Neutral Citation Number: [2022] EWHC 467 (Comm)

Case No: CL-2021-000044

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/03/2022

Before :

MR JUSTICE JACOBS

- -

Between :

MUR Shipping BV

Claimant

- and -

RTI LTD

Defendant

- -
- -

Nigel Eaton QC and Adam Woolnough (instructed by **Rosling King LLP**) for the **Claimant**
Vasanti Selvaratnam QC and James Shirley (instructed by **Clyde & Co**) for the **Defendant**

Hearing dates: 9th, 10th February 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE JACOBS

Mr Justice Jacobs:

A: The appeal and the issues in outline

1. Mur Shipping BV ("the Owners" or "MUR") concluded a Contract of Affreightment ("COA") with RTI Ltd ("the Charterers" or "RTI") in June 2016. Under the COA, the Charterers contracted to ship, and the Owners contracted to carry, approximately 280,000 metric tons per month of bauxite, in consignments of 30,000 – 40,000 metric tons, from Conakry in Guinea to Dneprobugsky in Ukraine. On 6 April 2018, the US Department of the Treasury's Office of Foreign Assets Control ("OFAC") applied sanctions ("the sanctions") to RTI's parent company, adding them to the Specially Designated Nationals and Blocked Persons List. This led to the Owners invoking a force majeure clause in the COA by sending a force majeure notice ("FM Notice") on 10 April 2018.

2. In the FM Notice, whose material terms are set out below, the Owners said that it would be a breach of sanctions for the Owners to continue with the performance of the COA. The Owners also noted that the "sanctions will prevent dollar payments, which are required under the COA". The Charterers responded by saying that sanctions would not interfere with cargo operations, that payment could be made in Euros, and that the Owners, being a Dutch company, were not a "US person" caught by sanctions. The Owners' response was that the freight in the COA was to be paid in US dollars, and that there had been a force majeure event which might prevent loading and discharging in consequence of the sanctions. They said that this was for the "very good reason" that if monetary transfers from Charterers to Owners were restricted, Owners could not be expected to load and discharge the cargo without receiving payment in accordance with the COA. The Owners then declined to nominate ships under the COA for a relatively short period of time, relying upon force majeure. The Charterers obtained alternative tonnage and brought a claim for the additional costs incurred.

3. The arbitration tribunal comprised Mr Jeremy Russell QC, Mr Mark Hamsher and Ms Sarra Kay. The tribunal accepted that the effect of both "primary" and "secondary" sanctions was drastic. Thus, normal commercial counterparties would be frightened of trading with the party that has been sanctioned, bank finance was likely to be frozen, and underwriters would be reluctant to insure normal trading activities. The tribunal also held that sanctions had an impact on the ability of the Charterers to make US dollar payments to the Owners. In paragraph 45 of its First Partial Award dated 23 December 2020 ("the Award"), they record that the experts in the case were agreed as follows:

> "In the event RTI was required, between April 6 and April 23, 2018, to make any U.S. Dollar payments to MUR that passed through an intermediary bank in the U.S. (which is highly likely), it is highly probable that the U.S. intermediary bank would have initially stopped the transfer on the basis of RTI's status as a blocked party until the bank could investigate whether the transaction complied with U.S. sanctions requirements."

4. In paragraph 46, the tribunal said that the evidence was that in practice virtually all US dollar transactions are routed through US banks, and that "common sense indicates that any US bank would exercise extreme caution before making a payment that could conceivably fall foul of sanctions legislation".

5. The tribunal held that, but for one point, the Owners' case on force majeure succeeded. The point on which it failed was that, applying the terms of the force majeure clause, it could have been "overcome by reasonable endeavours from the Party affected." This was because the tribunal considered that the exercise of reasonable endeavours required the Owners to accept a proposal made by the Charterers to make payment in €. The tribunal described this as a "completely realistic alternative" to the payment obligation in the COA, which was to pay in US dollars. The Owners could have adopted this alternative with no detriment to themselves, because the Charterers had made it clear in correspondence that they would bear any additional costs or exchange rate losses in converting € to US$, and also because a number of payments were in fact made by RTI in € and converted on receipt by the Owners' bank, with no evidence that the Owners rejected those payments.

6. By leave of Calver J granted on 7th May 2021, the Owners appeal under section 69 of the Arbitration Act 1996 on a question of law arising out of the Award. The appeal raises a short question of law, namely whether reasonable endeavours extended to accepting payment in (non-contractual) € instead of (contractual) US$.

7. The Owners' case was that under force majeure clauses in general, including the clause in the present case, the exercise of "reasonable endeavours" does not require the affected party to agree to vary the terms of the contract or agree to a non-contractual performance.

8. The Charterers contend that there is no reason in principle why the exercise of reasonable endeavours should not involve a variation of contractual terms. The existence of a relevant contractual term was simply one matter to be considered in the overall assessment of what is reasonable in all the circumstances. That assessment was for the tribunal to make, and their conclusion that Owners should have accepted € was plainly sensible. If payment had been made in €, the Owners' bank would have credited them with the equivalent in US$, with any exchange loss or shortfall being made up by the Charterers.

9. The issue raised by the appeal concerned the effect of sanctions on the Charterers' ability to make payment under the COA: Mr Eaton for the Owners described this as the "payments" aspect of the Owners' force majeure case. Another aspect of the Owners' force majeure case concerned "penalties": the risk that the Owners, as the counterparty of a party which has been sanctioned, would be penalised by continuing to perform a contract with a sanctioned party. The two aspects of the case are to some extent related. It is apparent from the Award that US sanctions are aimed at preventing or at least disrupting the ordinary business activities of the directly or "primary" sanctioned party. This is because of the potential impact of sanctions on the "secondary" party. Banks are (potentially) "secondary" parties, and the tribunal said that common sense indicated that any US bank would exercise extreme caution before making a payment that could conceivably fall foul of the sanctions legislation. The Owners themselves were (potentially) "secondary" parties as well, and the tribunal considered that the Owners were entitled to "take time to review the position and opt for caution".

10. By a Respondent's Notice, the Charterers raised a number of arguments in support of a contention that, if necessary, the Award should be upheld for reasons not expressed or not fully expressed in the Award. In the event, four arguments were pursued at the hearing. These were, in summary, as follows.

    i) The COA did not require payment of freight in US$. It was contractually permissible for the Charterers to pay in €. This argument directly challenged the tribunal's conclusion (in paragraph 50 of the Award) that: "RTI could of course not insist as of right on making payments in euros, because their payment obligations in the COA were to pay US dollars". If accepted, the argument would mean that there was no relevant force majeure event which affected the Charterers' payment obligations. This argument had not been identified in the Charterers' Respondent's Notice served prior to the hearing, nor in their skeleton argument. It was addressed comparatively briefly at the hearing itself, principally by reference to the facts set out in paragraph [50] of the Award. It was then further developed in a post-hearing submission after I had invited the parties to address certain issues.

    ii) Clause 36 of the COA was not engaged in any event, because any practical difficulty for the Charterers in making US$ payments did not, on the true construction of the COA, amount to a force majeure event. There were various aspects of this argument. They were, however, ultimately directed towards the question of whether there was the necessary causation required by the force majeure clause. The Charterers submitted that the tribunal was wrong to accept the Owners' argument that restrictions on payments, in consequence of sanctions, would result in loading or discharging being prevented or delayed.

    iii) The tribunal's conclusion on causation, and hence the applicability of the force majeure clause, was infected by the tribunal's erroneous view that the Owners were entitled to take time to review the position and opt for caution in the period after sanctions were imposed.

    iv) Clause 36 identified certain requirements for an effective FM Notice, and these were not complied with by the Owners' notice sent on 6 April 2018.

11. Oral submissions were made by Mr Eaton QC for the Owners, and Ms Selvaratnam QC and (on the argument in paragraph [10 (iv)] above) Mr James Shirley for the Charterers. At one stage, there was a dispute as to the potentially admissible material for the purposes of resolving the relevant questions of law. In the end, however, the parties referred only to admissible materials in the form of the Award itself, and the two key documents referred to therein: the COA and the FM Notice. As described above, the parties made further submissions, at my request, on the question of whether it was permissible for the Charterers to make payment in €.

B: The COA

12. As set out in the Award, the COA was based on an amended Gencon form charterparty dated 9 June 2016, pursuant to which the Owners agreed to carry bauxite for the Charterers from Conakry, Guinea to Dneprobugsky, Ukraine. The Owners were a company registered in the Netherlands. The Charterers were a company registered in Jersey.

13. Box 12 described the cargo as follows:

> "Cargo .....
>
> About 280,00 mts 15 pet more or less Charterers option bauxite in bulk per month by lots 30,000 mts up to 40,000 mts 10 pct more or less in Owners' option but always on prevailing port and berth restrictions both ends which Owners have to satisfy themselves. Shipments to be performed between 01st July 2016 and 30th June 2018 (24 months). Loading program to be in accordance with Charterers scheduling."

14. Box 13, headed "Freight rate" was left blank. However, the freight rate was specified in Rider Clause 20 to which other provisions referred.

15. Box 14 was headed "Freight payment (state currency and method of payment, also beneficiary and bank account (CL 4)". The text of the box was completed as follows:

> "95% of freight to be paid within 5 banking days after signing/ releasing Bills of Lading (See Rider Clause 20)"

16. Clause 4 of the standard form, which was heavily deleted, provided:

> "The freight at the rate agreed in Box 13 shall be paid in cash calculated on the intaken quantity of cargo. See Rider Clause 20."

17. Rider Clause 20 in the fixture recap contained in the hearing bundle was incomplete. I was, however, separately provided with the text of Rider Clause 20 in the form ultimately agreed. This was as follows:

> "Clause 20. Freight payment
>
> Freight rate USD 12.00 per metric ton FIOT 1/1 basis USD 200 PMT IFO 380 CST in Gibraltar on Bill of Lading date and for each USD +/- 1.00 PMT change in the bunker prices as per Platt's Oilgram on the aforementioned date the freight to be adjusted by a Bunker Adjustment Factor (BAF) of USD 0.013 OMT.
>
> 95 per cent of freight to be paid within 5 (five) banking days after completion of loading and signing/releasing Congen Bills of Lading edition 1994 marked "Freight payable as per C/P dated 09th June 2016 to Owners' nominated bank account. Freight to be discountless, non-returnable vessel and/or cargo lost or not lost. Owners to pay disbursements both at loading and discharging ports. Balance of freight to be settled within 20 days upon receipt of all supporting documents together with settlement of demurrage/dispatch.
>
> Please find following banking details for freight payment:

> ABM AMRO Bank N.V.
>
> Gustav Mahlerlaan 10, 1082 PP Amsterdam
>
> The Netherlands
>
> Account no: [removed]
>
> IBAN no: [removed]
>
> SWIFT code: [removed]
>
> Correspondent bank: Wells Fargo Bank, New York SWIFT code: PNBPUS3N
>
> Beneficiary: MUR Shipping B.V."

18. Rider Clause 28 contained various provisions relating to the description of the "Performing vessel". It also provided for agreement on scheduling, in the following terms:

> "Charterers to inform owners of the anticipated program of shipments for every next month by-the 16th date of the current month. Owners to propose their respective schedule of shipments latest by the 19th date of the current month to Charterers for Charterers' approval. The schedule must include names of the vessels, their type, flag, estimated intake and date of arrival at Conakry. Charterers have 4 (four) working days to accept such schedule or to propose an alternative schedule to Owners. Both parties should agree on the final schedule latest by the 28th date of the current month and such schedule to be considered as final and binding, otherwise shipments to be performed fairly evenly spread for said month."

19. The critical force majeure clause was as follows:

> "36.1. Subject to the terms of this Clause 36, neither Owners nor Charterers shall be liable to the other for loss, damage, delay or failure in performance caused by a Force Majeure Event as hereinafter defined. While such Force Majeure Event is in operation the obligation of each Party to perform this Charter Party (other than an accrued obligation to pay monies in respect of a previous voyage) shall be suspended.
>
> 36.2. Following the end of the Force Majeure Event, the Parties shall consult in good faith to make such adjustments as may be appropriate to the shipment schedule under this Charter Party.
>
> 36.3. A Force Majeure Event is an event or state of affairs which meets all of the following criteria:

a) It is outside the immediate control of the Party giving the Force Majeure Notice;

b) It prevents or delays the loading of the cargo at the loading port and/or the discharge of the cargo at the discharging port;

c) It is caused by one or more of acts of God, extreme weather conditions, war, lockout, strikes or other labour disturbances, explosions, fire, invasion, insurrection, blockade, embargo, riot, flood, earthquake, including all accidents to piers, shiploaders, and/or mills, factories, barges, or machinery, railway and canal stoppage by ice or frost, any rules or regulations of governments or any interference or acts or directions of governments, the restraint of princes, restrictions on monetary transfers and exchanges;

d) It cannot be overcome by reasonable endeavors from the Party affected.

36.4. A Party wishing to claim force majeure in respect of a Force Majeure Event must give the other Party a Force Majeure Notice within 48 hours (Saturdays, Sundays and holidays excepted) of becoming aware of the Force Majeure Event. Such Force Majeure Notice shall be a notice in writing which:

a) sets out or attaches details of the Force Majeure Event, and

b) states that the Party giving the Force Majeure Notice wishes to claim force majeure in respect of such Force Majeure Event.

c) give reasonable estimated duration of the Force Majeure Event to the extend [sic] it is reasonably possible to do so at the time of giving the Force Majeure Notice.

36.5. A Party which fails to give a Force Majeure Notice upon the occurrence of a Force Majeure Event in accordance with Clause 36.4 shall not be permitted to claim force majeure in respect of such Force Majeure Event.

36.6. Without prejudice to the generality of this Force Majeure Clause, time lost while waiting for berth at or off the loading port or discharge port and/or time lost while at berth at the loading port or discharge port by reason of a Force Majeure Event or one or more of the port authority imposing restrictions in relation to safe navigation in the port, the restraint of Princes, strikes, riots, lockouts of men, accidents, vessel being inoperative or rendered inoperative due to the terms and conditions of employments of the Officers and Crew, shall not count as laytime or time on demurrage."

C: The Award

20. The Award dealt with a number of disputes other than the claim which gave rise to the force majeure argument, and it is not necessary to describe those aspects of the Award. The following paragraphs in this section summarise or reproduce the material parts of the Award. (In this judgment, bracketed paragraph numbers refer to the paragraphs of the Award, except where the context otherwise requires).

21. The present claim arose from the fact [11] that RTI had chartered in 7 vessels when MUR, alleging force majeure, suspended performance of the COA in April 2018. The claim was based on the difference between the COA and chartered in rates for these 7 vessels.

22. The tribunal did not consider that the Owners were under an obligation to ensure that there were no gaps in the loading schedule so that the berth at Conakry was constantly occupied. However, with a loading rate of 12,000 metric tons per day as specified in the COA, the berth would in practice need to be more or less constantly occupied if the monthly cargo quantities were to be achieved [14].

23. The liability issues relating to the claim for the 7 vessels, during the period of suspension, were addressed in paragraphs [23] – [53].

24. On 6 April 2018, OFAC added United Company Rusal plc, a Jersey company that is a majority owner of the Charterers, to the Specially Designated Nationals and Blocked Persons List ("the SDN List").

25. At 1650 hours Dubai time on Saturday 7th April 2018 Mr Peter Hansen of MUR sent an email to colleagues asking "Do we have a sanctions clause that could release us from RTI COA?" In his email he gave a link to a Financial Times article which referred to "Deripaska sanctions".

26. At 1733 hours Dubai time on Tuesday, 10th April MUR sent a force majeure notice to RTI. The material parts of the FM Notice were as follows:

> "MUR were sorry to note that guarantors UC Rusal have been placed on the OFAC SDN list, and that as Charterers RTI are a subsidiary of UC Rusal, Charterers are similarly to be treated as if they are named on the list.
>
> … …
>
> Having reviewed the effect of these sanctions and General License 12 we note that, subject to the terms of that license, it would be a breach of sanctions for Owners to continue with the performance of the COA. For contracts entered into prior to 6 April 2018, General License No. 12 provides that performance until 5 June 2018 is permitted but only to the extent that it is "ordinarily incident to and necessary to the maintenance or wind down of operations, contracts ... " etc, to do so. It is not "necessary" for MUR to load any further cargoes under the COA and it would therefore be a breach of sanctions if MUR were to

> do so. MUR's present intention is to however continue with the transportation of Charterers' cargoes that have already been loaded as detailed above, provided that this can be done without breaching sanctions.
>
> We further note that the sanctions will prevent dollar payments, which are required under the COA.
>
> Therefore, as a result of the sanctions placed on Charterers and guarantors, we are left with no option but to claim force majeure in accordance with clause 36 of the charterparty and this notice will have to remain effective for as long as the sanctions remain in place, or unless it is possible to obtain relief from sanctions which we will investigate."

27. On 14th April 2018 RTI sent an email to MUR rejecting the FM Notice. They alleged in the email that the sanctions would not interfere with cargo operations, that payment could be made in €, and that MUR, being a Dutch company, were not a "US person" caught by the sanctions. In the email they also put MUR to proof of the time at which they learnt of the events set out in the FM Notice and they reserved their position as to whether the FM Notice had been sent within 48 hours of MUR becoming aware of the force majeure event. They called upon MUR to withdraw their notice.

28. On 17th April MUR emailed their disagreement with RTI's message. They commented:-

> "... Freight is specified in US dollars in the recap, and "restrictions on monetary transfers" is listed as a force majeure event which might prevent loading and discharging for the very good reason that if monetary transfers from Charterers to Owners are restricted Owners cannot be expected to load and discharge the cargo without receiving payment in accordance with the COA. For Charterers' guidance we can confirm that the notice was sent within the COA time limits, and Owners' notice remains in effect for the reasons set out above and in that notice."

29. RTI continued to protest that the sanctions against UC Rusal did not preclude performance of the COA. There were also exchanges about whether payments could be made in a currency other than US$ and whether payment in € would constitute a breach of the COA. In the event, after OFAC issued General License 14, MUR resumed nominations of vessels under the COA on 25th April 2018.

30. Having rejected the Charterers' argument that the FM Notice was sent too late, the tribunal described the legislation.

31. The governing legislation is the Countering America's Adversaries Through Sanctions Act 2017 ("CAATSA"). OFAC can sanction individuals, officials and their affiliated companies. On 6th April 2018 OFAC sanctioned Mr Oleg Deripaska, then President of Rusal, and a number of the companies he directly or indirectly controlled. At the same time, to minimise disruption to existing contracts, OFAC would issue regulatory

exemptions, referred to as "General Licenses" which allowed companies and individuals to carry out certain transactions with the designated parties.

32. Companies or individuals placed on the SDN List will be subject to primary sanctions. People or companies dealing with those named on the SDN List may be the subject of secondary sanctions. Even non-US parties will be covered by the secondary sanctions legislation if they carry out activities related to the listed parties. However, they would only be targeted if the non-US party had "significant" dealings with the listed party. The use of the word "significant" gives OFAC discretion as to what conduct should or should not attract secondary sanctions. OFAC provide guidance to parties by publishing answers to Frequently Asked Questions. In FAQ 545 (published on 31st October 2017), OFAC stated that "a transaction is not significant if U.S. persons would not require specific licenses from OFAC to participate in it". The same guidance was provided in FAQ 574 (published on 6th April 2018) and FAC 579 (published on 23rd April 2018).

33. OFAC's General License 12, which was issued at the same time as the designation of companies including Rusal on 6th April 2018, authorised US persons and those subject to US jurisdiction to carry out "all transactions and activities ... that are ordinarily incident and necessary to the maintenance or wind down of operations, contracts, or other agreements ... until 5th June 2018".

34. On 23rd April 2018 General License 14 extended the permission to maintain or wind down activities to 23rd October 2018.

35. On 19th December 2018 OFAC notified Congress that it intended to lift sanctions directed at Mr Deripaska and his companies including Rusal and, in the event, he and that company were removed from the SDN List on 27th January 2019.

36. The experts were agreed that the Owners' performance of the COA would not have constituted "significant transactions" under section 228 of the 2017 Act, if a US person in the Owners' place had qualified under General License 12. The tribunal also accepted the evidence of the Charterers' expert that both before and after 23 April 2018, when performance of the COA resumed, there was minimal risk of secondary sanctions penalties being applied on the Owners [42].

37. Having held that there was minimal risk of secondary sanctions penalties being applied on the Owners, the tribunal then said [43]:

> "However, the position summarised in paragraph 41 above emerged only after the exchange of detailed expert evidence and a careful consideration of all the aspects of the COA. The effect of primary and even secondary sanctions is drastic. Normal commercial counterparties will be frightened of trading with the party that has been sanctioned, bank finance is likely to be frozen and underwriters will be reluctant to insure normal trading activities. Consequently, MUR were perfectly entitled to take time to review the position and opt for caution by only reinstating the COA once General License 14, which allowed the activities to continue beyond the end of the COA period, had been issued."

38. In paragraph [44], the tribunal made the following finding, again accepting the Charterers' expert evidence, that:

> "With regard to the effect of the sanctions on dollar payments, we preferred the evidence of Mr Smith that no penalties would have been imposed because if the exemption granted by GL 12 applied to the performance of the COA, it would also have permitted US dollar payments under the COA".

39. In paragraph [45], however, the tribunal referred to the experts' agreement that:

> "In the event RTI was required, between April 6 and April 23, 2018, to make any U.S. Dollar payments to MUR that passed through an intermediary bank in the U.S. (which is highly likely), it is highly probable that the U.S. intermediary bank would have initially stopped the transfer on the basis of RTI's status as a blocked party until the bank could investigate whether the transaction complied with U.S. sanctions requirements."

40. The critical part of the tribunal's reasoning was set out in paragraphs [46] – [51], in particular paragraph [50] as follows:

> "[46] The evidence was that in practice virtually all US dollar transactions are routed through US banks and common sense indicates that any US bank would exercise extreme caution before making a payment that could conceivably fall foul of sanctions legislation.
>
> [47] Clause 36.3(d) of the COA included in the definition of a force majeure event that "It cannot be overcome by reasonable endeavors from the Party affected".
>
> [48] At the hearing RTI criticised MUR for not seeking guidance from OFAC and/or not agreeing to allow payments to be made in euros - something that was proposed at the time by RTI.
>
> [49] There was evidence that OFAC does maintain a "hotline" that parties can call to obtain guidance on the approach that OFAC would adopt towards the circumstances of that specific party. However, we very much doubted that in reality there was a high chance that OFAC would have been prepared to give guidance on which MUR could rely within a meaningfully short timescale.
>
> [50] However, accepting payments in euros was a much more realistic possibility. It would have presented no disadvantages to MUR because their bank in the Netherlands could have credited them with US dollars as soon as the euros were received. RTI could of course not insist as of right on making payments in euros because their payment obligations in the COA were to pay US dollars. However, we were satisfied that it was a completely

> realistic alternative that MUR could have adopted with no detriment to them because (i) RTI made clear in correspondence that it would bear any additional costs or exchange rate losses in converting euros to US dollars and (ii) a number of payments were in fact made by RTI in euros and converted on receipt by MUR' s bank; there is no evidence that MUR rejected those payments.
>
> [51] Consequently, although MUR's case on force majeure succeeded in all other respects, it failed because it could have been "overcome by reasonable endeavors from the Party affected".”

41. In paragraph [52], the tribunal addressed the argument (advanced as the fourth reason for upholding the Award on other grounds) as to the sufficiency of the FM Notice.

> “Although the issue was academic, for the sake of completeness, we should comment that we considered that the force majeure notice given by MUR would have been effective. Clause 36 merely required the notice to set out details of the force majeure event. The details that mattered were the imposition of sanctions against Rusal. Contrary to the argument advanced on behalf of RTI, we did not consider that the force majeure notice was defective because it did not spell out in detail what specific parts of the COA operation could not be carried out because of the sanctions.”

42. The tribunal then referred [53] to the fact that the Owners had resumed nominating vessels. The tribunal said that this did not matter, and had no bearing on whether the Owners, objectively, were covered by the force majeure clause.

43. The upshot was [54] that the Charterers were in principle entitled to recover the additional costs of chartering in the seven vessels during the suspension of the COA by the Owners. The tribunal assessed the Charterers’ damages in the sum of US$ 2,170,050.03 (although it should be noted that this figure includes damages in respect of claims that are not the subject of the appeal).

44. Subsequent to the publication of the Award, the tribunal addressed an application by the Owners for clarification under section 57 of the Arbitration Act 1996. The tribunal said that it was satisfied that its reasoning and conclusions were valid and correct, but accepted and apologised for the fact that there was an inconsistency or ambiguity between paragraphs [43] and [51] of the Award. In paragraph [43], the tribunal had said that the Owners were “perfectly entitled to take time to review the position and opt for caution by only reinstating the COA once General License 14, which allowed the activities to continue beyond the end of the COA period, had been issued”. In paragraph [51], however, the tribunal had rejected the Owners’ force majeure case because it could have been overcome by reasonable endeavours. The tribunal provided the following qualification and clarification as to what it had said:

> “In the paragraphs leading up to paragraph 43, we considered the expert evidence as to whether general licence 12 would have

> permitted continued performance of the contract of affreightment. In paragraph 43 we concluded that although the view of the experts was that performance of the contract of affreightment would have been permitted, we concluded that given the potentially drastic consequences of not complying with applicable sanctions, MUR were entitled to take time to review the situation. Unfortunately, we failed to qualify the last sentence of paragraph 43 by saying that MUR were "prima facie perfectly entitled, subject to consideration of whether the force majeure event could be overcome by reasonable endeavours". If we had qualified the conclusion at the end of paragraph 43 in terms to that effect, there would have been no inconsistency or ambiguity between that paragraph and paragraph 51."

D: General approach to appeals and to arguments that an award should be upheld on different grounds

45. As described above, the Charterers sought, in addition to supporting the tribunal's analysis, to uphold the Award on a number of grounds which were not relied upon by the arbitrators. Before considering the parties' arguments in more detail, it is appropriate briefly to describe the framework for the court's decision on a section 69 application, in particular where a party seeks to uphold an award on different grounds.

46. Where leave to appeal has been given, the essential question is whether the tribunal has made an error of law, and if so what if any consequence flows from that error. Primarily, this involves consideration of the argument on the issue of law in relation to which leave to appeal has been given.

47. A respondent to an application under section 69 of the 1996 Act may, however, serve a Respondent's Notice: CPR PD62.12.6 (2). There is no leave requirement. This part of the Practice Direction to CPR Part 62 is headed: "Applications for permission to appeal". The words of the relevant paragraph of the Practice Direction are:

> "12.6: A respondent who wishes to oppose an application for permission to appeal must file a respondent's notice which –
>
> (2) states whether the respondent wishes to contend that the award should be upheld for reasons not expressed (or not fully expressed) in the award and, if so, states those reasons (but not the argument)".

48. There is a degree of conflict in the authorities as to whether the requirement for a Respondent's Notice applies only at the leave stage. In *Cottonex Anstalt v Patriot Spinning Mills Ltd* [2014] EWHC 236 (Comm), Hamblen J considered (at paragraphs [41] – [42]) that notice to uphold for different reasons had to be given by the respondent at the permission stage, and that permission to rely upon such grounds should only rarely be given if raised subsequently. In *Ramburs Inc v Agrifert SA* [2015] EWHC 3548 (Comm), para [10], Andrew Smith J took a different view, pointing out that a respondent did not have to oppose the application for leave to appeal – in which event there would be no opportunity to submit a Respondent's Notice.

49. It seems to me that the position is not wholly clear on the terms of paragraph 12.6. I favour the view taken by Hamblen J: where – as is invariably the case on applications for permission to appeal under section 69 – a respondent has in fact opposed the application for permission, then it is indeed necessary for any reasons for upholding the award on different grounds to be set out in a Respondent's Notice. It is possible for those reasons to be supplemented, but (unless consented to) the court's permission to make an amendment to the Respondent's Notice is required. This approach is consistent with the overriding objective, and will enable the appellant to know, in advance of the appeal, the case that the respondent will advance in relation to upholding the award for reasons not expressed or not fully expressed in the award. The alternative approach results in a respondent being wholly unconstrained by any need to give notice to the appellant, with the consequence that new arguments can be raised at the hearing itself or indeed (as has happened to some extent in the present case) subsequent to the hearing.

50. However, irrespective of that issue, it is clear that a respondent is just as constrained as an appellant by the parameters of section 69. Any point argued pursuant to a respondent's notice must be one of law. It is no more open to a respondent than an appellant to go behind or beyond the Tribunal's findings of fact. Thus, in *The Mary Nour (No 2)* [2007] EWHC 2340 (Comm), Field J said at para [13]:

> "Where the grounds on which a respondent to a section 69 appeal relies for upholding an award have not been pronounced upon by the arbitral tribunal, the court will inevitably come to its own conclusions on those grounds which, in my view, must be based on a point or points of law. It does not follow from *Vitol SA v Norelf Ltd* [1996] AC 800 that because under the 1979 Act neither leave nor a certificate that the point of law was one of general public importance was required that a respondent can rely on grounds that are not points of law. And where, as here, the tribunal has rejected the grounds relied on, the respondent must in my judgment show that in doing so the tribunal erred in law so that, if any of the relevant findings are mixed findings of fact and law, there will only be an error of law if the finding fails the *Edwards v Bairstow* test that the tribunal misdirected itself or no tribunal properly instructed as to the relevant law could have come to the determination reached. To accept Mr Nolan's submission and decide *de novo* a question of mixed fact and law decided by the tribunal would be to act contrary to the clear policy of the Act which is to limit severely the grounds on which the reasoning in arbitral awards can be challenged. And it matters not, in my opinion, that it was strictly unnecessary for the tribunal to give the reasons it did for rejecting the ground or grounds sought to be relied on by a respondent to uphold the award."

51. In that case, the respondent seller challenged the tribunal's conclusions as to the effective cause of the seller's loss and on remoteness of damage. Field J held that the tribunal's findings were findings of mixed fact and law, and that neither finding was outside the permissible range, and nor did the tribunal misdirect itself as to the law.

52. In *Cottonex Anstalt v Patriot Spinning Mills Ltd*, Hamblen J referred to *The Mary Nour*, and said at [35] that:

> "What, however, is generally impermissible is to raise a new point of law which requires consideration of factual materials and in relation to which material findings might have been sought and made had the point been raised at the arbitration. Both the appellant and the respondent are confined to the findings made in the award. The respondent can argue new points of law based on those findings. If, however, the failure to argue the point which the respondent wishes to raise has the result that not all potentially relevant findings have been made then it should not be open to it".

53. The question of what is a "question of law" is analysed in the judgment of Mustill J in *Finelvet AG v Vinava Shipping Co Ltd (The Chrysalis)* [1983] 1 WLR 1469, 1475. Although dating from a period prior to the 1996 Act, this judgment remains illuminating and has been cited in cases subsequent to the 1996 Act. Mustill J said as follows:

> "Starting therefore with the proposition that the court is concerned to decide, on the hearing of the appeal, whether the award can be shown to be wrong in law, how is this question to be tackled? In a case such as the present, the answer is to be found by dividing the arbitrator's process of reasoning into three stages: (1) The arbitrator ascertains the facts. This process includes the making of findings on any facts which are in dispute. (2) The arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached. (3) In the light of the facts and the law so ascertained, the arbitrator reaches his decision.
>
> In some cases, stage (3) will be purely mechanical. Once the law is correctly ascertained, the decision follows inevitably from the application of it to the facts found. In other instances, however, stage (3) involves an element of judgment on the part of the arbitrator. There is no uniquely "right" answer to be derived from marrying the facts and the law, merely a choice of answers, none of which can be described as wrong.
>
> Stage (2) of the process is the proper subject matter of an appeal under the Act of 1979. In some cases an error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It is, however, also possible to infer an error of law in those cases where a correct application of the law to the facts found would lead inevitably to one answer, whereas the arbitrator has arrived at another; and this can be so even if the arbitrator has stated the law in his reasons in a manner which appears to be correct, for the court is then driven

> to assume that he did not properly understand the principles which he had stated.
>
> Whether stage (3) can ever be the proper subject of an appeal, in those cases where the making of the decision does not follow automatically from the ascertainment of the facts and the law, is not a matter upon which it is necessary to express a view in the present case. Pioneer *Shipping Ltd. v. B.T.P. Tioxide Ltd.* [1982] A.C. 724 and *Kodros Shipping F Corporation v. Empresa Cubana de Fletes* (No. 2) [1983] 1 A.C. 736, show that where the issue is one of commercial frustration, the court will not intervene, save only to the extent that it will have to form its own view, in order to see whether the arbitrator's decision is out of conformity with the only correct answer or (as the case may be) lies outside the range of correct answers. This is part of the process of investigating whether the arbitrator has gone wrong at the second stage. But once the court has concluded that a tribunal which correctly understood the law could have arrived at the same answer as the one reached by the arbitrator, the fact that the individual judge himself would have come to a different conclusion is no ground for disturbing the award."

54. A further principle appeared at one stage to be potentially relevant in the context of the issues raised in the respondent's notice, namely the court's approach to reading arbitration awards. In a frequently cited dictum, Bingham J said in *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14:

> "As a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the object of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting as is usually the case, that there will be no substantial fault that can be found with it."

In the end, however, there was no material dispute as to how the award was to be read, and in particular as to how to read the tribunal's conclusion as to causation (relevant to the first point taken in the respondent's notice).

E: The appeal – the parties' arguments

The Owners' case

55. On behalf of the Owners, Mr Eaton submitted that there were two aspects of the Owners' force majeure case: the "penalties" aspect (namely that the Owners would have been exposed to penalties as a matter of US sanctions law) and the "payments" aspect (namely that banks would not in practice clear US$ payments for the Charterers without investigation, and would exercise "extreme caution" before making a payment). On both aspects, the tribunal would have found for the Owners, but for the

fact that it considered that reasonable endeavours extended to accepting payment in € instead of contractual US$.

56. He submitted that there was no authority which supported the tribunal's view that reasonable endeavours could extend to requiring the affected party to agree to vary the terms of the contract or to agree to a non-contractual performance. This was despite the fact that force majeure clauses had long been held to be subject to an implied "reasonable endeavours" proviso, and that an express proviso (such as that in clause 36.3 (d)) was also common. He submitted that principle indicates that the tribunal was wrong, and that analogous case-law pointed to the same conclusion.

57. As far as principle is concerned, he submitted that force majeure clauses, and perils-based exceptions clauses, were directed to a situation in which the relevant event is, in some specified manner, impeding performance of the contract. It was therefore necessary carefully to identify what performance the contract requires, in order to test whether the relevant event has impeded that performance. Since force majeure provisions are directed to impediments to performance of the contract according to its terms, it logically followed that a reasonable endeavours proviso (whether express or implied) is directed to a situation in which the impediment can be surmounted so that the contract can be performed according to its terms. Such a proviso did not extend to varying the terms of the contract and/or performance. It might sidestep the impediment, but it would not overcome it so as to enable the contract to be performed.

58. Mr Eaton referred to a number of cases in support of these propositions, in particular the importance of identifying the obligation in question and whether or not the party affected by force majeure (or its equivalent) was contractually required to perform in some other way: *The Rookwood* (1894) 10 TLR 314 (CA); *Brightman v Bunge y Born* [1924] 2 KB 619 (CA); *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food ("the Vancouver Strikes"* case) [1963] AC 691 (HL). He emphasised the importance of certainty in commercial contracts. There would be great uncertainty as to the scope of a "reasonable endeavours" provision if it were to be divorced from endeavours to perform the contract in accordance with its terms. Contracting parties can agree provisions which do vary performance in response to impediments, or require renegotiation. But there was no relevant provision in the present COA which required this.

59. Mr Eaton submitted that the cases on alternative performance, in particular *Vancouver Strikes*, showed that the exercise of reasonable endeavours did not require the affected party to agree to vary the terms of the contract or agree to non-contractual performance. Whilst there was no express reasonable endeavours clause in *Vancouver Strikes*, the principle that a party should exercise reasonable endeavours to overcome an impediment, such as a strike, is well established and would have been well-known by the most distinguished cast of counsel and judiciary who were involved in that case. Yet there was no requirement for the charterers to exercise their option to switch cargoes, however reasonable that might have been. If a party is not required to agree to vary the terms of the contract or agree non-contractual performance in an election case, where the contract expressly provides for alternative methods of performance, still less can a party be required to do so where the contract provides for only a single method of performance (here payment in US$).

60. Mr Eaton's written and oral opening submissions did not of course address the new argument advanced by the Charterers as to whether it was contractually permissible for the Charterers to make payment in €. In his oral reply submissions, Mr Eaton submitted that the contract required payment in US$, as the tribunal had correctly held. This submission was further developed, subsequent to the hearing, following a question which I had raised and arguments then made by the Charterers.

The Charterers' submissions

61. On behalf of the Charterers, Ms Selvaratnam submitted in her pre-hearing skeleton argument that the tribunal was correct to find that accepting a transfer made by the Charterers in €, which would "automatically" be converted into US$ in the Owners' nominated bank account, with all additional charges borne by the Charterers, qualified as reasonable endeavours. There was nothing in clause 36.3 (d) which silently excluded reasonable endeavours that involved accepting what the Owners contended to be non-contractual performance. There was here no commercial difference between the performance offered and the performance stipulated in the COA. The Owners were not being asked to give up a right to receive US$: on the facts found by the tribunal, the € would be converted by the Owners' bank to US$ upon receipt. The tribunal's decision therefore did not require the Owners to give up their right to receive US$: they would, after conversion by their bank, receive US$.

62. In her oral argument, she went somewhat further and submitted that the Charterers were contractually entitled to make payment in €. She submitted that the contract said nothing about the currency in which money was to be transferred. If monies were transferred in €, and then these were "automatically" credited in US$, the Charterers' contractual obligation would be performed. The COA remained a US$ contract, but the payment obligation could be satisfied by using € to discharge it. Under the COA, it remained possible for payment to be made either in cash or direct into the Owners' bank in the Netherlands through banking channels in amounts that would satisfy amounts due under the contract. There was no fact finding which called into question the bank's authority to receive €. Ms Selvaratnam accepted, in her oral submissions, that were it not for RTI alleviating any suggestion of loss on exchange rates or bank charges, then there would not be legitimate performance. However, because RTI offered to cover exchange loss and bank charges, it was a legitimate way of meeting the obligation.

63. In any event, however, she said that since the tribunal rejected the Owners' argument that RTI was prevented from making US$ payments – holding that the exemption granted by General Licence 12 applied so that US$ payments were permitted – it did not actually matter whether the tribunal was correct to regard the COA's currency of payment as US$. Even if it was, payment by the Charterers in €, immediately converted into US$ by the Owners' bank at the Charterers' expense, would have amounted to a technical breach of the COA at most, and would only give rise to a claim for nominal damages.

64. Ms Selvaratnam focused on the importance of the link between the force majeure event and loading and discharging. The force majeure clause was not engaged if loading and discharge could, with reasonable endeavours, be facilitated. Even if the Owners were entitled "stubbornly" to refuse the Charterers' offer to pay in €, it was that unreasonable refusal which prevented the Owners from relying upon the force majeure clause. The parties' obligations to load and discharge were entirely untouched by the tribunal's

decision. Since the force majeure clause was concerned with facilitating loading and discharging under the original COA, there was every reason to require a party to accept an immaterially different payment performance, to that envisaged by the COA, if that served to facilitate loading or discharging. Payment in € would remove any conceivable impediment to loading or discharge.

65. In relation to clause 36.3 (d), there was no reason for saying that "reasonable" bore a special meaning such that it could never as a matter of law be reasonable to accept a non-contractual performance, however reasonable that course might be. Nor was there any reason to read that clause as subject to an implied exception in respect of non-contractual performance. Acceptance of non-contractual performance of obligations other than loading or discharging should be eligible as "reasonable endeavours", if those facilitated loading and discharge. It would be wrong for the court to say that any form of non-contractual performance was ruled out. In her oral submissions, Ms Selvaratnam said that the enquiry as to what was reasonable was best left to the arbitrators to weigh up. The tribunal could look at all of the circumstances. The fact that performance was non-contractual was only one factor which should be weighed in the balance, and the tribunal was best placed to make that decision. Non-contractual conduct might be required in order to keep the contract alive, and therefore enable loading and discharging to take place. The fact that a "payment route" may have been specified in the contract did not mean that the Owners could necessarily hold on to that right. There was nothing in the force majeure clause, construed as a whole, which excluded non-contractual performance if that was reasonable, on the facts, in order to overcome impediments to loading and discharging.

66. The Charterers submitted that the decision on mitigation in *Payzu v Saunders* [1919] 2 KB 581 provided an instructive parallel. Mitigation might require a claimant to accept revised terms from the party in breach. This showed that "bright lines" as to what was reasonable should not be drawn: it was always a question of fact and judgment.

67. It was uninstructive to consider cases (such as *Bulman v Fenwick* [1894] 1 QB 179 or *Vancouver Strikes*), where the courts had considered whether or not a party should be required to switch ports or cargoes. It might be reasonable to say that contractual ports or contractual cargo need not be changed pursuant to the reasonable endeavours obligation. But those provisions related directly to loading and discharge at contractual ports and of contractual cargo. The position was otherwise in relation to currency of payment. And in any event, if the change to a different port or cargo was straightforward (for example because the port was immediately adjacent, or the cargo was barely different), it might be reasonable to change.

68. Reliance was also placed upon the decision of the Court of Appeal in *B&S Contracts v Green* [1984] ICR 419. The case supported the proposition that a party, in order to exercise best endeavours to overcome a strike, might have to accept a non-contractual payment offered by its contractual counterparty.

E: The appeal – discussion

69. The Owners' argument, as summarised above, raises a clear question of law. The tribunal's conclusion on reasonable endeavours was critical to the outcome of the case, because the tribunal said [51] that the Owners' case on force majeure succeeded in all other respects. Arguments other than reasonable endeavours therefore form part of the

case whereby the Charterers seek to uphold the Award on grounds other than those relied upon.

The payment obligation

70. Before considering the "reasonable endeavours" argument raised by the appeal, it is appropriate to consider the first of the reasons given by the Charterers for upholding the Award on grounds other than those relied upon by the tribunal, namely the nature of the payment obligation in the COA and whether it was contractually permissible for the Charterers to make payment in €. This is a threshold argument. If correct, the question of "reasonable endeavours" would never arise, and the issue of law, for which permission has been given, would be academic.

71. I have no doubt that the tribunal was correct to say, in paragraph 50 of the Award, that the Charterers "could not insist as of right on making payments in euros because their payment obligations in the COA were to pay US dollars". Indeed, the contrary argument was not raised in the Respondent's Notice or in the Charterers' written pre-hearing argument, but was made for the first time within the appeal in Ms Selvaratnam's oral submissions. The submission at that time, as I understood it, essentially raised a question of the construction of the COA in the light of the tribunal's findings at paragraph [50] of the Award relating to the ease of conversion and the proposal made by the Charterers at the time. The argument was later encapsulated in Ms Selvaratnam's submission that there was nothing in the COA which obliged Charterers to tender US$ to the Owners' bank or excluded any right to tender €.

72. I do not accept that submission. Box 14 of the Gencon form set out the parties' agreement, in relation to the freight payment, as to "currency and method of payment; also beneficiary and bank account". There was a cross reference to clause 4 of the Gencon form. Both the entry in Box 14, and clause 4 of the Gencon form, referred to Rider Clause 20. This provided, in the form ultimately agreed by the parties, for a basic US$ freight rate (US$ 12 per metric ton), together with a Bunker Adjustment Factor also calculated in US$. The banking details identified the beneficiary and bank account in The Netherlands, but also a correspondent bank in New York. Accordingly, both the currency of payment and method of payment were contractually agreed: a payment in US$ to a specified bank in the Netherlands. There is therefore nothing in the COA which supports the Charterers' submission that, on the true construction of the COA, the Charterers had, effectively, an option to pay in any currency of their choosing, and were not required to pay in US$. It was not suggested that a term could be implied into the COA that had this effect. The reference in clause 4 of the standard form to payment in "cash" does not advance matters: the possibility of payment in cash does not alter the currency of payment, and in any event the reference in the standard form to "cash" would likely yield to the specific agreement as to the method of payment in Rider Clause 20.

73. I also reject the argument, advanced particularly in submissions subsequent to the hearing, that the COA contained no provision relating to the currency of payment, but only a provision relating to the currency of account. Box 14 makes it clear that it requires a currency of payment to be specified.

74. Nor do I accept the Charterers' related submission, based upon paragraph [50] of the Award, that a payment in € was the equivalent of a payment in US$, because the

Owners' bank would "automatically" convert the € to US$ upon receipt. There is no such finding in the Award. Paragraph [50] of the Award says that the Owners' bank "could have credited" the Owners with US$ as soon as received. That finding does not transform the Charterers' € payment into a US$ payment. Mr Eaton submitted, correctly in my view, that if A is obliged to pay B in US$, A cannot perform that obligation by paying € to B's agent, on the basis that the agent can carry out the necessary conversion. The payment to the agent made in those circumstances remains a non-contractual € payment, not a contractual US$ payment. It does not become a US$ payment because the agent is capable of converting the funds received from US$ to €.

75. Indeed, a € payment is not even the functional equivalent of a US$ payment, because there may (as paragraph [50] of the Award recognises) be additional costs or exchange rate losses in converting € to US$. The fact that (as paragraph [50] indicates) the Charterers had to offer to pay additional costs or exchange rate losses in making the conversion only serves to emphasise that the proposed € payment was not contractual. If it had been contractual, then there would be no need for the Charterers to make this proposal.

76. Subsequent to the hearing, I drew the attention of the parties to the discussion in *Dicey Morris & Collins: The Conflict of Laws* 15th edition, paragraphs 37R-051 – 37-060 and *Proctor: Mann on the Legal Aspect of Money* 7th edition, paragraphs 7.41 – 7.55. Dicey Rule 263 provides:

> (1) Irrespective of the currency in which a debt is expressed or damages are calculated (money of account), regard shall be had to the law of the country in which the debt or liability is payable in order to determine the currency in which it may, or must, be discharged (money of payment), but (*semble*) the rate of exchange at which the money of account must be converted into the money of payment is determined by the law applicable to the contract or other law governing the liability.
>
> (2) If a sum of money expressed in a foreign currency is payable in England, it may be paid either in units of the money of account or in sterling at the rate of exchange at which units of the foreign legal tender can, on the day when the money is paid, be bought in London in a recognised and accessible market, irrespective of any official rate of exchange between that currency and sterling. *Quaere*, whether this rate of exchange also applies if English law is not the law applicable to the contract.

77. The discussion in both textbooks indicates that where a contract is governed by English law, and there is an obligation to pay in a foreign currency in England, the debtor can tender either the foreign currency or sterling. I asked the parties for further submissions as to whether this principle was potentially applicable in the present case when applied to a payment to be made in The Netherlands. Could it be argued that just as a foreign currency debt payable in England can be discharged by payment of sterling, so a foreign currency debt payable in The Netherlands can be discharged by the payment of € which

is the currency of that state? Both parties served brief submissions, including reply submissions, on that topic.

78. Having considered the parties' submissions, it does not seem to me that this is a permissible line of argument at this stage. The present case is not concerned with an obligation under an English law contract to pay foreign currency in England. I am considering an English law contract to pay foreign currency in The Netherlands. *Dicey* suggests (in paragraph 37-056) that the position is as follows, whilst making it clear that there is no English authority on this (and related) points and that the solution "here put forward is based on what are thought to be conclusions from general principles":

> "If a debt, expressed in whatever currency, pounds, dollars or francs, is governed by English law and payable in Switzerland, Swiss law should determine whether it can be discharged by tendering Swiss francs".

79. Mr Eaton submitted that it was questionable whether this did represent English law. He submitted that there was no reason why, in this example, Swiss law should determine the issue. Rather, the permissibility of payment should depend upon the construction of the contract. I do not need to resolve that question. The passage from *Dicey* indicates that there is no rule of English law, and no authority to support the proposition, that it is always permissible for a party, under a contract governed by English law, to make a payment in the "local" currency where that differs from the contractual currency of payment. At best, from Charterers' perspective, the approach in *Dicey* would lead to the conclusion that Dutch law would determine whether or not the US$ payments due under the COA could be discharged in €.

80. However, the question of the approach of Dutch law was not raised at the arbitration, as both parties' post-hearing submissions made clear. There are therefore no findings in the Award which can be relied upon by the Charterers in support of a case that Dutch law, as the place of payment, would permit a € payment. Indeed, it seems to me that the finding of the tribunal, in paragraph [50], that the Charterers "could not insist as of right on making payments in euros because their payment obligations in the COA were to pay US dollars" is inconsistent with the argument that payment in € was permissible as a matter of Dutch law. In making that finding, the tribunal was no doubt considering the construction of the COA. Nevertheless, the effect of the Charterers' argument is to invite the court to make a finding as to Dutch law which would be contrary to the tribunal's clear conclusion in paragraph [50].

81. I do not accept that the absence of a finding can be cured by resort to the presumption that Dutch law is the same as English law. On an arbitration appeal, the court cannot make findings of fact. A finding as to Dutch law, whether or not based on the presumption, would be as much a finding of fact if the findings were presumptive as if they were based on evidence. The appeal, including any argument to uphold an award for different reasons, must be determined on the basis of the findings in the Award: see *The Mary Nour* and *Cottonex* discussed above. There are no findings here which can be used to found the Charterers' argument. Furthermore, the approach to the presumption has recently been considered at length in the judgment of Lord Leggatt JSC in *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45, paragraphs [119] ff and in particular [143] – [149]. I am doubtful as to whether it would have been appropriate for the arbitrators to apply any presumption in the present case, bearing in

mind factors such as: the fact that Dutch law is not a common law system; the absence of any relevant authority under English law; and the uncertainty as to how exactly the presumption would be applied. (For example, would it go no further than a presumption that an obligation under a Dutch law contract to pay foreign currency in The Netherlands could be discharged by the payment in €?). As it is the point was not pleaded or argued in the arbitration, and there is therefore no foundation for a case to be raised on appeal.

82. Furthermore, the point developed in the Charterers' post-hearing submissions was not identified in a Respondent's Notice. If I am correct in concluding that it should have been, then this would be a further reason for rejecting the point. The Owners opposed the grant of any permission to raise the point, contending that it had neither been raised in the arbitration nor made at the hearing of the appeal. I consider that there was force in the submission that it would be unfair, and not consistent with the overriding objective, for any amendment to the Respondent's Notice to be permitted. However, this point is academic, because I have in any event rejected the argument on its merits in the light of the findings (and absence of findings) in the Award.

83. I therefore conclude that the Charterers were contractually required to pay in US$, and were not contractually permitted to pay in €.

84. Accordingly, the tribunal's Award does raise the question of whether "reasonable endeavours" under clause 36.3 (d) can require, as Charterers submit, the Owners to accept a non-contractual payment. On that issue, and for the reasons which follow, I broadly agree with the submissions of Mr Eaton for the Owners as summarised above. I consider that those submissions reflect both principle and authority.

The Charterers' broad argument

85. At its broadest, the Charterers' submission was that when a question arises as to the exercise of reasonable endeavours, there is some significance which might be attached to the nature of the parties' contractual obligations, including whether in any particular case reasonable endeavours would require a party to accept non-contractual performance. However, the significance of any contractual obligation was simply one factor to be weighed in the balance in deciding the overall question of reasonableness. That overall question was for the tribunal to determine. This argument was also reflected in the Charterers' response to the application for permission to appeal: the Owners' application was opposed on the basis that the issue raised was a question of fact.

86. There is no authority which supports this broad proposition, and in my view it is contrary to the principles of law apparent from *Bulman v Fenwick* and *Vancouver Strikes*.

87. In *Bulman*, the charterers of a vessel carrying coal from the Tyne to the Thames sought to rely upon a strike clause in response to the owners' claim for demurrage. The claim was in respect of a period during which the vessel was lying in the Regent's Canal waiting to unload, but was unable to do so in consequence of a strike. The charterparty had contained a number of possible discharge places in London, including Regent's Canal, Beckton and a number of other places. The charterers' order for the vessel to proceed to the Regent's Canal was given before the charterers became aware of the

strike of coal porters at that place. The decision of Pollock B, who tried the case with a jury, at first instance was that the claim for demurrage failed.

88. Pollock B explained that there had been some doubt in his mind as to whether the charterers had acted reasonably in ordering the ship to the Regent's Canal, when the facts were that before she got there a strike existed to the knowledge of the charterers. The jury found that the charterers had acted reasonably in giving the order. However, a further question arose as to whether the charterers had acted reasonably after they had heard about the strike: specifically, whether "the [charterers'] representatives in London, when they heard of the strike, ought to have intercepted the vessel at some part of the Thames, and ordered her to some other place, named in the charterparty, where there was no strike".

> "I therefore asked the jury whether, it being reasonable, as they had found, to order the ship to the Regent's Canal, it was reasonable to allow her to continue her course and go there after the defendants' representatives knew of the strike. The jury found that it was not reasonable; and they also found that if the vessel had been stopped at Gravesend, and ordered to some other place of discharge named in the charterparty, she could have been discharged within the period allowed by the charterparty …"

89. He said that this finding raised the question "very clearly and neatly whether it was within the right of the [charterers], upon the true construction of the charterparty, to order the [vessel] to the Regent's Canal, and to leave that order undisturbed, although before she got there the strike had commenced". Pollock B said that the question depended upon the true construction of the charterparty, and "not on the question of whether it was reasonable or unreasonable to send the vessel to the Regent's Canal". He held that the option given to the charterers to select the discharge place was created for the benefit of the charterers, and they had a right to act on it:

> "Even although it turns out that, when the vessel arrived at the port to which she was ordered, there was a strike of workmen there, the plaintiffs are not entitled to say to the defendant, because there was a strike there you ought not to have allowed the vessel to go there because it was not reasonable to do so. It is not a question between the plaintiffs and the defendants as to what is reasonable or unreasonable, it is a question of contract between the parties".

90. His conclusion, therefore, was that the charterers were within their rights in sending the vessel to the Regent's Canal and that "notwithstanding the finding of the jury on the question left to them", the charterers' defence based upon the strike clause succeeded.

91. Pollock B's decision was affirmed by the Court of Appeal where Lord Esher gave a short judgment in a case which was in his view "as clear as can be". He said that the charterers were entitled to order the vessel to the Regent's Canal, and that "there was nothing which happened afterwards to oblige the charters to alter their order". He then said:

> "It is true that when the vessel arrived at the Regent's Canal there was a difficulty in taking delivery because of a strike of workmen; but a strike would in itself not be sufficient to exonerate the charterers from doing the best they could to accept delivery, and would not entitle them to fold their arms and do nothing. If, notwithstanding the strike, they could by reasonable exertion have taken delivery of the cargo within the proper time, the strike would not have afforded them any defence. But the jury have found that they could not, by any reasonable effort, have taken delivery. The delay, therefore, was caused entirely by the strike, and was within the exception in the charterparty."

92. In my view, the case is significant in the context of the Charterers' broad argument for a number of reasons.

93. First, it is clear from the judgment of Lord Esher that the charterparty required the charterers to do their best to accept delivery notwithstanding the strike: they could not "fold their arms and do nothing". *Bulman* has therefore been cited as authority for the general proposition that an event will not come within a force majeure or similar clause if it could have been overcome or avoided by the taking of reasonable steps: see *Chitty on Contracts* 34th edn Vol 1 para 26-066; *Lewison: The Interpretation of Contracts* 7th edn para 13.23. There is ample further judicial authority to the same effect: see eg *B&S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 439, in particular at 427 (Kerr LJ); *Channel Island Ferries Ltd v Sealink UK Ltd* [1988] 1 Lloyd's Rep 323.

94. Similarly, Article 122 of the current (24th) edition of *Scrutton on Charterparties and Bills of Lading* states (paragraph 11-008):

> "Charterparties contain an undertaking by the shipowner and charterer to perform their respective parts of the contract, unless prevented by certain perils excepted in the contract, provided that such perils could not have been avoided by reasonable care and diligence on the part of the person prevented by them from performing the contract and of his servants. Bills of lading contain an undertaking by the shipowner or carrier to deliver safely the goods set forth in them, unless prevented by certain perils known as "excepted perils" or exceptions, provided that such perils and their consequences could not have been avoided by reasonable care and diligence on the part of the shipowner or carrier and his servants."

Bulman is one of the authorities cited in this connection.

95. Secondly, *Bulman* shows that the parties' contractual obligations are not simply one factor to be weighed in the balance in deciding the overall question of reasonableness. The jury in that case had expressly found that that it was not reasonable for the vessel to be allowed to continue her course to the Regent's Canal and go there after the charterers' representatives knew of the strike. However, both Pollock B and the Court of Appeal considered that the critical question was not the reasonableness or otherwise of the charterers' conduct, but what the contract entitled the charterers to do. Pollock B

said that it was not a question between the owners and charterers as to what was reasonable or unreasonable: it was a question of contract between the parties. Lord Esher said that nothing which happened, after the giving of the order to go to the Regent's Canal, obliged the charterer to alter their order. Accordingly, the jury's fact finding that the charterers had not acted reasonably did not matter. Far from being simply a factor to weigh in the balance, the parties' contractual obligations were regarded as paramount and determinative.

96. In that context, I do not accept Ms Selvaratnam's submission that Pollock B had doubts about the jury's fact finding. I am unaware of any basis upon which Pollock B could have disregarded the jury's fact findings in the days when civil trials were decided by judge and jury. However, I do not consider that there is anything in the judgment that indicates that Pollock B had doubts about the jury's fact finding. He said that the jury's finding raised the relevant legal issue "very clearly and neatly", and he then addressed it.

97. Thirdly, an important feature of *Bulman* is the existence of a range of 5 contractual options, as to the discharge port, in the charterparty. (Similarly, in the *Vancouver Strikes* case, there was a range of permissible cargoes). One might have thought that the existence of a contractual choice would lend weight to an argument it would be reasonable for the charterers to be required to perform differently, if their originally selected choice was affected by the strike. However, once a valid order had been given for discharge at Regent's Canal, the charterparty in *Bulman* entitled (indeed required) the charterers to discharge at that place. Despite the fact that they could not "sit on their hands", there was nothing which required the charterers to perform the contract in a different way. The answer to the case was therefore the same as it would have been if Regent's Canal had been the only discharge port named in the charter.

98. Accordingly, in relation to the Charterers' broad argument, *Bulman* shows that a party is not required, by the exercise of reasonable endeavours, to accept non-contractual performance in order to circumvent the effect of a force majeure or similar clause. It also shows that a relevant contractual obligation is not simply a factor to be weighed in the balance when coming to an overall assessment of reasonableness.

99. I also consider that the decision in *Vancouver Strikes* is, in substance, to the same effect. It certainly demonstrates the critical importance, in the context of a strikes clause (which is akin to a force majeure clause), of identifying the parties' contractual obligations. The relevant charterparty clause concerned the nature of the cargo to be loaded: "wheat in bulk … and/or barley in bulk and/or flour in sacks… Charterer has the option of loading up to one-third cargo of barley in bulk … Charterer has the option of loading up to one-third cargo of flour in bags …". The case again concerned a claim for demurrage by shipowners. The loading of wheat in bulk was delayed by an elevator strike, and the charterers contended that they were protected by that clause. The central question was whether the charterers were required to ship one of the alternative cargoes in order to avoid the effect of the strike. If so, then they would have been in breach of their loading obligation, and demurrage would be payable. The case was argued at very considerable length (as Mr Eaton wistfully observed in his submissions): it occupied 9 hearing days in the House of Lords, and this followed a 16 day hearing in the Court of Appeal.

100. The decision was that the charterers were not required to load these alternative cargoes. This was because the contractual options in the charterparty were "true" or "unfettered" options, which the charterers were not required to exercise. Thus, Lord Devlin drew a distinction between a case where there was an obligation which could be performed in a number of alternative ways, and what he described as a "business" option. In the former case, the consequence of one alternative being temporarily or permanently barred was as follows:

> "…the consequence of damming one channel is simply that the flow of duty is diverted into the others and the freedom of choice thus restricted. If then a shipper cannot ship wheat, he must ship either barley or flour. The width of the alternatives is in the contract for the benefit of both parties and it can be a liability as well as a benefit for the shipper."

101. However, Lord Devlin then contrasted the case of a "business" option:

> "But where there is a " business option " the legal position is quite different. There is not then one contractual obligation to be performed in alternative ways, but one obligation to be performed in one way, unless the option holder chooses to substitute another way and does so by the effective exercise of his option. In exercising the option, which he has acquired solely for his own advantage, the holder is not bound to consider the convenience or the interest of the other party. If the obligation is to ship a full and complete cargo of wheat with the option to change to barley or flour and the shipment of wheat is impeded, he is not obliged to change to barley or flour simply because that is the only way in which he could ship a full and complete cargo. So the question here is whether the contractual obligation on the charterer is correctly expressed as an obligation to ship a full and complete cargo of wheat, barley or flour in proportions which can, subject to the specified limits, be selected by the charterer; or whether it is an obligation to ship a full and complete cargo of wheat with an option to the charterer to substitute for that cargo a mixed one."

102. The result was that the charterers' case on construction succeeded, and therefore the owners' claim for demurrage failed. This was because there was no requirement on the charterers to switch cargoes in order to avoid the effect of the strike, and thereby (as expressed in the headnote to the report in the Appeal Cases) "to lose the protection afforded by clause 31 in respect of their wheat cargo". The case is therefore consistent with the approach taken in *Bulman* and the submission of the Owners. It indicates that the nature of the contractual obligation determines the question of the nature of the steps which a party must take to avoid the impact of a force majeure event, and that a party does not have to perform the contract otherwise than in accordance with the contract in order to avoid a force majeure event.

103. It is true, as Ms Selvaratnam pointed out, that the case was argued on the basis that what mattered was the true construction of the charterparty: in particular, what was the nature of the option conferred upon the charterers? No argument was specifically advanced to

the effect that even if the contractual obligation was that for which the charterers contended, the exercise of reasonable endeavours required the charterers to switch cargoes. She pointed to a passage in the course of argument in the Court of Appeal where counsel for the (unsuccessful) shipowners had submitted that it "is not a question of whether it is reasonable for the charterer to switch: he is obliged to do so, and the only question is how long it is reasonable to take in obtaining alternative cargo". The implication of her submission was that counsel for the shipowners (Mr Eustace Roskill QC in the Court of Appeal, leading Mr Roche QC and Mr Bateson) had failed to argue what might have been the winning point in the case, namely that reasonable endeavours required the charterers to switch from wheat in order to avoid the effect of the strike, notwithstanding that it was not their contractual obligation to do so.

104. I do not consider that this is the correct approach to the *Vancouver Strikes* case, which in my view provides powerful authority against the Charterers' broad submission. The reason that the construction of the charterparty was the critical question in that case, and specifically whether the charterers were contractually obliged to load alternative cargoes to wheat, was that it was recognised by counsel and judiciary alike that this was the determinative question. If the charterers were not contractually required to switch, because they had a "true" or "business" option, then it was obvious that they were entitled to the protection of the strike clause. The principle that a party is required to exercise reasonable endeavours to overcome an exception such as the strike clause was very well established, and would have been very well known to all counsel and most if not all of the judges in the case: in particular to Mr Eustace Roskill QC who was one of the most distinguished shipping lawyers of his generation. The trial judge in *Vancouver Strikes* was McNair J, who was at that time the senior editor of *Scrutton on Charterparties*. The then current (16th) edition contained the statement of principle now contained in Article 122, quoted above, which has appeared in identical form in successive editions of Scrutton since at least 1923.

105. The leading judgment of the Court of Appeal in *Vancouver Strikes* was given by Sellers LJ, who had been a judge in the Commercial Court and a distinguished shipping lawyer. It is not necessary to describe the background and calibre of the other judges in the case. I do not accept that everyone in the case missed the critical point. Rather, the fact that "reasonable endeavours" was not argued reflects the fact that it would not have provided an answer to the charterers' reliance on the strikes clause, once it was decided (as it was) that the charterers had no obligation to switch cargoes in order to avoid the effect of the strike. The charterers' ability to rely upon the strike clause did not depend upon an overall assessment of their reasonableness in deciding not to switch. The nature of the contractual obligation was determinative, and was not simply a factor to be weighed in the balance in an assessment of their reasonableness.

106. In the present charter, unlike *Bulmer* and *Vancouver Strikes*, the relevant obligation under consideration did not contain a range of possible choices for either party. The obligation was, as discussed above, for the Charterers to pay US$: neither party had the option to select anything else. The absence of an option cannot, however, strengthen the Charterers' case. As Mr Eaton submitted, the Owners could not be in a worse position in a contract where there was only one currency in which the payment obligation could be performed, than a case where the contract contained options for the payment in different currencies which the Owners had not exercised.

107. I also consider that clause 36.2, in the present case, provides some further, if marginal, support for the proposition that the exercise of reasonable endeavours did not require a party to accept non-contractual performance. Clause 36.2 required the parties, following the end of the force majeure event, to make such adjustments as may be appropriate to the shipment schedule under the charterparty. That clause linked with Rider Clause 28, which provided for agreement on a final schedule which was to be "final and binding". Accordingly, the parties in clause 36.2 specifically identified the need for a variation to a binding schedule in consequence of the force majeure event, and in that respect contemplated and provided for performance which was not in accordance with their previous contractual agreement. But that is the only respect in which the parties provided for what might otherwise have been non-contractual performance.

108. I therefore reject the Charterers' broad submission.

The Charterers' narrower argument

109. However, Ms Selvaratnam also put forward a range of related arguments which were narrower in scope. She submitted, in substance, that the relevant obligation in the present case was qualitatively different to obligations concerning the place of discharge or the nature of the cargo to be loaded. Even if in those contexts a party does not have to accept non-contractual performance, the same conclusion did not necessarily follow in all cases, and it should not follow in the present case bearing in mind that € could readily be converted to US$. Her argument also focused on the particular language of the force majeure clause in the present case, which related to prevention or delays to loading or discharge. The effect of her submission was that even if a party might not be required to accept non-contractual performance of obligations relating and critical to loading or discharge, the payment obligation in the present case did not fall into that category. It related only to payment. Payment in € was in practice as good as payment in US$, because funds could be readily converted. Payment in € would unblock any obstacle to loading and discharging, and ultimately this is what mattered.

110. I do not accept the various facets of this line of argument. In my view, the obligation to pay freight in the agreed contractual currency is an important contractual obligation. If (as discussed above) the contract permits payment in a currency other than US$, then the present argument does not arise at all: there would be no force majeure. If, however, the contract requires payment only in US$, then the consequence would be that the Owners could, as Mr Eaton submitted, properly reject a non-contractual payment and require the Charterers to perform in accordance with the COA. Non-performance of the freight payment obligation would be non-performance of a significant obligation, and could lead for example to the exercise of a lien on the cargo pursuant to clause 8 of the standard form Gencon charter.

111. The payment obligation is clearly different to the obligations which are directly germane to loading and discharging. However, I can see no basis for concluding that its different character leads to the result that reasonable endeavours does not require a change in contractual performance in one category of obligation (for example, the place of discharge or the contractual cargo to be loaded), but does require a party to accept a change in contractual performance in relation to the payment obligations. It seems to me that all of these terms are important contractual terms, and that it is undesirable and difficult for there to be a need to weigh up the relative importance of different aspects

of the contract. To some extent, the argument restates the proposition (which I have already discussed and rejected) that the exercise of reasonable endeavours requires contractual performance to be no more than a feature which is weighed in the balance.

112. I also agree with Mr Eaton's submission that an exercise which involves assessing the relative importance of contractual terms would lead to considerable uncertainty in the operation of force majeure clauses. Such clauses have been introduced very widely into contracts and one purpose of such clauses is to mitigate the inherent uncertainties in the application of frustration: *Peel: Frustration and Force Majeure* 4th edition paragraphs 12.025-12.026.

113. Nor do I consider that the requirement in clause 36.3 (b), that the "Force Majeure Event" should prevent or delay loading or discharge, leads to the conclusion that the only relevant contractual provisions are those which directly concern loading or discharge. Clause 36.3 (b) is an important part of the force majeure clause: it identifies the necessary consequence, as a matter of causation, of the "event or state of affairs" described in other parts of the clause. However, it is clear from clause 36.3 (c) that there may be a wide range of different matters which bring about the consequence that loading or discharge is delayed or prevented. Those matters include "restrictions on monetary transfers and exchanges". The parties therefore contemplate that any of these wide range of matters may impact upon loading and discharging. The question of whether it did so in any particular case is a question of causation, and is the subject of the principal point argued by the Charterers under their Respondent's Notice and which I consider in Section F1 below. There is, however, no reason to construe the force majeure clause as being concerned only with contractual obligations directly concerned with loading and discharging: the force majeure event may have an impact on other contractual obligations which then have the causative impact required by clause 36.3 (b).

114. In that context, I accept Mr Eaton's submission clause 36.3 (d) is not to be construed as focusing only upon a single aspect of the COA, namely loading and discharging. The clause requires that "It" cannot be overcome by reasonable endeavours from the Party affected. The word "It" is used at the outset of 36.3 (a), (b), (c) and (d). "It" refers to the force majeure event or state of affairs as a whole: it is not confined simply to loading or discharging.

Authorities relied upon by the Charterers

115. The Charterers relied upon a number of strands of authority in support of the conclusion that the exercise of reasonable endeavours may, and does in the present case, require a party to accept non-contractual performance.

116. The Charterers drew an analogy with cases relating to mitigation of loss following breach of contract. In that context, *Payzu v Saunders* showed that a party may be required to accept non-contractual performance from the other (guilty) party if that would mitigate the innocent party's loss. In *Payzu*, a seller had wrongly refused to deliver goods under a contract where the buyer was entitled to a period of credit prior to being required to make payment. This was a breach of contract, and the buyer sued for damages. The defaulting seller was always willing to supply the goods for cash (rather than on credit) at the contract price. The leading judgment in the Court of Appeal was given by Bankes LJ, who said that the question of what it is "reasonable for a

person to do in mitigation of his damages cannot be a question of law but must be one of fact in the circumstances of each particular case". In this case, the buyer should have accepted the seller's offer. Scrutton LJ said that "in commercial contracts it is generally reasonable to accept an offer from the party in default". The Charterers therefore submitted that "reasonable endeavours" in the force majeure clause was a form of mitigation. In *Payzu*, it was reasonable for the buyer to accept non-contractual performance, and in the present case "reasonable endeavours" required non-contractual performance to be accepted.

117. I do not consider that the two situations are analogous, or that the principles concerning mitigation of loss following breach should be imported into the present context. The issue in the present case does not concern remedies for breach of contract. As Mr Eaton pointed out, there may be a number of situations in which a party may have no remedy, or a limited remedy, for non-contractual performance which constitutes a breach of contract. *Payzu* provides an illustration in relation to mitigation. Another example is where a party breaches a warranty in a contract, rather than a condition: the consequence will be that the innocent party will not be entitled to terminate the contract, but will be confined to a remedy in damages.

118. However, the present case is not a damages or remedies case at all. The question here is the operation of the force majeure clause which is designed to regulate how the contract is to be performed if there is a force majeure event. The clause regulates that performance by providing for the suspension, pursuant to clause 36.1, of the parties' obligations to perform. The consequence is that, during the period of suspension, neither party is in breach. The principle established in *Payzu* has no application, even by analogy, in the present context.

119. The Charterers relied upon the decision of the Court of Appeal in *B&S Contracts v Green* as providing an illustration of a situation of a party being required to accept a non-contractual payment in order to overcome a force majeure event. The claimants in the case had agreed to erect exhibition stands for the defendants at an exhibition at Olympia. The contract had a force majeure clause which applied to strikes. There was a strike of the claimants' intended workforce, who demanded £ 9,000. The claimants were willing to pay £ 4,500, but not the full amount. The claimants then told the defendants that the contract would be cancelled unless the defendants paid the remaining £ 4,500. This was demanded not as an advance on the contract price, but rather as an additional sum in order to meet the workers' demand and thereby enable the contract to be performed and the defendant's exhibition to go ahead. The defendants paid the money to the plaintiffs and the contract was performed. The issue concerned the £ 4,500 which the defendants had paid. This was deducted by them from the contract price, and the claimants sued for the balance of the price. The judge gave judgment to the claimants on their claim for the balance of £ 4,500 of the contract price, and for the defendants on their counterclaim for the same amount of money as money paid under duress. The Court of Appeal dismissed the claimants' appeal.

120. The argument on appeal concerned the defendants' counterclaim for the repayment of money paid under duress. There was no appeal by the defendants against the judge's decision that they were liable for the balance of the contract price. The question of duress depended essentially upon whether there had been an illegitimate threat by the claimants.

121. The leading judgment was given by Eveleigh LJ. He rejected the claimants' case that there had been no threat sufficient to give rise to duress. He then considered the claimants' argument that the threat was not of unlawful action, since the claimants were entitled to rely upon the force majeure clause. That in turn depended upon whether the claimants could show, in accordance with the contractual terms, that they had made every effort to carry out the contract. Eveleigh LJ said that those efforts had to be reasonable in the circumstances. He said that payment of the extra £ 4,500, or the whole of the £ 9,000, was reasonable: it was a simple solution to the problem. It was not impossible for the claimants to find the extra £ 4,500, because this had been offered to them as an advance payment.

122. The judgment of Griffiths LJ was to similar effect. He looked closely at the circumstances, and in particular the offer of the defendants to make the balance of £ 4,500 available as an advance. That was an answer to the claimants' case that they did not have the money available to deal with the strike. Griffiths LJ saw no reason why the claimants should not have accepted the money offered by way of an advance. The reason that they did not do so was because they wanted the defendants to hand over the money "as a gift rather than as an advance". Similarly, Kerr LJ referred to the money being put on the table and being available to the claimants. But they decided not to accept it on the terms offered, because they "wanted it as an extra, and that in itself is wholly fatal to the plaintiffs' attempt to rely on the strike clause in this case".

123. I do not consider that this decision has any real application in the present context. The unsuccessful claimants did not argue that the payment being offered by the defendants was non-contractual, and that therefore they could not be obliged to accept it in order to exercise reasonable endeavours to avoid the strike. The Court of Appeal therefore did not have to deal with the issue which arises in the present case. It is not surprising that this argument was not made, since the payment offered by the defendants could not be described as non-contractual in any real sense: it was simply an advance payment of monies that the defendants would be required to pay anyway. There could be no suggestion that the offer of the money was a breach of contract by the defendants. There is therefore no analogy between the advance payment offered by the defendants in *B&S Green*, and the non-contractual payment offered in the present case which involved (leaving force majeure aside) a breach of the Charterers' payment obligation.

124. The Charterers referred me to the decision of New York arbitrators, applying New York law, in a shipping case. I need not deal with the facts or issues in that case, since I did not consider that it provided any assistance in relation to the issues of English law in this case.

125. Ms Selvaratnam also referred to the discussion in *Peel: Frustration and Force Majeure* paragraph 4-111, where Professor Peel discusses a number of frustration cases arising from the closure of the Suez Canal in 1956 or 1973. Some of those cases involved contracts where there was express or implied reference in the contract terms to Suez. The author concludes:

> "Thus even the failure of an expressly or impliedly stipulated method of performance will not discharge a contract if that method is not of fundamental importance, unless the parties make it clear that they intend the stipulated method to be exclusive."

126. It was therefore argued that the currency provision in the present charter was not of fundamental importance, and that since a failure of an expressly or implied stipulated method of performance will not discharge a contract, so here the exercise of reasonable endeavours required acceptance of a different method of performance of the payment obligation.

127. Mr Eaton submitted that the Suez cases were difficult cases, and they were concerned with the very different doctrine of frustration. One purpose of force majeure clauses was to avoid the difficulties and uncertainty of the doctrine of frustration, and it would be undesirable to introduce the principles relevant to that doctrine into the area of the law which I am considering.

128. I consider that there was considerable force in that submission, and I accept it. Frustration is essentially concerned with the discharge of contracts, and the Suez cases discussed by Professor Peel illustrate the reluctance of the courts to hold that contracts have been discharged. The issue in the Suez cases was whether the closure of the canal was sufficiently fundamental to discharge contracts, in circumstances where vessels would then have to perform much lengthier voyages around the Cape. Generally speaking, the answer to that question was "no", but it is apparent that a stronger argument for frustration arose in cases where the terms of the charter referred to, or contemplated passage through, Suez.

129. The cases are considered in the judgment of Mocatta J in *Palmco Shipping Inc v Continental Ore Corp (The Captain George K)* [1970] 2 Lloyd's Rep 21. He explained that in *The Massalia* [1961] 2 QB 278, Pearson J had held the contract frustrated, attaching importance to a contractual provision which indicated an obligation to go via the Suez canal. The case was subsequently overruled in *The Eugenia* [1964] 2 QB 226. Lord Denning thought that Pearson J had attached too much importance to the clause as imposing an obligation to go through the canal. In *The Captain George K*, Mocatta J would have decided (absent *The Eugenia*) that the contract was frustrated. He would have attached importance to a contractual provision relating to Suez as "indicating beyond a peradventure what the contractually contemplated voyage was". However, the provision was a warranty rather than a condition, and he did not think that of itself would produce frustration. Ultimately, however, Mocatta J was unable to distinguish *The Eugenia*, but thought that the case before him might be appropriate for a leapfrog appeal to the House of Lords.

130. This brief description of the Suez cases as discussed in *The Captain George K* bears out Mr Eaton's submission that they were difficult cases in the context of frustration. In particular, there was scope for argument as to the significance of the provisions which referred to Suez. In the present case, however, there can be no doubt as to the significance of the Charterers' obligation to make payments to the Owners, in particular the payment of freight. The arbitrators held this obligation could only be performed by payment in US$, and (for reasons already explained) this conclusion cannot be challenged either as a matter of construction of the COA or otherwise. The Suez frustration cases do not in my view provide any real assistance as to the principles which applied in the context of the force majeure clause that I am considering.

Conclusion

131. Having considered the case-law in this area, I am ultimately persuaded that the exercise of reasonable endeavours did not require the Owners to sacrifice their contractual right to payment in US$, and with it their right to rely upon the force majeure clause. If there was a contractual right to payment in US$, and a contractual obligation to pay in that currency, then this was a right and obligation which formed part of the parties' bargain. The exercise of reasonable endeavours required endeavours towards the performance of that bargain; not towards the performance directed towards achieving a different result which formed no part of the parties' agreement. If reasonable endeavours did not require the acceptance of different contractual performance in *Bulman* and (by implication) *Vancouver Strikes*, I do not consider that it required such acceptance in the present case. I also accept Mr Eaton's submissions that if the loss of a contractual right turns purely on what is reasonable in a case, then the contractual right becomes tenuous, and the contract is then necessarily beset by uncertainty which is generally to be avoided in commercial transactions.

F: The Respondent's Notice to uphold the Award on other grounds

F1: The causation argument

Introduction

132. The tribunal concluded in paragraph [51] that the Owners' case on force majeure succeeded in all respects, apart from the "reasonable endeavours" point. Accordingly, the tribunal accepted that there was a force majeure event or state of affairs which:

i) was outside the immediate control of the Owners (clause 36.3 (a))

ii) prevented or delayed the loading of the cargo at the loading port and/or the discharge of the cargo at the discharging port (clause 36.3 (b)); and

iii) was caused by one or more of the matters set out in clause 36.3 (c).

133. It is clear from a fair reading of the Award that the relevant events falling within clause 36.3 (c) concerned the imposition of sanctions on the Charterers and their impact on monetary transfers. The tribunal no doubt considered that the imposition of sanctions, and their effect on the Charterers' ability to make US dollar payments, fell within clause 36.3 (c): in particular "any rules or regulations of governments or any interference or acts or directions of governments … restrictions on monetary transfers and exchanges".

134. The focus of the Charterers' present argument was the tribunal's conclusion that this was causative of prevention or delay to the loading of the cargo or its discharge. The Award did not set out the tribunal's reasoning or analysis of causation. Ultimately, however, it was common ground that a fair reading of the Award was that the tribunal accepted the Owners' argument, as set out in one of the early exchanges and recorded in paragraph [28] of the Award. That paragraph quotes the Owners e-mail sent on 17 April 2018 referred to in that paragraph. The Owners said:

> "... Freight is specified in US dollars in the recap, and "restrictions on monetary transfers" is listed as a force majeure event which might prevent loading and discharging for the very

> good reason that if monetary transfers from Charterers to Owners are restricted Owners cannot be expected to load and discharge the cargo without receiving payment in accordance with the COA. For Charterers' guidance we can confirm that the notice was sent within the COA time limits, and Owners' notice remains in effect for the reasons set out above and in that notice."

The Charterers' arguments

135. The Respondent's Notice itself did not identify, with any clarity, the error of law which the tribunal was alleged to have made in relation to causation. However, a number of themes were developed in the Charterers' written and oral submissions.

136. It was submitted that neither US sanctions, nor any resulting practical difficulty for the Charterers in making US$ payments, prevented or delayed the loading or discharge of the cargo. The tribunal had not found that any practical difficulty in making US$ payments had that effect. There was a finding of the tribunal that US$ payments, that passed through US intermediary banks, would initially be stopped pending investigation. However, those facts did not amount, in law, to the prevention or delay of loading or discharge. The Charterers did not go so far as to say that monetary restrictions could never prevent or delay loading or discharging. But there was no prevention or delay in the present case. Monetary restrictions might on some facts interfere with operations of a port of loading itself, or with some fundamental operation that has to be performed there by a third party, outside the control of the parties to the COA. But it did not do so here.

137. The Charterers referred to Rider clause 20 which provided for payment of freight within 5 days after completion of loading, and contended that it was extremely difficult to see how a difficulty paying freight could even theoretically prevent or delay *loading*. They referred in that connection to the decision of Burton J in *Dunavant Enterprises v. Olympia Spinning & Weaving Mills* [2011] EWHC 2028 (Comm) paras [29] – [30].

138. They therefore submitted that a refusal to load by the Owners would be unprotected by the force majeure clause, and would have been a breach of the COA – unless the Owners were entitled to treat the Charterers' future inability to pay freight in US$ as an anticipatory repudiation of the COA and accepted that breach as bringing an end to the COA.

139. In the Charterers' submission, this analysis highlighted the fact that the force majeure clause is not concerned with any and all of the many types of difficulty that may arise in the context of a COA: it was only events that prevented or delayed loading or discharging operations. An anticipated or apprehended force majeure event would not come within the clause.

140. In her oral submissions, Ms Selvaratnam identified the critical point of law, and the "root cause" of the tribunal's error, as being the tribunal's failure to appreciate that the event which brought about the Owners' failure to load was self-induced. This was a matter within the control of the Owners. The Owners had chosen not to receive payment following the imposition of sanctions, and had then chosen not to load cargoes. Where that choice had been made, no reliance could be placed on the force majeure clause. The choice was within the Owners' control. Any prevention or delay in loading was

therefore not caused by restrictions on money transfers or matters within the force majeure clause: it was simply the Owners' election. Any delay was caused not by sanctions, but rather by the Owners' response.

141. In that connection, Ms Selvaratnam relied upon the decision in *Dunavant* which, she said, supported the proposition that non-payment would not prevent a cargo from being shipped. *Dunavant* showed that it was not good enough for the Owners simply to say that they could not proceed with performance if they were not assured of payment. She also emphasised the tribunal's finding, in paragraphs [36] – [41] of the Award, that performance of the COA, and therefore performance of the loading and discharge obligations, was permitted and not prevented by the imposition of sanctions. Performance could continue even if the Owners were not paid. She also drew attention to the finding in paragraph [44] of the Award that US dollar payments were permitted.

142. The Charterers' submission also relied, in relation to their causation argument, upon arguments similar to those advanced in relation to the appeal. They submitted that the Owners should have accepted the offer of payment in €. The initial refusal to accept € was the proximate cause of the non-performance during the relevant period. This was an unreasonable decision. The failure to accept € was a matter which was within the control of the Owners, and therefore did not come within clause 36 (a). If € had been accepted, there would have been no delay in loading or discharge, and therefore there would be nothing within clause 36 (b). The unreasonable decision would also mean that there was no relevant event within clause 36 (c). It would also have the consequence that it would be unreasonable for the Owners to exercise a lien on the cargo for unpaid freight, in circumstances where there was an offer to pay freight in a different currency.

143. In their reply submissions, the Charterers argued that even if monetary restrictions were a cause of prevention or delay in loading, that was not sufficient. The Owners' reaction to the sanctions would be a concurrent cause. If reliance is to be placed on a force majeure clause, the relevant event had to be the sole cause. In that context, Ms Selvaratnam referred to the decision of Teare J in *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640. A competing cause would not qualify under the force majeure clause, and this was so even if the competing cause was a party's reasonable reaction to the cause which was within the clause.

144. The upshot was that the tribunal's conclusion in paragraph [51] of the Award, whereby the tribunal accepted that the causative requirement of clause 36 had been satisfied, must have been based on an error of law. The Award should therefore be upheld on this alternative ground.

145. There were other strands to Ms Selvaratnam's argument. Force majeure clauses were generally read so as to require physical prevention, whether permanently or for a period of time. The conventional meaning of prevention, as requiring physical or legal impossibility, applied to the force majeure clause in the present case. Here the sanctions did not lead, on the tribunal's findings, to the consequence that performance of the COA was physically or legally impossible.

The Owners' submissions

146. The Owners submitted that the question of whether cargo operations were impeded was a question of fact, rather than a legal conclusion. It was for the tribunal to assess the

evidence, and the appeal proceeds on the basis of the facts found in the Award. The tribunal's conclusion was a common-sense conclusion. It was obvious that the Owners could not be expected to continue to load and discharge, pursuant to a COA which in practice required (on the tribunal's findings) a continual flow of vessels at the loadport, without being paid. The Charterers' inability to make contractual payments would very obviously delay performance, not least because the Owners would be entitled to exercise a lien on the cargo for unpaid freight.

147. To the extent that the Charterers' argument raised issues as to the construction of the clause, the Owners submitted that – in the light of the clause as a whole – the prevention or delay under clause 36.3 (b) was not confined to direct physical interference with cargo operations. A force majeure clause can be triggered by legal impediments which do not have a direct physical impact on cargo operations. Monetary restrictions, which are expressly referred to in the clause, would not be felt on the cargo operations themselves, but on the flow of money which funds those operations. Clause 36.3 (b) cannot therefore be confined to direct physical impediment.

148. It is no answer to say that it was the Owners' decision to suspend operations in response to the sanctions. The suggestion that clause 36.3 (b) cannot be satisfied if responsive action by the Owners enters the causal chain is really just a reworking of the case that the clause requires direct physical interference. The tribunal clearly concluded that (reasonable endeavours apart), the Owners' suspension of operations was a natural response. If so, it did not constitute some *novus actus interveniens*: see *Chitty on Contracts* 24th edn, paragraphs 29.078-29.082.

Discussion

149. It will be apparent from the summary of the Charterers' arguments that a large number of different, but related, points were made in support of this line of argument. For the reasons which follow, I do not consider that it is possible to discern any error of law in the tribunal's conclusion that (reasonable endeavours apart) the Owners' case on force majeure succeeded in all other respects. I do not consider that the Award betrays any error in the tribunal's approach to the construction of the clause. Nor do I consider that the Award indicates that the tribunal failed to understand and apply any relevant principle that a party cannot rely upon a force majeure clause if the necessary prevention or delay was "self-induced". The Charterers' real complaint was that the tribunal should not have found that there was a sufficient causal connection between non-payment of freight and prevention or delay in loading or discharging. It was ultimately common ground that the tribunal accepted the Owners' case, summarised in the e-mail quoted in paragraph [28] of the Award, that non-payment would have the necessary causative impact on loading and discharging. It seems to me that this is (at best from Charterers' perspective) a finding of mixed fact and law, and that is within the range of permissible conclusions.

150. I start with the question of whether the Award betrays an error in the tribunal's approach to the construction of the clause. The Charterers' argument ultimately, as it seems to me, rests on a proposition that the events relied upon were not capable in law of coming within the force majeure clause. I do not accept that proposition. The tribunal made findings as to the imposition of sanctions and, importantly in the present context, that one of the effects of sanctions was to restrict the Charterers' ability to make payments of US$ through banking channels that would normally, and in the absence of sanctions,

be available. It is correct that the tribunal found that, legally, US$ payments were still permitted. However, this did not mean that they could in fact and in practice be made. In paragraph [45], the tribunal accepted the agreed evidence that it was highly probable that the US intermediary bank would have initially stopped the transfer on the basis of the Charterers' status as a blocked party until the bank could investigate whether the transaction complied with US sanctions requirements. In paragraph [46], the tribunal said that common sense indicated that any US bank would exercise "extreme caution before making a payment that could conceivably fall foul of sanctions legislation".

151. Against this background, it is unsurprising that the tribunal concluded that there had been an event or state of affairs which met the criteria set out in clause 36.3 (c). There was no discernible error of law in that regard. Clause 36.3 (c) identifies a large number of matters. They included "any rules or regulations of governments or any interference or acts or directions of governments" and "restrictions on monetary transfers and exchanges". The relevant matters described in the Award come within those wide words. They were all very obviously outside the control of the Owners, so that there was no error of law in the tribunal concluding that clause 36.3 (a) was satisfied.

152. The Charterers submitted that the impact of the clause is confined to matters which physically prevent or delay loading or discharging. The substance of the submission was that there was no room, under the clause, for an intervening decision-making process on the part of the Owners. It was one thing if there was physical prevention. It was another thing if the Owners took a decision not to load or discharge. I do not accept this argument. Clause 36.3 (c) covers a wide variety of matters. Some of them (such as extreme weather conditions, or fire, or blockade) are of a character which will usually have a direct physical impact on loading and discharging. However, that is not the case, or at least will not generally be the case, with "rules or regulations of governments or any interference or acts or directions of governments or restrictions on monetary transfers". Each of those matters will usually, if not always, involve a reaction by people, including by the parties themselves, to the relevant rules, regulations, interference, acts or directions or restrictions. They will not usually be sufficient in themselves physically to prevent loading or discharge.

153. That is particularly the case in relation to "restrictions on monetary transfers and exchanges". These will affect the ability of a party to make payment, or of the other party to receive payment. In such situations, loading or discharging will remain physically possible, but the parties to this clause nevertheless contemplated that these restrictions might, on appropriate facts, prevent or delay loading or discharge.

154. Indeed, as Mr Eaton submitted, this would also be the case in a situation where (contrary to the tribunal's conclusion) the US sanctions would be applied to the Owners in the event that they continued to perform the COA. In such a case, loading of goods in Guinea, and discharge in Ukraine, would remain physically possible. Indeed, it would remain legally possible, because there was no local law which prevented either activity. The Charterers' argument posits, however, that even in such case, the Owners would not be entitled to rely upon the force majeure clause; because sanctions would not physically or legally prevent loading or discharge, notwithstanding the "drastic" effects described by the tribunal in paragraph 43, which would include the freezing of bank finance and difficulties in obtaining insurance. I do not accept that the force majeure clause is limited in this way.

155. I therefore reject the argument that the tribunal made a discernible error of law in its construction of the force majeure clause, and in particular in failing to confine the impact of the clause to cases where loading or discharge was physically or legally impossible.

156. The next line of attack on the tribunal's conclusion concerns the various arguments that any delay in loading or discharge was "self-induced". I do not accept the Charterers' argument to the effect that a claim for force majeure is impermissible if it involved, as one aspect of causation, a decision by the party relying upon the clause. The decision in *Seadrill v Tullow* does not establish that broad proposition. In that case, the charterer of a rig sought to rely upon force majeure in circumstances where a relevant force majeure event had prevented drilling in one part of the contractual area (known as "TEN"), but where the charterers' alleged inability to drill in another part of the contractual area (known as "Greater Jubilee") was unaffected by force majeure. The charterers' difficulty in relation to Greater Jubilee had nothing to do with the force majeure event relied upon, but was related to other matters. It was in that context that Teare J applied the principle that a "force majeure event must be the sole cause of the failure to perform an obligation" (see paragraph [79]). In so doing, he referred to and applied the decision of the Court of Appeal in *Intertradex SA v Lesieur-Torteaux Sarl* [1978] 2 Lloyd's Rep 509. He made it clear, however, that questions of causation were always sensitive to the legal context in which the question arises: see [69].

157. There is nothing in that case which leads to the conclusion that a party's decision, as a reaction to a force majeure event, leads to the consequence that no reliance can be placed on a force majeure clause – on the basis that the decision is a "concurrent" cause and the force majeure event is no longer the "sole" cause. On the contrary, one aspect of the decision in *Intertradex* itself shows that this is wrong. That case is one of the early cases to establish that if a force majeure event means that a party is left with a limited supply, and cannot fulfil all of its contracts, there is still force majeure provided that it appropriates its available supplies reasonably. The case is cited in *Chitty* paragraph 15-166 in support of the proposition that the affected party can rely upon force majeure provided that he allocates in any way which the trade would consider proper and reasonable. This line of authority shows that a reasonable decision, as a reaction to a force majeure event, does not disentitle a party from relying upon a force majeure clause. Indeed, I did not consider that I was shown any authority in support of the contrary proposition.

158. I also consider that there is no reason in principle why a reasonable decision made in response to a force majeure event should disqualify reliance on the clause. I agree with Mr Eaton's submission that the relevant question is whether the decision is such as to break the chain of causation from the original force majeure event. In the context of breach of contract, this will usually require unreasonable conduct by the claimant: see *Chitty* paragraphs 29-078 – 29-082. I see no reason why a different test relating to causation should be applied in the present context. Indeed, *Intertradex* and the other authorities relating to allocation of limited supplies also indicate that reasonableness is the touchstone in the context of the application of a force majeure clause.

159. The conclusion that a decision by the Owners, as a reaction to a force majeure event, does not disqualify reliance on the clause is reinforced by the consideration, described above, that a number of the matters referred to in clause 36.2 (c) would not stop loading

or discharge automatically, but would usually if not inevitably require an "intervening" reaction to the relevant matter.

160. I therefore reject the Charterers broad "self-induced" argument. However, the Charterers also advanced a narrower "self-induced" argument, to the effect that the chain of causation was broken in the present case because the Owners unreasonably refused to accept €. I do not accept this narrower argument either. The causation issue raised in the Respondent's Notice only arises if the appeal would otherwise succeed. The premise of the argument must be that (as I have indeed held) the exercise of reasonable endeavours did not require the Owners to accept a non-contractual payment. In other words, the Owners were entitled to require the contract to be performed in accordance with its terms. If that is the starting point, then it would be a very surprising conclusion that the Owners' insistence on contractual performance, and refusal to accept non-contractual performance, was unreasonable, with the consequence that the chain of causation was broken. I do not accept that the Award reveals an error of law in that regard. If the tribunal's conclusion as to the nature of the reasonable endeavours obligation is wrong (as I consider that it was), then I do not consider that the same conclusion can in substance be reached on the basis that the Owners acted unreasonably (breaking the chain of causation) by requiring the contract to be performed in accordance with its terms.

161. The final line of argument is, in substance, that the non-payment of freight could not in law be causative of prevention or delay in loading or discharge, and that therefore the tribunal's conclusion to the contrary – pursuant to its acceptance of the argument set out in paragraph [28] of the Award – is wrong in law. The argument posits that the Owners were contractually required to continue loading and discharging in accordance with the COA, notwithstanding the fact that freight payments could not readily and promptly be made because of the matters described in paragraphs [45] and [46] of the Award.

162. One aspect of this argument was the Charterers' case that the Owners were simply apprehending a future force majeure event. I do not accept that this is so. Here, there was the actual imposition of sanctions which meant that matters covered by clause 36.3 (c) had occurred. The Owners were not, in that respect, relying on something that might or might not happen in the future. I did not understand the Charterers to argue that clause 36.3 (b) nevertheless requires the parties to continue to perform the COA in order to see whether or not the relevant events do in fact prevent discharge. However, if such an argument were to be advanced, I would not accept it. For example, if the discharge port were to be subject to an embargo or blockade, the Owners would not in my view be required to load vessels and send them there. When considering whether loading or discharging is delayed, there must be a prospective element when a vessel or vessels have not actually been loaded. The purpose of the clause is to suspend the obligation of each party to perform, and it would make no commercial sense for the parties to be required (for example) continuously to load ships which will then be unable to discharge, or would be subject to delays in discharge, on arrival at the discharge port. In the context of frustration, it is well-established that the commercial venture must be considered as a whole, and that a shipowner or charterer is not bound to load, even if loading is possible, where a peril will affect the later performance of the commercial venture: see *Geipel v Smith* LR 7 QB 404; *Embiricos v Sydney Reid* [1914] 3 KB 45. It is therefore not necessary, in the context of frustration, to see whether interference with

the performance actually takes place, or would have taken place if attempts to perform had not been abandoned: see *Peel: Frustration and Force Majeure* 4th edition paragraphs 9-001 – 9-003. Applied to the present context, a prospective delay in discharging may, if otherwise covered by the force majeure clause, be sufficient to entitle a party to delay loading, even if loading itself would not be impeded.

163. It also follows that it does not matter that the COA required freight to be paid after loading had been completed. This might mean that any impact of non-payment would only be felt after loading, but it would nevertheless have an impact (subject to the point next discussed) on the commercial venture.

164. The question is therefore whether, on the facts of the present case, the occurrence of an event within clause 36.2 (c) would produce the consequence (prevention or delay in loading or discharge) identified in clause 36.2 (b). I see no reason, however, why it was not capable in law of doing so. For reasons previously discussed, the clause did not only operate in cases of direct physical interference with loading or discharge. The parties contemplated that restrictions on monetary transfer and exchanges might lead to loading or discharge being prevented or delayed. The tribunal found that the COA required more or less continuous cargo operations at the loadport. Furthermore, under the standard form Gencon charterparty, the Owners have a lien for unpaid freight. The right of lien means that the Owners are not required, contractually, to discharge the goods if the freight has not been paid. Against this background, it is within the range of permissible decisions for a tribunal to conclude that the parties would not contemplate that such operations would continue if the Owners were not being paid the freight to which they were entitled. That decision would be reinforced by the fact that Owners would in principle be entitled to exercise a lien for unpaid freight. The exercise of a lien would almost inevitably cause delay in discharge.

165. I accept that there may be a number of arguments against this conclusion; for example, an argument that the exercise of a lien would not be reasonable in circumstances where an alternative method of payment was proposed or possibly offered by way of security. However, I am not deciding the question of whether there was sufficient causation on the facts of the present case. The only question is whether the tribunal's conclusion as to causation, namely that clause 36.2 (b) was satisfied,[1] was within the range of permissible decisions. For the reasons set out above, I consider that it was.

166. This conclusion is not affected by the decision in *Dunavant*. The force majeure issue in that case arose in a very different contractual context. There was a contract for the sale of cotton, to be performed in August 2009 with a letter of credit to be opened by the buyer at least 15 days prior to the first day of the contract shipment month. The defendant buyer was having difficulties with its bankers, and there was uncertainty as to whether or not it would be possible to open the letter of credit. In the event, the parties agreed to close-out the transaction in an exchange of correspondence on 9/10 June 2009, just over a month prior to the date when the letter of credit would have to be opened. The "invoicing back" provisions of the International Cotton Association had the result that the claimant seller was liable to pay a significant sum to the buyer on the close-out, because the market had risen. This produced what the claimant seller regarded as an unfair result; because the "innocent" claimant was willing to perform,

[1] The tribunal must have been satisfied on this point, since they held that the Owners' case on force majeure "succeeded in all other respects"; ie other than on the "reasonable endeavours" point.

and it was the "guilty" buyer whose difficulties had led to the close-out. Burton J decided that the claimant was indeed liable to the buyer, because the relevant force majeure clause was irrelevant in the context of the contractual obligation of the parties to comply with the "close-out" and "invoicing back" provisions of the rules of International Cotton Association. He considered that the clause was "wholly inapplicable".

167. This meant that it was not necessary for Burton J to decide upon the effect of the force majeure clause in the light of the facts found by the tribunal. He did, however, address the argument, albeit briefly. He held that reliance upon the clause would have failed. The clause in question referred to delivery of goods being prevented or delayed by a series of matters, including "other causes beyond our control". The claimant's case was advanced on the basis that delivery was prevented by the inability of the buyer to pay and its failure to open a letter of credit due to banking restrictions. Burton J accepted a number of submissions made by counsel for the buyers. Amongst those submissions was an argument that delivery was not prevented: it could still have taken place, although the claimant seller might not have been paid.

168. I do not consider that this reasoning can be applied in the present context. The argument in the present case, based upon the findings in paragraphs [45] and [46], is not simply or indeed principally based upon prevention, but upon delay. *Chitty* paragraph 26-078 indicates that the word "delayed" is not necessarily to be treated as equivalent to "prevented", and circumstances which merely hinder performance may fall within the provision. In addition, the force majeure clause in the present case shows that the parties contemplated that "restrictions on monetary transfers and exchanges" might lead to a delay in the loading or discharge of cargo. It would therefore be surprising to conclude that the ordinary consequence of such a restriction, namely non-payment or a delay in payment, would be incapable of producing the consequence set out in clause 36.3 (b). Furthermore, in the context of a charterparty where the Owners have a lien for freight, non-payment will inevitably delay performance of discharge.

169. I now address the Charterers' argument that a refusal by the Owners to load would be in some way dependent on the question of whether the Owners could treat the Charterers' future inability to pay freight in US$ as an anticipatory repudiation of the COA, and had accepted that breach as bringing an end to the COA. I do not accept this point. The question of whether the Owners could invoke the force majeure clause depends upon the terms of that clause, in the light of the events which happened. It does not depend upon whether the Charterers were in breach, or whether such breach was repudiatory. There would also be difficulties, even if there was a breach actual or anticipatory, in terminating a long-term contract such as the COA in consequence of a temporary inability to perform, even if that did amount to a breach. Ultimately, I did not consider that this line of argument led anywhere in relation to the causation issue, or the application of the force majeure clause more generally.

170. I therefore do not accept that the Award should be upheld on this ground.

F2: The argument that the Owners were not entitled to "take time to review the position and opt for caution"

The parties' arguments

171. The Charterers submitted that the tribunal made an obvious error of law in paragraph 43 of the Award, as clarified, in holding that, subject to reasonable endeavours, the force majeure clause gave the Owners a legal entitlement to take time to review the position and opt for caution by only reinstating the COA after General Licence 14 had been issued. There was no basis upon which the tribunal was entitled to conclude as a matter of law that the force majeure clause was triggered. The tribunal had impermissibly re-written the clause so that it operated while the Owners made up their minds. The clause expressly gives a party 48 hours (excluding weekends and holidays) to decide whether to declare force majeure. It was an error of law to decide that the Owners would have been permitted a further period of contemplation (but this time enjoying the benefits of the force majeure clause). Clause 36.1 provides that performance may be suspended only while the force majeure event is "in operation".

172. In her oral submissions, Ms Selvaratnam said that this error by the tribunal infected its overall conclusion that, but for the reasonable endeavours point, the requirements of the force majeure clause were satisfied. The error infected the reasoning which led to the tribunal's conclusion to that effect in paragraph [51]. The consequence is that the Award should stand even if the appeal were to succeed, or possibly that the Award should be remitted to the tribunal for further consideration.

173. The Owners submitted that the critical paragraph of the Award [43] concerned only the "penalties" aspect of the Owners' case, not the ″payments″ aspect. They argued that even if the Charterers' criticism of that paragraph was justified, it did not follow that the appeal failed because the Award should be upheld on a different ground. If the Owners are right about "reasonable endeavours", the Owners are entitled to succeed on their "payments" case, even if the present argument is an answer to the ″penalties″ aspect.

174. The Owners also submitted that the criticism of paragraph [43] was not justified. The substance of the tribunal's point was that it was not only banks (mentioned in paragraph [46]) who would be alarmed. Sanctions would alarm the Owners too, whatever the strict legal position, and the Owners too would be expected to opt for caution. There is no reason in principle (absent a *novus actus interveniens* which broke the chain of causation) why the Owners' own reaction to the sanctions should be treated as any less an impediment than the banks' reaction.

175. In that context, the Owners referred to authority that a contract party which finds itself in a doubtful position and exposed to possible peril is entitled to take time for review: eg, *The Teutonia* (1871-72) 4 LRPC 171, in which the Master of a Prussian ship bound for Dunkirk was entitled to deviate to Deal to investigate reports that the Franco-Prussian war had begun; *The Houda* [1994] 2 Lloyd's Rep 541, where owners were entitled to investigate the authority of the people purporting to issue voyage orders (and in which the Court of Appeal said that the right of review was not confined to specific categories of case). Whilst the specific context here is different, such authorities support the conclusion that a reasonable necessity for the affected party to review the implications of an occurrence can qualify for force majeure.

Discussion

176. I start with the question of whether there was any error of law in paragraph [43] at all, before turning to the question of whether any error of law, if established, would lead to the conclusion that the Award should be upheld on different grounds.

177. The finding in paragraph [43] is that a reasonable response to the sanctions was for the owners to review the position and opt for caution for a period of time. The tribunal describes the drastic consequences resulting from the imposition of sanctions, even on "secondary" parties who are not the primary or directly sanctioned party. As discussed in Section F1 above, the force majeure clause may be applicable in circumstances where there is a reaction to the relevant events which does not break the chain of causation, because it is a reasonable response. In those circumstances, the cause of the delay in loading or discharge, which is a requirement of clause 36.3 (b), remains the force majeure circumstances set out in clause 36.3 (c), rather than the intervening (reasonable) decision or reaction of the Owners in response to that circumstance. Accordingly, I do not consider that there was any error of law. I accept Mr Eaton's submission that there is no reason in principle why, unless it is as a *novus actus interveniens* breaking the chain of causation, the Owners reaction to the sanctions (as a secondary party) should be treated any differently to the reaction of banks (who were also secondary parties).

178. Nor is this conclusion affected by the fact that the force majeure clause gives a short period for a FM notice to be sent. The FM notice is required, as further discussed in Section F3 below, in order to give notice of the events relied upon as constituting force majeure. This has no impact on the present and different question as to whether a reaction to the event breaks the chain of causation.

179. I also consider that an analogy can properly be drawn with the decision in *The Houda*. The case arose from difficulties arising after the invasion of Kuwait by Iraq in August 1990. The vessel had loaded a part cargo of oil in Kuwait when the invasion occurred. The vessel then sailed. A question arose as to liability for a period of time during which the vessel owners had declined to act upon orders given by charterers in the uncertain situation which arose following the invasion. The charterers contended that the vessel was off-hire during that time, or that they were entitled to damages. The owners' case was that any failure to comply with an order amounted to no more than a delay whilst considering whether to obey it, and this was reasonable and permissible on the true construction of the charter. The first stage of the trial was to consider whether reasonableness was a relevant consideration at all, with a possible second stage which would if necessary determine whether, on the facts, the owners had acted reasonably.

180. The trial judge (Phillips J) decided, in effect, that reasonableness was not a relevant consideration, because there were only a limited number of circumstances where reasonableness would be relevant. The Court of Appeal reversed that decision. Neill LJ said:

> "I am unable to accept that the right, or indeed the duty, to pause can safely be confined to specific categories of cases. I consider that it is necessary to take a broad and comprehensive view of the duties and responsibilities of the owners and the master and to ask, as was suggested in *The San Roman* (sup.): How would a

> man of reasonable prudence have acted in the circumstances? Thus, for example, the delivery of a cargo pursuant to an order given by the agent of an invading army may pose just as much a threat to cargo and those who have legitimate rights to it as an iceberg or a foreign frigate. It will depend on the circumstances.
>
> …
>
> The orders which from the basis of the charterers' case in these proceedings emanated from London. It is not of course for this Court to decide whether on the facts the owners had reasonable grounds to pause, but I am satisfied that in a war situation there may well be circumstances where the right, and indeed the duty, to pause in order to seek further information about the source of and the validity of any orders which may be received is capable of arising even if there may be no immediate physical threat to the cargo or the ship."

181. Millett LJ said:

> "In my judgment the authorities establish two propositions of general application: (1) the master's obligation on receipt of an order is not one of instant obedience but of reasonable conduct; and (2) not every delay constitutes a refusal to obey an order; only an unreasonable delay does so"

182. It is true that these statements were made in the context of a case where the issue was: did the master need to act upon the charterers' orders immediately? This is a different question to that which arises in the present case. Nevertheless, *The Houda* shows that situations can arise where it is reasonable for a party to delay in the performance of a contractual obligation where there is a difficult and uncertain situation, and where a prudent owner may have to guard against a particular risk (described by Neill LJ as the risk that the charterers' orders may have come from the "wrong" side). In that case, the owners established (in principle) their entitlement to delay performance in circumstances where there was no force majeure clause. It seems to me that where there is a force majeure clause, such as that in the present case, the Owners are if anything in a stronger position; because, as previously discussed, a reasonable reaction to the relevant events will not break the chain of causation.

183. Even if the above analysis were incorrect, so that paragraph [43] did contain an error of law, I would not consider it appropriate to uphold the Award on different grounds. For the reasons which follow, I am not satisfied that (on a fair reading of the Award and the tribunal's later correction) the reasoning in paragraph [43] played any significant or material part in the tribunal's conclusion that, reasonable endeavours apart, all of the requirements of the force majeure clause (including the causative impact of the matters set out in clause 36.3 (c) on loading and discharge) were satisfied.

184. As previously discussed, it is common ground that the argument on causation, which the tribunal had accepted, was the "payments" argument summarised in paragraph [28] of the Award. This indicates that the tribunal was not focusing on the "penalties" argument when considering causation. This is confirmed by the result which the

tribunal reached. The tribunal considered that the Owners' refusal to accept payment in € was a failure to exercise reasonable endeavours, and that this precluded reliance on the force majeure clause. However, the offer of payment in € would only address and deal with the "payments" aspect of the problems created by the US sanctions. It would not address and deal with the more general "penalties" problem identified in paragraph [43], which concerned the drastic impact of sanctions on a commercial counterparty. Those problems could not have been "overcome" by the receipt of a payment in €. If the tribunal had attached significance to the reasoning in paragraph [43], then its conclusion in paragraph [51] – that the force majeure event or state of affairs could have been overcome by reasonable endeavours on the part of the Owners – would make no sense. This shows that, as the Owners submitted, the Tribunal's decision was based on the causative impact of the "payments" argument summarised in paragraph [28].

185. If this is right, then any error of law in paragraph [43] has no material impact on the tribunal's reasoning and conclusion in paragraph [51], and there is no basis for upholding the Award for reasons other than those relied upon by the tribunal.

186. If the conclusions set out in this section of my judgment are correct, then there is an irony to the Charterers' case that the Award should be upheld on grounds other than those relied upon by the tribunal. It seems to me that it is the Owners who can legitimately complain that the tribunal erred by not carrying through their conclusion, in paragraph [43], into their decision as to the applicability of the force majeure clause. If (as I consider to be the case) the tribunal were correct in law to say that the Owners were "perfectly entitled to take time to review the position and opt for caution by only reinstating the COA once General License 14 … had been issued", then the Owners' case on force majeure should have succeeded irrespective of the payment issue (i.e. the fact that they had been offered payment in €). However, it is not appropriate to go that far. The Owners did not seek or obtain permission to appeal on this issue. It therefore suffices to say that the Charterers' argument on this point does not lead to the conclusion that the Award should be upheld on different grounds.

F3: The terms of the notice

187. The tribunal, in paragraph [52] of the Award, concluded that the force majeure notice given by the Owners was not defective. I will deal with this point briefly, because – despite the forcefulness and enthusiasm with which Mr Shirley argued to the contrary – in my view the Charterers' argument is clearly wrong and the tribunal was clearly right.

188. The FM Notice in the present case claimed force majeure, identified the sanctions and their impact on both loading and payment. It is true that the notice did not spell out how the prevention of US dollar payments, in consequence of the sanctions, would impact upon loading and discharge. However, it is not necessary for a notice to spell out a detailed case in that regard. A force majeure notice need not contain or be equivalent to a detailed legal submission, particularly bearing in mind that it must be served in a short time-frame, namely within 48 hours of a party becoming aware of a force majeure event. Here, it was obvious that, by sending the notice, the Owners were saying that all of the requirements of the clause were satisfied.

189. Furthermore, the notice was sufficient to fulfil the purpose of a force majeure notice as described by Aikens J in *Mamidoil-Jetoil Greek Petroleum v. Okta Crude Oil Refinery* [2003] 1 Lloyd's Rep 1 at [134]:

> "The reason for requiring notice to be given must be that the "*other party*" can then investigate the alleged force majeure at the time. It can challenge whether it does prevent performance or delay in performance by the party invoking force majeure. Alternatively it can see if there are other means of enabling performance to be continued."

190. The fact that it was sufficient is demonstrated by the Charterers' response. It is clear from that response that the notice enabled the Charterers to investigate the alleged force majeure and its impact, to challenge whether it did prevent or delay performance, and to offer a payment in € as a means of enabling performance to continue.

191. This ground does not therefore provide a reason to uphold the Award on other grounds.

Conclusion

192. For the reasons set out above, the Owners' appeal succeeds, and the Award should not be upheld for different reasons.