The charterer, Limbungan, was a Malaysian special purpose vehicle wholly owned by a Malaysian parent, Lion DRI, and formed to enter into the present contract of affreightment, calling for 51 shipments, with Classic, a Marshall Islands company operating out of Monaco. The contract of affreightment concerned the carriage of iron ore pellets bought under a long-term contract by Lion DRI from a Brazilian mining company, Samarco, to be shipped at the port of Ponta Ubu and transported to Malaysia, where they would be transformed into briquettes for onward sale to a company called Megasteel. The stated facts show that Limbungan did not have a contractual claim to receive cargoes from Lion DRI but rather responded to orders from time to time.[35] Under the contract of affreightment, Limbungan could nominate shipments from a different Brazilian port, Tubarao, in respect of the produce of another mine operated by Vale. Lion DRI also had a long-term contract of sale with Vale but it had been inactive for some years. In the course of operating the charterparty, some shipments concerned purchases from Samarco by Antara, which was in the same corporate group as Lion DRI and which also had its own contract of affreightment with a different shipowner at more favourable freight rates than those offered by Classic. It too had a long-term inactive contract with Vale.

The current litigation concerned seven of the 51 shipments. Of these seven, Limbungan was already in breach respecting two shipments when there occurred a disaster in the shape of a burst in the Fundao dam, owned by Samarco, in 2015. This caused substantial loss of life and environmental pollution and led to Samarco suspending its mining operations. At the time of the dam burst, Lion DRI was not calling for pellets from Samarco: its customer, Megasteel, had no demand for iron briquettes as a result of the dumping of cheap Chinese steel. The principal issue in

[35] See the reference to receiving 'nominations' from Lion or Antara: [2018] EWHC 2389 (Comm) [50], [91].

the case therefore concerned the five shipments that were due to be made after the bursting of the dam for which Classic was seeking damages for breach of contract in failing to provide cargoes of iron ore pellets.

The issues isolated for examination in *Classic Maritime* were as follows: first, whether Limbungan could shelter behind a so-called 'Exceptions' clause dealing with stated natural disasters, including floods, and failures to supply or load cargoes, regardless of whether it was in a position to perform the contract in any event; secondly, if a causal link had to be shown between the dam disaster and the failure to present the five cargoes, whether on the facts Limbungan could establish this causal connection; and thirdly, what was the measure of damages in the circumstances for a breach of Limbungan's obligations. Another connected issue that also came to the surface was the strictness of Limbungan's obligation to deliver cargo obtained from the alternative supplier, Vale,[36] in the aftermath of the Samarco dam disaster. There was also the latent issue of whether a clause operating as a frustration (or cancellation) clause and displacing the common law frustration test carried with it the application of the Law Reform (Frustrated Contracts) Act 1943. This last issue would in the particular circumstances have no real relevance for two reasons. First, as we shall see, the clause was held not to be a frustration (or cancellation) clause. Secondly, even if it had been, issues concerning expenses and benefits that are the concern of the 1943 Act are much more likely to be met in joint venture and construction contracts than in charterparties.

2.2 The exceptions clause

Concerning the first of these three issues, the exceptions clause read:

> 'Neither the…owners, nor the charterers…shall be responsible for…failure to supply, load, discharge or deliver the cargo resulting from: act of God…floods…accidents at the mine…or any other causes beyond the owners' [or] charterers' control; always providing that such events directly affect the performance of either party under this charterparty…'

[36] Interestingly, a Wikipedia entry (https://en.wikipedia.org/wiki/Mariana_dam_disaster) claims that Vale is the owner of Samarco.

If the clause did indeed function as an exceptions clause by serving only to exclude liability for what would otherwise be a breach, the conclusion of both the court at first instance and the Court of Appeal was that the event in question had to be causally connected to the non-performance, so that, 'but for' its occurrence, Limbungan in the present case would have been able to provide cargoes for the five shipments in question. An exceptions clause of this kind was to be distinguished from a frustration (or cancellation) clause that, upon the stipulated event, automatically discharged the parties from further performance, possibly after a period of suspension of more or less duration. In the latter case, there would be no requirement for Limbungan to be ready and willing to perform at the time the dam burst. The difference between the two types of clause was a matter of construction. The clause in the present case was a true exceptions clause. It employed causal language in that the event in question had to affect directly Limbungan's performance so that its non-performance resulted from that event and it contained no reference to cancellation. In the Court of Appeal, Males LJ also laid emphasis upon the fact that the clause applied to both parties, it referred to particular cargoes and not to performance in general, it extended to a wide range of possible events, and it was particular in its reference to actual time lost.[37]

When ruling on the nature of the clause, the court in both instances distinguished cases dealing with differently worded clauses that employed both the language of causation and cancellation. The court in those earlier cases concluded that the contract was discharged as a result of the event because they were in the nature of frustration (or cancellation) clauses. One example given at both levels in *Classic Maritime* was the House of Lords decision in *Bremer Handelsgesellschaft mbH v Vanden-Avenne Izegem PVBA*,[38] where a prohibition of export clause, in the event of governmental acts 'preventing fulfilment' of the contract, called for the cancellation of the contract. The conclusion to be drawn from a comparison between these cases and *Classic Maritime* is that the presence of causal language that is not further

[37] [2019] EWCA Civ 1102 [39-46].
[38] [1978] 2 Lloyd's Rep 109. See also *Continental Grain Export Corp v STM Grain Ltd* [1979] 2 Lloyd's Rep 460.

qualified by a reference to cancellation should even as a matter of construction compel treatment of the clause as an exceptions clause. Nevertheless, a reference in the clause to cancellation should trump any language of causation contained in the clause. Now, this latter proposition is far from being self-evident and owes much to the status of the *Bremer* case as a decision of the House of Lords. Where the prohibition clause in the *Bremer* case cancels the contract, it is surely only in those cases where the governmental act prevents fulfilment of the contract that it does so. The words in question are 'preventing fulfilment' and not 'of a nature that would or might prevent fulfilment'. These words are words of causation. Causation is the gateway through which an obligor must pass in order for there to be a cancellation.

A further point that also calls for comment is the acceptance by both courts of the proposition that Limbungan's lack of readiness and willingness to perform meant that it could not rely upon the exceptions clause. If Limbungan had been ready and willing to perform—which will be discussed below—the bursting of the dam would still have prevented it from performing. Classic was bargaining for performance by Limbungan and not for Limbungan's readiness and willingness to perform. Readiness and willingness normally goes to the eligibility of a party making a claim for breach of contract, and not to the establishing of a defence to non-performance. Even if Limbungan could be said to be in breach for not being ready and willing to perform as opposed to being in breach for non-performance, this default could not be said to have caused Classic's loss because its causal impact on the claimant would have been overtaken in any event by the flooding of Samarco's mine.[39]

Suppose now that there had been no exceptions clause in the contract of affreightment. The flooding of the mine from which the pellets were to be supplied appears to be a frustrating event.[40] There is nothing in the case to indicate that the effect of the exceptions clause was to oust the doctrine of frustration.[41] Since the clause was characterised as not to concern itself with frustrating events, that is hardly surprising. If the owner of the concert hall and pleasure grounds in *Taylor v*

[39] The separate possibility of pellets being acquired from Vale's mine is discussed below.
[40] The thorny issue of partial frustration, if the flooding was temporary, would nevertheless come into play as long as the contract was considered to be entire and not severable as appeared to be the case. See also text accompanying (n 8).
[41] As would be the case if the clause were a *force majeure* clause: see for example *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154, 163.

Caldwell[42] had disabled himself from performing the contract by selling the premises prior to the due date of performance, the contract would surely have been frustrated when the concert hall burned down, unless it had already been terminated for anticipatory repudiation. Again, in *Avery v Bowden*,[43] a voyage charterparty case, the captain's refusal to accept the charterers' repudiation, when they said they had no cargo for loading in Odessa,[44] meant that the contract remained on foot and was only later discharged for supervening illegality when the Crimean War broke out between Britain and Russia. The shipowners therefore had no action for damages. Had the anticipatory repudiation in these two hypothetical and actual instances been accepted, the assessment of damages as either being crystallised at the date of termination or as calculated in the light of subsequent events would have come into play. This question, as we know, has been firmly resolved in favour of the latter approach by *The Golden Victory*[45] and *Bunge SA v Nidera NV*.[46]

2.3 Causal connection in fact

The second issue concerned the ability of Limbungan to claim in the circumstances the protection of the clause as an exceptions clause. The resolution of this issue turned first of all upon the existence and effectiveness of 'arrangements' made prior to the dam burst for procuring cargoes. This was dealt with at length at first instance, where it was regarded as raising issues of mixed law and fact.[47] The court was of the same view in respect of the 'but for' test as it applied to the question whether the dam burst disabled the charterer from performing.[48] The alternative

[42] (1863) 3 B&S 626, 122 ER 309.
[43] (1855) 5 E&B 714, 119 ER 647.
[44] For present purposes, the court assumed that the language of the charterers' agent in Odessa was strong enough to amount to a repudiation, though it believed this not to be so.
[45] *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12, [2007] 2 AC 353.
[46] [2015] UKSC 43, [2015] 2 Lloyd's Rep 469.
[47] [2018] EWHC 2389 (Comm) [48].
[48] [2018] EWHC 2389 (Comm) [48].

arrangements point was passed over lightly in the Court of Appeal which, correctly it is submitted, treated the matter as an element in the 'but for' reasoning.[49]

Had such arrangements been made, that should not have been the end of the matter for the spotlight would then have been cast on whether orders would have been given to Limbungan by either or both of the buyers, Lion DRI and Antara. On the assumption that arrangements had been made to ship out of Ponta Ubu, Limbungan should then only have been able to claim the protection of the clause if the buyers in turn were able to claim the same protection.[50] As seen above, this requirement may be expressed in terms of attributed fault.[51] This requirement should run all the way up the supply chain. Two points, however, now have to be made. First, if the earlier supplier is protected by an exceptions clause on more generous terms than those afforded to Limbungan, or even by an exceptions clause that has no equivalent in the contract between Limbungan and Classic, this will not expand any protection otherwise available to Limbungan in its contract with Classic. Secondly, turning to Samarco, suppose the dam burst had been due to negligence on the part of Samarco itself, the owner of the dam. According to the court at first instance, this would not prevent Limbungan from claiming the protection of the exceptions clause[52] because 'the design, construction and maintenance of the mine' (which included the dam) were not functions delegated by Limbungan in its capacity of charterer. As a pragmatic matter, this puts a sensible cap on the obligations of a delegating charterer.

The conclusion of the first instance court on the arrangements point was that the settled history of dealings between Limbungan and Lion DRI and Antara amounted to arrangements even in the absence of binding contractual commitment.[53] Nevertheless, the court found that demand from these two buyers from their sellers had fallen away even before the dam burst,[54] permanently in the case of Lion DRI given the fall-off in its customer's capacity for iron briquettes consequent on the dumping of steel by Chinese manufacturers. There was also a finding that demand from Antara would subsequently have picked up but that Antara would not have given

[49] [2019] EWCA Civ 1102 [14].
[50] *Atisa SA v Aztec AG* [1983] 2 Lloyd's Rep 579; *CTI Group Inc v Transclear SA (The Mary Nour)* [2008] EWCA Civ 856, [2008] 2 Lloyd's Rep 526.
[51] *CTI Group Inc v Transclear SA (The Mary Nour)* [2007] EWHC 2070 (Comm), [2007] 2 CLC 518.
[52] Or, as should be the case, of frustration (or impossibility of performance) if otherwise available.
[53] [2018] EWHC 2389 (Comm) [95].
[54] [2018] EWHC 2389 (Comm) [96].

instructions to Limbungan, preferring the alternative of cheaper transport arrangements.[55] It therefore followed that Limbungan could not avail itself of the exceptions clause because it was the unavailability of iron pellets from the buyers and not the dam burst that was the cause of Limbungan's failure to provide the five cargoes.

2.4 Alternative methods of performance

Although recourse to the exceptions clause was thus precluded via the Samarco route and Ponta Ubu, the court at first instance went on to consider the possibility of performance of the charterparty by alternative means taking the form of purchases from Vale and shipment out of Tubarao.[56] Vale and its port were not affected by the dam burst. Where a contract prescribes alternative methods of performance and the preferred method of the obligor fails, must the obligor turn to the second method, or may the obligor claim that it has elected in favour of one method of performance that may not now be carried out? This depends upon the construction of the contract. Either the contract provides alternative routes to performance or else it gives one party a unilateral liberty to alter the prescribed method of performance. [57] Although the report of the case at first instance does not say so, this question comes to life only if Limbungan is able to shelter behind the exceptions clause, which in fact was not the case. That is to say, if Limbungan was prevented from shipping Samarco ore, on the alternative obligations analysis that clause would not protect it from any obligation to ship Vale ore if such an obligation there was.

[55] [2018] EWHC 2389 (Comm) [102], [110].
[56] See GH Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) ch 10.
[57] See for example *Select Commodities SA v Valdo SA (The Florida)* [2006] EWHC 1137 (Comm) [10], [2007] 1 Lloyd's Rep 1.

In *Brightman & Co v Bunge y Born Lda Sociedad*,[58] the charterers were required to load a 'cargo of wheat and/or maize and/or rye'. They decided to load wheat but working to rule action by the railway company transporting the wheat to the loadport meant that the charterers could not load the wheat in time. There are dicta in the case to the effect that a charterer unable to load wheat should substitute maize or rye.[59] The charterers' decision to load wheat in a case of this sort neither compels it to load wheat as a matter of binding election nor provides it with an excuse for not loading maize or rye if the loading of wheat is prevented. On the other hand, in *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food*,[60] charterers had an obligation to load wheat but had also an 'option' to substitute barley or flour at higher freight rates. A strike by elevator employees prevented the charterers from loading a full cargo of wheat. The charterers were under no obligation to load either barley or flour as substitutes for the missing wheat. It is a question of construction whether a contract creates alternative methods of performance, as in *Brightman*, so that impossibility or illegality in respect of one method does not preclude performance by the other; or gives rise, as in *Reardon Smith*, to but one primary obligation with the obligor unilaterally being at liberty to substitute a different primary obligation.[61]

In *Classic Maritime*, the first instance court concluded that Limbungan was bound to perform by one or other of the methods of performance prescribed by the contract, though it did not say so in explicit terms. It was not a case of shipment out of the port of Ponta Ubu, served by Samarco, with an option to ship out of Tubarao, served by Vale, instead. As for the question whether 'arrangements' existed between Limbungan and Lion DRI or Antara in respect of shipment out of Ponta Ubu, Classic appears to have conceded[62] and the court accepted[63] that the bursting of the dam could be regarded as the cause of Limbungan's failure to supply the five cargoes through Samarco and the port of Ponta Ubu. But this was only on the assumption that 'arrangements' existed between Limbungan and Lion DRI or Antara for the provision of cargoes and not merely an unanchored hope of receiving supplies from those

[58] [1924] 2 KB 619.
[59] [1924] 2 KB 619, 628, 630-31, 637. The case turned on whether the action of the railway company's employees amounted to 'obstruction' for the purpose of what appeared to be an exceptions clause.
[60] [1963] AC 691. This case was cited neither in argument nor in the decision of the court.
[61] For suggested terminology to deal with these two categories, see GH Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) ch 10.
[62] [2018] EWHC 2389 (Comm) [66].
[63] [2018] EWHC 2389 (Comm) [66]. At [115], this qualification does not appear.

sources.[64] These arrangements, moreover, would have to be effective.[65] The existence of such arrangements would then bring into play the availability of alternative performance. Classic conceded that the alternative performance question could be put if arrangements might permissibly take the form of 'a relevant relationship because of history'.[66] Otherwise, Limbungan would be in no better position than any seller whose expected source of supply runs dry. Looking at the matter of shipment only out of Ponta Ubu, it is submitted that the question of arrangements between Limbungan and Lion DRI or Antara, ranging from the merest expectancy to binding commitment, in causal terms hardly seems to matter. The effect of the dam burst on Limbungan would have been the same in all cases across the spectrum.

In *Classic Maritime*, the nature of a charterer's duty to supply a cargo was described as absolute at both instances and at first instance as both non-delegable and delegable at intervals.[67] It is far from clear why the duty was described as non-delegable: there was nothing of a personal character in the supply of a cargo and, in the normal course of events, the cargoes that were provided were probably provided to Classic by Lion DRI or Antara, or even by Samarco itself.[68] Delegation and assignment are not the same thing as the court at first instance itself recognises elsewhere in the judgment.[69] Nothing, however, turned upon this point. It was the absoluteness of Limbungan's duty that gives rise to some difficulty in this case. If a duty to supply the cargo is absolute, then ought it not to follow that it is absolute as to whichever alternative performance is to take place? Nevertheless, it was asserted by Limbungan[70] and accepted by the court[71] that Limbungan had only to make reasonable efforts to procure cargoes from Vale once its chosen method of

[64] [2018] EWHC 2389 (Comm) [66] (the first of four conclusions).
[65] See text accompanying (n 50) above.
[66] [2018] EWHC 2389 (Comm) [66].
[67] [2018] EWHC 2389 (Comm) [65-66] (non-delegable), [134-135] (delegable).
[68] Samarco is referred to as the 'shipper', an imprecise label (see MG Bridge, *the International Sale of Goods* (4th edn 2017, para 3.05): [2018] EWHC 2389 (Comm) at [135].
[69] [2018] EWHC 2389 (Comm) [134]-[135].
[70] [2018] EWHC 2389 (Comm) [51].
[71] [2018] EWHC 2389 (Comm) [66].

performance via Samarco failed. Moreover, as conceded by Classic, Limbungan, in seeking exculpation for its failure to ship out of Tubarao, did not need to have this alternative arrangement in place before the dam burst.[72]

Certainly, where the chosen method of performance has been made, as well appears to be the case in *Classic Maritime*, circumstances preventing the employment of that method will lead to the obligor being given reasonable time to put in place the other method of performance and even, if the case allows, time to assess whether any restrictions on the chosen method are merely temporary.[73] Going beyond this, the march of time may justify the elimination of any difference between a reasonable time to perform a continuing strict duty and a lesser duty to exercise due diligence to perform. This is illustrated by *Ross T Smyth & Co (Liverpool) Ltd v WN Lindsay (Leith) Ltd*,[74] which concerned an October/November shipment of Sicilian horsebeans under a CIF Glasgow contract. On 20 October, the Italian government announced that a system of export licences would be introduced as of November 1. It proved impossible for the seller to obtain a licence for a November shipment. In order to take shelter behind a prohibition clause, the seller was called upon to show that it had exercised due diligence to ship the contract goods. As Devlin J expressed it, it was as though the seller had 61 options as to the date of performance. With 21 of those options already having tolled in October, with another 30 to follow in November, this left the seller with only 11 options[75] falling due in the month of October. The radically altered nature of the seller's obligation and dramatic shortening of the shipment window would therefore justify an alleviation of the normally strict duty to ship the goods within the contract period, though no justification for the lesser burden on the seller is given by the judge. Devlin J conceded that the seller could have pleaded 'utmost diligence' had it been necessary for the decision[76] (and in a similar case used the language of 'best endeavours').[77] In the absence of a finding of fact that the seller had exercised due diligence, it was held liable in damages for breach of contract in failing to ship the goods.

[72] [2018] EWHC 2389 (Comm) [58].
[73] *Brightman & Co v Bunge y Born Lda Sociedad* [1924] 2 KB 619.
[74] [1953] 1 WLR 1280.
[75] Devlin J counts 10.
[76] [1953] 1 WLR 1280, 1284.
[77] *Charles H Windschuegl v Alexander Pickering & Co Ltd* (1950) 84 Ll L R 89, 94.

Another point that did not arise for consideration in *Ross T Smyth* follows from the inherent tendency of governmental action of this sort to push up the market price of goods. It ought to be the case that due diligence should compel the seller to pay whatever price the market commands for shipment between October 21 and 31, even if it means that the seller now has a loss-making contract on its hands.[78] A seller with the luxury of choosing the available supply price over a period of 61 days should also have to accept the downside of that freedom.

As for *Classic Maritime* itself, no attempt was made to secure the five cargoes from Vale but the court at first instance was of the view that these would as a matter of fact have been unavailing because Vale would have been interested only in long-term supply arrangements.[79] The burden of proving this, in the circumstances discharged, fell upon Limbungan.[80]

2.5 Damages

Finally, there is the damages issue, where the Court of Appeal reversed the judge at first instance. I shall begin with the decision of Teare J at first instance. Limbungan having been found liable for breach of contract in failing to supply a cargo in Ponta Ubu, what had Classic lost in consequence of this? The court's approach was to consider the position Classic would have been in had it been ready and willing to provide the five cargoes but for the dam burst.[81] It was not in fact, as we have seen, ready and willing because, although it had *de facto* arrangements with Lion DRI and Antara, the unwillingness of these buyers to supply cargoes for shipment rendered the arrangements ineffectual. The bursting of the dam made them no more unwilling to supply cargoes. If, however, Limbungan had been ready and willing to provide the five missing cargoes, then the dam burst would have prevented Samarco from supplying the iron pellets to Lion DRI and Antara, which in turn would have

[78] See *Brauer and Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 All ER 497.
[79] [2018] EWHC 2389 (Comm) [129].
[80] [2018] EWHC 2389 (Comm) [128].
[81] [2018] EWHC 2389 (Comm) [141]. See also *Bunge SA v Nidera NV* [2015] UKSC 43, [2015] 2 Lloyd's Rep 469.

prevented them from supplying the pellets to Limbungan. Consequently, it was the court's conclusion that the measure of damages available to Classic should not be a substantial amount.[82]

Now, this at first sight looks odd. On the court's reasoning, the dam burst did not protect Limbungan from a breach of contract action but it did protect Limbungan from a substantial damages claim. It should be remarked that the judge was at pains to pre-empt criticism that this amounted to 'an impermissible sleight of hand'.[83] Yet, to make the above distinction between liability and damages seems to suggest that Classic was bargaining, not for cargoes of iron pellets, but rather for Limbungan's readiness and willingness to supply the pellets prior to the bursting of the Fundao dam. It was the freight that was due to it under the contract that Classic lost and Limbungan's breach of contract either was or was not the cause of this loss. Since, in view of the intervening dam disaster, Classic would not have earned that freight even if there had been no breach of contract by Limbungan, the court's conclusion on the damages point at first glance has the appearance of being right. The failure on the part of Limbungan to make *effective* arrangements based upon the readiness and willingness of Lion DRI and/or Antara to supply iron pellets was overtaken by the dam burst, thereby losing any continuing causal effect.[84] On that account, it was the dam burst that was the cause of Limbungan's failure to supply the five cargoes and not the unreadiness of Limbungan. The conclusion that Classic was not entitled to substantial damages, therefore, undercuts the court's earlier conclusion that Limbungan was not able to shelter behind the exceptions clause. Limbungan should have been able to rely upon an exceptions clause stating that 'charterers…shall [not] be responsible for… failure to…deliver the cargo resulting from…floods…'. Treating the dam disaster as an event overtaking the causal effect of Limbungan's breach of contract accords with the frustration illustrations given above that concern *Taylor v Caldwell*[85] and *Avery v Bowden.*[86] Again, if the contract had been a severable one, so that the five affected shipments could have been isolated from the rest, another solution would have been to hold that the exceptions clause did not oust the common

[82] But the court refrained from saying that the amount should be nominal.
[83] [2018] EWHC 2389 (Comm) [146].
[84] Cf. *Dillon v Twin State Gas and Electric Co* (1932) 168 A 111 (NH) (the case of the boy, falling to his death, who was electrocuted by the live wire that he seized in the course of his fall).
[85] (1863) 3 B&S 626, 122 ER 309.
[86] (1855) 5 E&B 714, 119 ER 647.

law test for frustration, with the result that the severable portion of the contract was discharged. As stated above, however, the common law is not responsive to partial frustration of entire contracts.[87]

The Court of Appeal took a quite different view of the matter. It started with the basic expectation principle of compensatory damages.[88] The shipowner had bargained for the five affected cargoes and was entitled to be recompensed for not receiving them. The court accepted the now-orthodox proposition that, when assessing damages, the court should take account of later events bearing upon the actual loss suffered by a breach of contract,[89] but in its view this orthodoxy should be confined to instances of anticipatory repudiation and should not apply to cases of actual repudiatory breach like the present. First of all, it is far from clear whether any such distinction should be drawn between actual repudiatory breach and anticipatory repudiation. The two do not exist in watertight compartments and a continuing anticipatory repudiation will over time merge with a repudiatory breach. Secondly, in the circumstances, the manifest inability of Limbungan to perform in the future amounted to a form of anticipatory repudiation.[90] The Court of Appeal was well aware that readiness and willingness to perform were not the same thing but then said: 'The charterer was not in breach because it was unwilling to perform, but because it failed to do so, even if the reason why it failed to do so was because it was unwilling.'[91] This statement merely invites scrutiny of the events that transpired between the charterer's unwillingness and its failure to perform on the due dates. As stated above, its unwillingness had been overtaken by the dam burst so as to lose its continuing potency.

Finally, on the reasoning of both courts, substantial damages should, nevertheless, have accrued in favour of Classic if Limbungan had been in breach of its duty to take reasonable steps to procure the five cargoes from Vale. Supplies from

[87] See text accompanying (n 8).
[88] As expressed in cases like *Robinson v Harman* (1848) 1 Exch 850, 855, and *Wertheim v Chicoutimi Pulp Co* [1911] AC 301.
[89] See *Bunge SA v Nidera NV* [2015] UKSC 43.
[90] See *Universal Cargo Carriers Corp v Citati* [[1957] QB 401.
[91] [2019] EWCA Civ [1102] [92].

Vale were not affected by the Fundao disaster, but, as we have seen, no such breach was proven.[92]

3. Coda

Earlier, I said that the issues raised in *Classic Maritime* could be mapped on to sale contracts. Let us now consider how, in the light of this decision, the current GAFTA combined clause might be applied. This prevention of shipment clause, after listing the events covered by the clause, provides:

> 'Should Sellers' performance of this contract be prevented, whether partially or otherwise, by an Event of Force Majeure, the performance of this contract shall to the extent of such prevention be suspended for the duration of the Event of Force Majeure...
>
> If the Event of Force Majeure continues for 21 consecutive days after the end of the shipment period, then Buyers have the option to cancel the unfulfilled part of the contract…'

The clause therefore, as in previous versions of the prohibition clause, mixes the language of causation and cancellation so that authority preceding *Classic Maritime* would treat it not as an exceptions clause but as a frustration (or cancellation) clause.[93] It should not matter that cancellation does not immediately follow the event. If the common law of frustration, in the circumstances arising, would have treated the contract as frustrated, this provision would apply so as to preserve the contract for the period stated.

Let us, however, backtrack to the definition of a *force majeure* event:

> ''Event of Force Majeure' means (a) prohibition of export, namely an executive or legislative act done by or on behalf of the government of the country of origin or of the territory where the port or ports named herein is/are situate, restricting export, whether partially or otherwise, or (b) blockade, or (c) acts of terrorism, or (d) hostilities,

[92] [2018] EWHC 2389 (Comm) [145].
[93] *Bremer Handelsgesellschaft mbH v Vanden-Avenne Izegem PVBA* [1978] 2 Lloyd's Rep 109.

> or (e) strike, lockout or combination of workmen, or (f) riot or civil commotion, or (g) breakdown of machinery, or (h) fire, or (i) ice, or (j) Act of God, or (k) unforeseeable and unavoidable impediments to transportation or navigation, or (l) any other event comprehended in the term 'force majeure''.

Although floods are not listed as a *force majeure* event, the Fundao dam disaster should be caught by the general language at the end of the provision. There is some awkwardness, however, in the language of the clause in respect of the way that it deals with governmental action, in so far as the words that trigger the clause—'restricting export'—are less potent than the word 'prevented', which comes into play elsewhere in the clause after the suspension period has run its course. The words 'restricting export' in the definition of a *force majeure* event, moreover, qualify only government action and not the *force majeure* events subsequently listed. This should not compel the treatment of the combined clause as an exceptions clause, or as a combined exceptions clause (for governmental action) and *force majeure* clause (for other Acts of God), given the earlier reference to the prevention of shipment. The difference in language between prohibition and *force majeure* events can be justified as due to a need to distinguish reasons for suspension from reasons for cancellation. Nevertheless, the door is open to an argument of this sort and the continued use of the language of causation and cancellation may in consequence of *Classic Maritime* become a subject of contention.