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Marine cargo insurance – navigating buyer vulnerabilities

The Institute Cargo Clauses (ICC) form a basic structure for defining standard coverage levels. Brokers typically augment this with additional non-Institute (or broker) clauses to provide wider and seamless insurance coverage. When the policyholder is the buyer, the requirement for insurance indemnity becomes both critical and complex, owing to the unique risks they face.

"Lost or not lost" clause

The Marine Insurance Act 1906 (MIA 1906) makes one exception to the rule that the insurable interest must be present at the time of loss. Section 6(1) of the MIA 1906 provides:

> "The assured must be interested in the subject matter insured at the time of the loss, though he need not be interested when the insurance is effected: *Provided that where the subject-matter is insured 'lost or not lost,' the assured may recover, although he may not have acquired his interest until after the loss*, unless at the time of executing the contract of insurance the assured was aware of the loss, and the insurer was not." (Emphasis added.)

The "lost or not lost" concept enshrined in the MIA 1906 served a purpose during an era characterised by inadequate communication systems. In such times, buyers were often unaware of the condition of their cargo at the time of placement of their insurance. Improved communication in the modern era, however, does not render retrospective cover irrelevant. The *NSW Leather Co Pty Ltd v Vanguard Insurance Co Ltd*[1] case provides a graphic illustration of the issues involved. The case concerned a shipment of containerised goods from Brazil to Sydney. The buyer paid for the goods and thus "felt" the loss, despite the absence of insurable interest at the pre-FOB stage of transit when the theft occurred. Handley JA noted that while the FOB buyer possessed insurable interest in this case, it was not of the type covered by a marine cargo policy. However, since the policy was subject to the 1963 edition of the ICC containing the "lost or not lost" provision, the buyer was able to recover for a loss that occurred when goods were not at his risk. He said: "An insured who acquires an insurable interest in a marine adventure after a loss is entitled to recover provided that loss then falls on him and there is *an appropriately worded policy*".

[1] (NSWCA) (1990) 103 FLR 70; (1991) 25 NSWLR 669.

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MUR Shipping – a comparative perspective

Unlike the position in, say, French or Dutch law, "force majeure" has no independent meaning in English law. The effect of a force majeure event (if any) therefore depends upon the existence and wording of a clause making provision for it. In the absence of such a clause, the force majeure event may result in the frustration of the contract (ie, the discharge of both parties from any obligation to continue performance).

However, frustration is rare. The more usual consequence is therefore that performance becomes more difficult for one of the parties. If, as a result, that party ceases to perform, then it will be in breach of contract, one potential consequence of which is that the other party will become entitled to terminate and claim damages.

Force majeure clauses seek to avoid the uncertainty and dramatic consequences that can ensue in their absence. Their typical structure is to identify events that may impede performance, and to permit the party whose performance is impeded to suspend performance or escape some or all the consequences of non-performance. They almost invariably, either expressly or by implication, provide that the party impeded must try to avoid the impeding effect of the event.[1]

In *RTI Ltd v MUR Shipping BV*[2] the UK Supreme Court allowed an appeal on the interpretation and application of a force majeure clause. *RTI* concerned a contract of affreightment, pursuant to which the (Dutch) owner MUR Shipping was to provide a steady stream of ships for the duration of the contract, and the (Jersey) charterer RTI was to provide a steady stream of freight payments in US dollars. The contract contained a force majeure clause, which provided expressly that – to qualify as a "Force Majeure Event", "It cannot be overcome by reasonable endeavors from the Party affected".

The facts and the lower courts' decisions

As a result of ~~the~~ US sanctions, the charterer found itself unable to make timely payments in US dollars. It offered to pay in euros instead, and to make good any currency and associated losses by the owner. The owner refused and suspended its performance for a substantial period of the contract. Its suspension came to an end after a change in the sanctions regime. The owner resumed nominations of vessels and accepted payments from the charterer of euros which were converted into US dollars by the owner's bank on receipt. The charterer claimed for the increased cost of chartering replacement tonnage during the period of suspension.

Subject to one point, it was common ground – at any rate by the time the case reached the Supreme Court – that the inability to make payment in US dollars was brought about by a force majeure event. The one point was whether "reasonable endeavors" required the owner to accept payment in euros during the suspension period.

The arbitral tribunal held that it did. Although the charterer was obliged to pay in US dollars, payment received in euros could have been converted immediately on receipt and the owner would have suffered no detriment. The owner sought and obtained permission to appeal under section 69 of the Arbitration Act 1996. Permission was granted, and Jacobs J allowed the appeal.[3] His reasoning was encapsulated as follows by the Supreme Court:

> "The exercise of reasonable endeavours required endeavours towards the performance of [the parties'] bargain; not towards a performance directed to achieving a different result which formed no part of the parties' bargain. … 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."[4]

The Court of Appeal,[5] by a majority, disagreed. Its approach was that the case turned on the clause in question, rather than any general principle, and was thus one of fact. Since acceptance of payment in euros would "overcome" the state of affairs caused by the sanctions, without associated detriment, "reasonable endeavors" by the owner required it to accept such payment. ~~One judge,~~ Arnold LJ~~,~~ dissented. He took the view that an offer of non-contractual performance could not overcome the "event or state of affairs" brought about by the sanctions.

He gave the example of a contract which required carriage to port A which was strike-bound and an offer to divert the vessel to port B which would not in fact be detrimental to the party invoking the force majeure clause (because, for example, the goods being carried were required at place C equidistant between port A and port B). He considered that in such circumstances the party invoking the clause would not be required to accept that offer. This was because the party invoking the clause was entitled to insist on contractual performance by the other party and, if the parties to the contract intended a force majeure clause to extend to a requirement to accept non-contractual performance, clear express words were required.

[1] They have other typical features, but this is the one that matters for the purposes of this article.
[2] [2024] UKSC 18; [2024] 1 Lloyd's Rep 621.
[3] [2022] EWHC 467 (Comm); [2022] 2 Lloyd's Rep 297.
[4] [2024] UKSC 18; [2024] 1 Lloyd's Rep 621, at para 16.
[5] [2022] EWCA Civ 1406; [2023] 1 Lloyd's Rep 463.

The Supreme Court's decision

The Supreme Court accepted the owner's submission that the prevalence of what it termed "reasonable endeavours provisos" in force majeure clauses meant that the point raised was one of general application, rather than – as the majority in the Court of Appeal had thought – one that turned merely on the clause at hand. It proceeded to overturn the Court of Appeal's decision for four reasons.

First, force majeure clauses are concerned with the causal effect of impediments to contractual performance. The party affected must show that the event caused its failure to perform, and it will be unable to if it could have avoided its consequences by the exercise of reasonable endeavours. The causal question is thus "to be addressed by reference to the parameters of the contract". It is whether reasonable endeavours "could have secured the continuation or resumption of contractual performance". Since the contractual performance in question was payment in US dollars, the impediment to its performance could not be overcome by payment in euros.

Secondly, freedom of contract is core to the English law of contract. It includes as its corollary the freedom not to contract, which includes the freedom not to accept the offer of non-contractual performance.

Thirdly, clear words are needed to forgo valuable contractual rights. This was the same as or related to the well-known principle that clear words are needed to forgo rights that would ordinarily follow from breach of contract.

Lastly, "Certainty and predictability are of particular importance in the context of English commercial law …".[6] The court found that:

> "[The owner's] case is straightforward: absent clear wording, a reasonable endeavours proviso does not require acceptance of an offer of non-contractual performance. The focus of the reasonable endeavours inquiry is clear: what steps can reasonably be taken to ensure contractual performance. The limits to that inquiry are also clear; they are provided by the contract …"[7]

All of these questions arise in the context of a clause which requires immediate judgments to be made. Parties need to know with reasonable confidence whether a force majeure clause can be relied upon at the relevant time, not after some retrospective inquiry. The court considered that the authorities supported this analysis and so allowed the owner's appeal.

English law comments

From the perspective of an English lawyer, much about this decision is familiar: the emphasis placed on certainty; the need to use clear words to achieve an unusual result; the adherence to the essential elements of the parties' bargain (including, here, the right to be paid in US dollars). The point that commercial parties must be able to know where they stand – rather than leave it to a court or tribunal to tell them months or years later – is a powerful one that is frequently deployed in the interpretation of commercial agreements.

To an extent it may be said that there is a circularity to the Supreme Court's reasoning, since the emphasis on the right to be paid in US dollars itself presupposes that the clause was incapable of affecting or modifying that right. If it were so capable, then the right to be paid in dollars would be modified (at least for the duration of the force majeure). This argument was not advanced, however, and its essential weakness is that it would translate not merely the nature of the right (from one to be paid in US dollars to one to be paid in a currency that could be converted into US dollars), but also the right into an obligation (to accept such payment). All in all, the decision was conventional and has generally been well received by the English legal commentariat.

A Dutch law perspective

It is often said that civil law is less flexible than common law since it is based on codified laws. Arguably this case illustrates the opposite, for the reasons set out below.

Freedom of contract and pacta sunt servanda are, as in English law, basic principles of (Dutch) civil law. Parties are expected to honour the obligations they took upon themselves when they entered into a contract. Particularly where it concerns a detailed contractual relationship between professional commercial parties, the courts are very reluctant to deviate from the four corners of the contract. Dutch law, too, sees legal certainty as essential when doing business.

In order to establish the four corners of the affreightment contract between the owner and charterer, a court needs to interpret two clauses: the payment clause and the force majeure clause. The contract obliges the charterer to make payments in US dollars. At issue is whether this obligation means that the charterer could only pay in US dollars, as the UK Supreme Court found, or could it also include an offer to pay in euros that would be converted in US dollars, so the owner would ultimately receive US dollars? Was that not the ultimate goal of the contract? It is not unlikely that a Dutch court would have found the latter, also to allow parties some flexibility in their business dealings. But even if it would have construed the payment clause as narrowly as the UK Supreme Court, a Dutch court would likely have found that the impossibility of making a direct payment in US dollars would have been overcome by reasonable endeavours from the charterer. It would have given a broader meaning to the force majeure clause than the Supreme Court did.

What would make a difference under Dutch law is the overarching principle that parties have to carry out their contracts in line with the principles of reasonableness and fairness (in other words: in good faith). Good faith would require the owner to accept payment in euros that could be converted in US dollars. The fact that the owner also chose to do so when it resumed nominating vessels under the contract emphasises this point. It also illustrates that it made sense from a business perspective to accept euros, without amending the contract for that.

[6] Per Lord Hamblen in *JTI Polska SP zoo v Jakubowski* [2023] UKSC 19; [2023] 2 Lloyd's Rep 64.
[7] At para 47.

A Dutch court could and probably would therefore have ruled in favour of the charterer and would have rendered a judgment that is in line both with the terms of the contract and with common business sense. And a Dutch court would not have felt any caution in doing so by the fear of setting a precedent for future (force majeure) cases. This is because the Dutch Civil Code gives parties the freedom to contract and to deviate from general contracting principles in the Civil Code. The latter was done with the force majeure clause in this case. A ruling on the force majeure clause, or any other contractual clause that is not based on a Civil Code provision or general legal principle, has little or no precedential value. Civil law can therefore offer tailored solutions to individual cases, without the strict doctrine of precedent.

More English law comment

It is instructive to set the Dutch solution to the *MUR Shipping* conundrum against Jacobs J's reasoning when allowing the appeal: "… 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."[8]

[8] At para 131.

An English lawyer would view the requirement of good faith, the availability of "tailor-made solutions" and the lack of (any) precedential value of the construction of particular clauses, if not with horror then at least askance. That is because each would seem to increase the scope for an unexpected result by taking the case to court – a step which on the whole commercial parties would want to avoid. Against that, of course, the English system took four[9] inconsistent bites of this particular cherry,[10] so its claim to the high ground of legal certainty is not at its strongest in this case.

More often than not, the civil and common law systems end up in the same place by different routes. Cases such as *MUR Shipping*, where the results would – very probably – have differed, are valuable in pointing up how their different approaches can, in the right case, lead to diverse outcomes.

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[9] Five, if one counts the application for permission to appeal.
[10] Appeal from an arbitration award on a point of law is not available in Dutch law, so in the Netherlands there would only ever have been one decision.

Case update

Undisclosed principals under letters of indemnity

Yangtze Navigation (Asia) Co Ltd and Another v TPT Shipping Ltd and Others (The Xing Zhi Hai) [2024] EWHC 2371 (Comm)

On 18 September 2024 the High Court delivered a significant judgment addressing issues regarding letters of indemnity (LOIs) and the concept of undisclosed principals in shipping contracts. The ruling provides greater clarity in identifying agency relationship, particularly regarding liability in complex shipping transactions.

The Xing Zhi Hai: the facts

This dispute arose from a series of timber shipments from New Zealand to India. The parties involved were: (a) several New Zealand companies that produced the logs, collectively referred to as "the Exporters"; (b) TPT Forests Ltd, which acted as the Exporters' agent under Log Marketing and Sales Agency Agreements (LMSAAs); (c) TPT Shipping Ltd, an affiliated company that provided shipping services and was tasked with issuing letters of indemnity; and (d) the claimants, Yangtze Navigation (Asia) Co Ltd and Berge Bulk Shipping Pte Ltd, the shipowners who entered into charterparties for the transport of the logs.

Under LMSAAs, TPT Forests was appointed to market and sell the logs on behalf of the Exporters. The LMSAAs contained clauses pertaining to the transportation of the logs, which were to be arranged by TPT Forests with TPT Shipping. TPT Forests also entered into a Shipping Services Agreement (SSA) with TPT Shipping, clearly stating that TPT Forests was acting as agent for the Exporters. The SSA outlined that TPT Shipping would handle the logistics and shipping of the logs. TPT Shipping subsequently executed three voyage charterparties with the claimants in its own name to transport the Exporters' logs from New Zealand to India.

As the cargoes were being discharged at the Indian port, the original bills of lading were not presented. To facilitate the release of the logs, TPT Shipping issued letters of indemnity to the shipowners, guaranteeing protection against any potential claims resulting from the absence of the original documents.

After the discharge, disputes arose involving the bill of lading holders, with Amrose Singapore Pte Ltd being a notable party, leading to claims of misdelivery against the owners. This situation culminated in the detention of several vessels as a measure of support for these claims. Initially, the claimants pursued TPT Shipping for compensation. Following TPT Shipping's entry into administration and its subsequent liquidation, they redirected their claims against TPT Forests and the Exporters, asserting that TPT Forests and the Exporters were undisclosed principals liable under the LOIs issued by TPT Shipping.