Neutral Citation Number: [2022] EWHC 699 (Comm)

Case No: CL-2021-000292

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/03/2022

Before :

THE HONOURABLE MR JUSTICE CALVER

- -

Between :

Laysun Service Co Limited	**Claimant**
- and -	
Del Monte International GMBH	**Defendant**

- -
- -

Timothy Young QC, Stephen Du (instructed by **Reed Smith LLP**) for the **Claimants**
Yash Kulkarni QC, Andrew Leung (instructed by **Preston Turnbull**) for the **Defendants**

Hearing date: Thursday 17 March 2022

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JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be Monday 28 March 2022 at 10:00 am

Mr Justice Calver :

The appeal

1. With the permission of Butcher J granted by order dated 2 November 2021, the Claimant appeals under section 69 of the Arbitration Act 1996 against an arbitration award of David Lucas, Alan Oakley and Sarra Kay (the "**Tribunal**") dated 16 April 2021 (the "**Award**").

The factual background

2. The appeal arises out a Contract of Affreightment between the Claimant, Laysun Service Co. Ltd. of Cyprus, ("**the Owners**") and the Defendant, Del Monte International GmbH of Switzerland ("**the Charterers**") dated 29 December 2017 ("**the Agreement**"). The Agreement concerned the carriage of refrigerated bananas from the Philippines to Bandar Bushehr in Iran during the period 1 January 2018 to 31 December 2018. It was for a total of 36 voyages, being 3 per month.

3. Clause 3.5 of the Agreement provided as follows:

> *"The Charterer shall bear the cost and risks of loading and unloading at the Port of Shipment and the Port of Destination[1]."*

4. As Mr. Timothy Young QC, who appeared with Mr. Stephen Du, submitted, the contractual obligations of the Charterers (who were described in the recitals as "*…engaged in the business of supplying bananas ('the Fruit') to wholesale distributors in Iran and other Gulf countries"*) were accordingly threefold:

   (i) the loading of the cargoes on vessels provided by the Owners (clause 3.5),
   (ii) the payment of freight (clause 5), and
   (iii) the discharging of the cargoes at Bandar Bushehr, Iran (clause 3.5).

5. After 17 shipments, the Charterers stopped providing cargoes. The Owners brought a claim for their losses arising out of the Charterers' alleged wrongful failure to perform the remaining 19 shipments. The Charterers denied liability. Their defence rested on two declarations of *force majeure* which were served on 25 June 2018 and 28 June 2018.

6. They contended that (a) it was impossible to make payments from Iran to a bank in another country and/or for international banks to facilitate or finance any transaction with an Iranian link. This was due to the US hardening its stance against Iran, culminating in May 2018 in the US leaving the international agreement with Iran in relation to its nuclear programme and ultimately imposing sanctions against Iran (the "**Payments Issue**"); and (b) it was impossible to import bananas into Iran due to the imposition by the Iranian Government, between April and at least June 2018 and possibly for longer, of various restrictions on import permits (the "**Import Permits Issue**").

[1] Namely, Bandar Bushehr, Iran.

7. As a result, the Charterers contended that clause 8 of the Agreement (being the force majeure provision) was engaged and that they were entitled from the end of June 2018, with immediate effect, to reduce the shipments to nil.

8. Clause 8 of the Agreement reads (so far as material):

> *"8.1. A force majeure event means, in relation to either party, any circumstances beyond the reasonable control of that party that prevents such party, practically or legally, from performing any or all of its obligations under this Agreement, including, without prejudice to the generality of the foregoing:-*
>
> *8.1.1. any act or change thereof, law, regulation, order or policy of any governmental or supranational authority, governmental interruptions of any applicable country including trade or import/export restrictions or the revocation or non-renewal of trading licenses;*
>
> *…8.2 Neither party will be in breach of this Agreement due to a force majeure event provided that such event is not due to the fault or negligence of such party and the effect of which could not have been avoided by taking appropriate and reasonable measures and such party has promptly notify the other party of such event.*
>
> *8.3 Party affected by a force majeure event will use all endeavours to mitigate the effect of the force majeure event to carry out its obligations under this Agreement in any way that is reasonably practicable and to resume the performance of its obligations as soon as reasonably possible.*
>
> *8.4. In the event of force majeure affecting either the Owner or the Charterer the Owner has the right to reduce the committed volume set forth in Clause 3 and/or the Charterer has the right to request a reduction in volume in proportion to the quantity of Fruit affected by the force majeure event."*

9. The Charterers were not themselves part of any chain of contracts of sale for bananas. The Charterers' bananas were sold by their sister company, **Del Monte UAE**, to two customers located in the UAE: Prime International Fruit LLC ("**Prime**") and Marhaba MTA General Trading LLC ("**Marhaba**"). Del Monte UAE's contract with Prime was for the supply of bananas from January to 31 December 2018 with payment by post-dated cheque at 60 days after bill of lading date against original documents[2]; and Del Monte UAE's contract with Marhaba was for the supply of bananas until September 2018 with payment by cash in advance of sailing[3]. Those two UAE customers in turn sold the bananas to Iranian receivers, namely **Aryasam Foods and Cold Storage** and **Iran Golden Fruit & Fars Kabkaab Co** respectively[4]. Prime did not buy bananas only

[2] Award, paragraph 25.
[3] Award, paragraph 26.
[4] Award, paragraph 24.

from Del Monte UAE; it also bought bananas from Unifrutti[5] and from other sellers, referred to as "co-loaders", who used the Owners' vessels to transport the bananas.[6]

10. The Charterers did not have their own unloading arrangements in Iran, but relied upon the Iranian receivers contracted by/through Del Monte UAE to perform the unloading of bananas carried under the Agreement[7].

11. *The Payments Issue* - From February 2018, Del Monte UAE started experiencing problems with receiving payments from its UAE customers. The Tribunal found as facts that Prime and Marhaba were unable to make payments to Del Monte UAE, because no bank in the UAE would accept an Iranian payment[8]; and Del Monte UAE was in turn unable to receive payments from Prime or Marhaba from April or May 2018.[9]

12. *The Import Permits Issue* - The Tribunal found as a fact that the Iranian government stopped issuing new import permits "*towards the end of June 2018*" until 31 July 2018[10] and that "*it was not possible for [the Charterers] to perform their obligations under the Agreement from the end of June 2018 until, at the least, the end of July 2018 because they were unable to discharge bananas to their existing customers in the absence of either of them having import permits.*"[11]

13. The Tribunal found as a result that:

> *"The inability of Prime and Marhaba to make a payment to Del Monte UAE rendered it impossible for [the Charterers] to perform their obligations under the Agreement and clause 8.1 was therefore triggered. We have found that, on the balance of probabilities, the Government stopped issuing import permits towards the end of June 2018 and that [the Charterers] were therefore unable to perform the Agreement until, at the least, the end of July 2018 by delivering to either of Prime or Marhaba. We also concluded that it was not an option for Del Monte UAE to find alternative customers in time to continue to perform the Agreement before it expired. There was nothing, therefore, that [the Charterers] could have done, for the purposes of satisfying clause 8.3, that would have been "reasonably practicable" so as to mitigate the effect of the force majeure event. They were therefore entitled to reduce the committed volume to nil in accordance with clause 8.4 of the Agreement."*

14. Against that factual background, Mr. Young submitted that the question was and remains whether the Charterers can validly rely on clause 8 of the Agreement to exclude their liability for breach, that is to say whether they proved that they were *prevented*, practically or legally, from performing any or all of its obligations on the true construction of clause 8 of the Agreement. He submitted that for the purposes of this

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[5] Award, paragraphs 2, 164 to 168.
[6] Award, paragraphs 169 to 173.
[7] Award, paragraph 111.
[8] Award, paragraph 109.
[9] Award, paragraph 109.
[10] Award, paragraph 215.
[11] Award, paragraph 216.

appeal, the relevant questions of law have been distilled into the questions set out in the Claim Form, which are as follows[12]:

> "*a. Whether on the facts found and on the true construction of the Agreement, the Charterers were entitled to invoke the force majeure provisions of clause 8 so as to relieve them from liability for failing to make and pay for shipments thereunder for the entire period covered by the Agreement, namely until 31 December 2018;*
>
> > *...[13](ii) because payment difficulties in related sale and purchase contracts (to which neither the Charterers nor the Owners were party) meant that bills of lading might not arrive at the discharge port so that the Owners would then have the right to decline to permit delivery of the goods carried until surrender of the Bills of Lading;*
> >
> > *(iii) because the receivers of the cargo (chosen under contracts of sale/purchase to which neither the Owners nor the Charterers were party), did not have import permits allowing the importation of the goods carried into the destination state; the Charterers were bound to prove no more than that the said receivers of the cargo could not obtain newly issued import permits in order for the Charterers to be entitled to invoke the force majeure provisions of clause 8 of the Agreement or whether the Charterers need also to prove that the said receivers did not have existing import permits and could not acquire import permits under the import permit trading arrangements as found;*
> >
> > *(v) because (or when) the said receivers terminated their purchase contracts with a sister company of the Charterers or stopped trading in the goods to be carried under the Agreement.*
>
> *b. Whether the Tribunal were correct in law in holding that the judgment of the Court of Appeal in The Crudesky, whereby a party seeking to rely on a force majeure exemption cannot rely on the acts/omissions of that party's delegates, was restricted to the case where there was an '…ongoing relationship…' between the party and the said delegate and did not extend to the case where that relationship has been terminated.*"

15. As framed, these questions suggest at first sight an attempt by the Owners to challenge mixed questions of fact and law. That in itself would make any challenge to the Tribunal's decision a difficult task. In *Cosemar SA v Marimarna Shipping Co Ltd (The Mathew)* [1990] 2 Lloyd's Rep 323[14], Steyn J (as he then was) stated at 326:

> "*The arbitrators plainly erred in their approach on this aspect. Yet it must be borne in mind that their decision was not one of pure law; it was a question of mixed law and fact. In such a situation their error in approach is not by itself decisive. It is still*

[12] Butcher J aptly described the questions of law as "inartfully expressed" and this led to the amended version set out above.

[13] There is no paragraph (i) or (iv) as a result of Butcher J's direction.

[14] Quoted with approval by HHJ Peter Coulson QC (as he was) in *Benaim (UK) Ltd v Davies, Middleton & Davies Ltd* [2005] EWHC 1370 at [108].

> *necessary to consider whether their actual decision in all the circumstances falls outside the permissible range of solutions open to arbitrators*." (emphasis added)

16. However, in fact these suggested questions of law are either premised on supposed factual findings which the Tribunal did not make, or are not questions of law at all but rather thinly veiled challenges to the Tribunal's findings of fact. I agree with Mr. Kulkarni QC, leading Mr. Leung for the Charterers, that once the true factual findings of the Tribunal are appreciated, these so-called errors of law simply do not arise. I accordingly turn to the Tribunal's factual findings next in relation to (i) the Payments Issue and (ii) the Import Permits Issue.

The Payments Issues

The Tribunal's factual findings

17. The Tribunal found the following facts concerning the Payments Issues:

(1) In early 2018 the Trump Administration took a hardened stance against Iran and threatened to withdraw from the Joint Comprehensive Plan of Action ("JCPOA"). This caused extreme turbulence of the foreign exchange rates in Iran and transactions with an Iranian link became problematic[15]. The US announced its withdrawal from the JCPOA on 8 May 2018 and at the same time reimposed sanctions on Iran[16].

(2) In consequence, Del Monte UAE were "unable to receive payments" from Prime or Marhaba from April or May 2018; and Prime and Marhaba were unable to make payments to Del Monte UAE, because no bank in the UAE would accept an Iranian payment[17]. None of the accounts at which Del Monte or members of their group already had existing relationships were willing to accept such payments[18].

(3) It was impractical and entirely unrealistic to suppose that Del Monte UAE would be able to open an account with a new bank which might accept Iranian payments. Against the back cloth of the sanctions environment that obtained, if Del Monte UAE applied, out of the blue, to open an account at a new bank, they would inevitably and quite properly have been subjected to lengthy and thorough enhanced due diligence with quite possibly a certain amount of suspicion, and without any guarantee that the process would result in an approval. There was no evidence that payments could be made outside of the banking system[19].

(4) Without the Iranian receiver making payment for the goods, they would not receive the bill of lading. Yet the Iranian receiver required the bill of lading in order to clear the cargo through customs *before* it could discharge the cargo[20].

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[15] Award, paragraph 31.
[16] Ibid, paragraph 44.
[17] Ibid, paragraph 109. Owners state that "this fact is of course accepted as final and binding" but then they disregard this fact.
[18] Ibid, paragraph 109.
[19] Ibid, paragraphs 105-109.
[20] Ibid, paragraphs 111-116; 156-161 (unless the cargo is being delivered directly to the receiver, when customs clearance and discharge can be carried out simultaneously). The Tribunal's findings make clear that they did not elide discharge and delivery, as alleged by Owners in paragraph 29 of their skeleton argument.

18. The Tribunal concluded, based upon these findings of fact, that the inability of the Iranian receivers to make payments and the inability of Prime and Mahaba to pay by any bank at their disposal resulted in a qualifying event of force majeure under clause 8.1 of the Agreement[21].

Suggested question of law

19. It can be seen, therefore, that the suggested question of law, namely whether the Charterers were entitled to invoke clause 8 "*because payment difficulties in related sale and purchase contracts (to which neither the Charterers nor the Owners were party) meant that bills of lading might not arrive at the discharge port so that the Owners would then have the right to decline to permit delivery of the goods carried until surrender of the Bills of Lading*", is based upon an entirely false factual premise. The Tribunal did not find that the Charterers could invoke force majeure because the Owners could withhold delivery of the goods; rather, it held that the goods could not be discharged because without the bills of lading the goods could not clear customs, which needed to take place prior to discharge of the goods. It follows that the Owners are shooting at an imaginary target; the so-called error of law in respect of the Payments Issue simply does not arise.

The Import Permits Issue

20. As the Tribunal stated in paragraph 120 of its Award, given its findings on the Payments Issue, the Import Permits Issue became academic. It nonetheless went on to make factual findings as follows:

    (1) With the US Government's threat of renewed sanctions against Iran, by a decree dated 11 April 2018 (the "**11 April Decree**"), the Iranian Government imposed new regulations aimed at controlling the outflow of foreign currency from Iran and restricting imports (which were a source of foreign exchange outflow). In particular, the 11 April Decree imposed import permit requirements throughout all the ports of Iran before goods could legally be imported into Iran[22].

    (2) Discharge of the cargo could not take place until the cargo had been cleared through customs and it could not be cleared unless there was a valid import permit[23]. There was no way around this as even discharge into storage rather than to a receiver could not take place until the cargo had been customs cleared[24].

    (3) There was a de facto stop on the issuance of import permits towards the end of June 2018 until at least 31 July 2018 which meant that Del Monte UAE was unable to ship bananas to Marhaba and Prime[25].

[21] Ibid, paragraph 119.
[22] Ibid, paragraphs 38, 41-42.
[23] Ibid, paragraphs 160-161 and 208.
[24] Ibid, paragraphs 160-161.
[25] Ibid, paragraphs 214-215.

(4) The Owners failed to establish their argument (which Mr. Young sought to re-argue at the hearing before me[26]) that Prime or Marhaba refused to use (as a matter of choice) permits for Del Monte UAE's benefit, whether existing or traded permits[27].

(5) The Tribunal rejected the Owners' contention that the Charterers could have discharged to new customers (of Del Monte UAE) and accepted the Charterers' case as to the difficulty of identifying and contracting with a new buyer at short notice or even over the course of the following six months in order to resume performance of the Agreement[28].

(6) Finding and selling to other customers for delivery into Iran during the remainder of 2018 was not an option for Del Monte UAE[29].

(7) It followed that it was not possible for the Charterers to perform their obligations under the Agreement from the end of June 2018 until at least the end of July 2018 because in the absence of their existing customers having import permits, they were unable to discharge the cargo[30].

21. The Tribunal then considered clause 8.3 and found that it was not reasonably practicable for Del Monte UAE to resume shipping bananas to either Marhaba or Prime, both of whom had ended their contracts with Del Monte UAE. The former had used up their remaining allowance under their last valid permit in July 2018 and the latter did not have new import permits after the end of June[31]. Moreover, locating substitute customers before the end of 2018 was unreasonable and impractical[32]. Since there was nothing the Charterers could have done to mitigate the effect of the force majeure events or resume performance under clause 8.3, they were excused from performing until the Agreement expired[33].

Suggested questions of law

22. Again, it can be seen that the Owners' suggested questions of law so far as the Import Permits Issue are concerned are either premised on false factual findings or are not questions of law at all. The first suggested question of law is whether the Charterers were entitled to invoke clause 8.1 "*because the receivers of the cargo (chosen under contracts of sale/purchase to which neither the Owners nor the Charterers were party), did not have import permits allowing the importation of the goods carried into the destination state; the Charterers were bound to prove no more than that the said receivers of the cargo could not obtain newly issued import permits in order for the Charterers to be entitled to invoke the force majeure provisions of clause 8 of the Agreement or whether the Charterers need also to prove that the said receivers did not*

[26] Both orally and in his skeleton argument at paragraph 9(ii).
[27] Ibid, paragraphs 148; 161; 173; 184-185; 196; 197; 198; 200; 211; 213; 215, 216.
[28] Ibid, paragraph 138.
[29] Ibid, paragraph 214.
[30] Ibid, paragraph 216.
[31] Ibid, paragraphs 145, 198.
[32] Ibid, paragraphs 222-224.
[33] Ibid, paragraphs 225, 232.

have existing import permits and could not acquire import permits under the import permit trading arrangements as found."

23. But this issue was an issue of fact for the Tribunal to determine; and the Tribunal did determine it and it is not open to the Owners to seek to re-open this factual issue. As described above, the Tribunal found that the Owners failed to establish their argument that Prime or Marhaba refused to use (as a matter of choice) permits for Del Monte UAE's benefit, whether existing or traded permits. The Tribunal found as a fact that Marhaba were unable to acquire new import permits after May/June 2018[34]; and the Tribunal found that there was no evidence that Prime had any existing permits which it could use, nor was there any evidence to suggest that Prime was able to obtain new permits after June 2018[35]. The Tribunal's conclusion was that the Charterers were "*unable to discharge bananas to their existing customers in the absence of either of them having import permits*";[36] and "*We have found that there is no evidence that Prime or Marhaba had import permits available to them after June 2018*.[37]" It follows that the Owners are simply wrong to assert, as they do in paragraph 43(ii) of their skeleton argument[38] that "*nothing was said in the conclusion about* ***existing*** *permits which was an extraordinary omission by the Tribunal*."

24. The second suggested question of law is whether clause 8 is triggered by Prime and Marhaba terminating their purchase contracts with Del Monte UAE or stopping trading in the goods to be carried under the Agreement. But this was not the Charterers' case. The Charterers invoked *force majeure* under clause 8.1 not because of these matters, but because, as the Tribunal held (i) receiving Iranian payments became <u>impossible</u>[39], ultimately resulting in bills of lading not being available at the discharge port for the purposes of customs clearance, followed by the discharge of the goods and (ii) Prime and Marhaba (and their Iranian receivers) were <u>unable</u> to receive the cargo in Iran without import permits; not merely because they made a voluntary commercial decision to cease trading[40]. These are factual findings which cannot be re-opened. These factual findings were fundamental to the Tribunal's finding of force majeure, and once this is appreciated, it can be seen that the Tribunal's finds have been wrongly caricatured by the Owners as follows[41]:

> *"If the facts of this case amount to a sufficient legal justification to excuse the Charterers from performing of the Agreement, then the force majeure clause no longer only protects the Charterers in the event that there has been an event outside the parties' control which prevents performance, but also protects the Charterers in the event that doing business in Iran has simply become unprofitable or beyond the risk appetite of the*

[34] Ibid, paragraphs 148, 215, 216.
[35] Ibid, paragraphs 198 and 216.
[36] Ibid, paragraph 216.
[37] Ibid, paragraph 232.
[38] Paragraph 52 of their skeleton argument is also factually incorrect for the same reason.
[39] Ibid, paragraph 109, 232.
[40] Ibid, paragraphs 214, 216 and 221.
[41] Owners' skeleton argument, paragraph 64.

> *Charterers or their sister companies. That is not the intended purpose of any force majeure clause".*[42]

That was never the Charterers' case and it does not represent the Tribunal's finding that the Charterers were prevented from performing their obligations under the Agreement[43].

25. The third and final suggested question of law is said to be whether "*the Tribunal were correct in law in holding that the judgment of the Court of Appeal in The Crudesky, whereby a party seeking to rely on a force majeure exemption cannot rely on the acts/omissions of that party's delegates, was restricted to the case where there was an '…ongoing relationship…' between the party and the said delegate and did not extend to the case where that relationship has been terminated*".

26. However, this question does not arise on the Tribunal's findings of fact. The Tribunal itself made clear that this issue would only arise if, contrary to its findings of fact, Prime did have import permits but chose not to use them for the Charterers: see paragraph 202 of the Award[44]. But first, there was no finding of fact that Prime or Marhaba *chose* not to use permits that they had for Del Monte UAE's benefit. And second, such a finding would contradict the Tribunal's factual findings set out in paragraph 23 above. It follows that the issue is of academic interest only[45].

27. In all the circumstances, the appeal is doomed. It is constructed on a false factual premise and even then impermissibly seeks to challenge the Tribunal's findings of fact. As Mr. Kulkarni pointed out, it is presumably for this reason that the Owners' oral and written (unjustified) criticisms of the Award ("*rationally bizarre and commercially absurd*"; "*unintelligible to any shipping lawyer*"; "*simple and utter nonsense as a matter of English law*") became somewhat hyperbolic.

28. There is a further preliminary objection which the Charterers' make about the way in which Owners seek to put their case on this appeal. The Tribunal's finding on clause 8.3 is summarised in paragraph 21 above. Their approach to the question of the proper construction of clauses 8.1 and 8.3 is set out in paragraphs 71-77 of the Award. In essence, it is that the Charterers must prove that clause 8.1 has been triggered by the Payments Issue and/or the Import Permits Issue. Clause 8.3 then addresses the period of interruption: "*Del Monte must prove that (a) they used all endeavours to mitigate the effect of the force majeure event to (b) carry out their obligations in any way that is reasonably practicable and (c) to resume performance of their obligations as soon as reasonably possible.*"

29. As the Tribunal recorded in paragraph 219 of its Award, Owners' argued that clause 8.3 "had nothing to do with resuming performance … but all to do with what could Del Monte have done in order to "*reduce the pain that has been caused by the force majeure event*". They gave examples such as shipping to Saudi Arabia or shipping to Kuwait and then they said the test was whether it was *reasonably practicable* to do any of those

[42] Paragraph 11 of Owners' skeleton argument also misstates the Tribunal's factual findings.
[43] The Tribunal use words such as "not possible", "unable", "prevented": see Award, paragraphs 214, 215, 216 and 221. The prevention was both legal and practical.
[44] Owners misstate the Tribunal's findings in paragraph 49 of their skeleton argument.
[45] Had I needed to decide the point, I would have found in favour of Charterers for the reasons set out in paragraphs 43-46 of their skeleton argument.

alternatives to mitigate the effect of the force majeure event. The test for whether you have to resume performance is simply whether the force majeure event under clause 8.1 is over or not (they said)".

30. That is the case that Mr. Young again sought to argue before this court, namely that if the force majeure event under clause 8.1 is over, then the Charterers must resume performance, and it was over, he submitted, by the end of July 2018.

31. However, the Owners have not suggested that the Tribunal erred in law in giving clauses 8.1 and 8.3 this construction; and the Owners did not obtain permission to appeal on any such question of law. It is not open, therefore, to the Owners to seek to raise this additional alleged error of law in paragraphs 61-63 of their skeleton argument (which Mr. Young maintained in oral submissions) for which they do not have permission.

32. In any event, in my judgment the Tribunal correctly interpreted clauses 8.1 and 8.3. I reject the submission of Mr. Young that the wording of clause 8.3 applies only whilst the Charterers are "*affected by a force majeure event*", and that after 31 July 2018 there was no force majeure event to affect the Charterers, and therefore the rest of the clause simply had no application. I do not consider he is right to contend that there cannot be anything to mitigate if the force majeure event has ceased to exist.

33. Clause 8.1 describes what constitutes a force majeure event. Clause 8.3 then provides for the steps which a party who has been affected by that force majeure event must take to mitigate its effects. Its focus is on the effect of the event. It is the effect of the force majeure event on the party's obligations under the Agreement which must be mitigated; and the effect of the force majeure event may indeed be felt even after the event is over. Likewise, even though the force majeure event itself may be over, its *effect* may continue to prevent the resumption of the party's performance of its obligations under the Agreement. The Tribunal found as a matter of fact that that was so in the present case; and also found as a fact that the Charterers did not fail to use all reasonable endeavours to mitigate the effect of the force majeure event to carry out its obligations under the Agreement in any way that was reasonably practicable[46]. It follows that any challenge to the Award in this respect is doomed to fail.

34. In the light of the foregoing, none of the alleged errors of law are established by the Owners.

Further arguments which do not arise

35. For completeness, I shall deal briefly with certain further arguments which Mr. Young advanced.

36. In paragraph 31 of his skeleton argument and in his oral submissions, Mr. Young submitted that the Tribunal erred in disregarding the fact that the Agreement was clear and express as to the discharging obligations of the Charterers and if presentation of the bills of lading was indeed critical to the discharge of the cargo, then that was something for which the Charterers themselves bore contractual responsibility under the Agreement. On any proper analysis he submitted, the Charterers were under a duty

[46] Award, paragraphs 224-225.

(under clause 3.5 obliging them both to load and unload the goods, and as a matter of general law) to ensure that the bills of lading made their way to the Iranian receivers in time for presentation to the vessel and there was nothing that had the effect of preventing the Charterers from transferring the bills of lading to the Iranian receivers.

37. Mr. Young suggested that it was "O level shipping law" in the light of *The Nikmary* [2003] EWCA Civ 1715 that if the Charterers cannot unload the cargo without an import permit (to gain customs clearance), then they are responsible for obtaining the permit (and ensuring customs clearance). He submitted that such a duty is within the ambit of clause 3.5. *The Nikmary*, he submitted, shows that there is no logical basis for distinguishing between loading and discharging in this respect, and that the Charterers have a non-delegable duty to do whatever is necessary onshore to procure the relevant acts of loading and discharging contemplated by clause 3.5. If that means obtaining an import permit or presenting a bill of lading, that is within Charterers' responsibility. However, when pressed he accepted that there is no authority (and *The Nikmary* is not authority) for this proposition "at the discharging end", but he argued that there was no analytical basis for distinguishing between loading and unloading in this respect.

38. This argument was not even raised before the Tribunal and nor did it feature in the Owners' skeleton argument for permission to appeal. It is accordingly not open to the Owners to seek to argue this point now: see section 69(3)(b) of the Arbitration Act 1996.

39. Clause 3.5 provides that: "*The Charterer shall bear the cost and risks of loading and unloading at the Port of Shipment and the Port of Destination"*. Assuming in the Owners' favour that the clause transferred to the Charterer not simply responsibility for the cost of the loading and unloading operations and the risk of those cargo handling operations going wrong, but that it was also a promise to the Owners to remove the cargo from the ship (an issue not expressly addressed in *The Sea Mirror* [2015] EWHC 1747 (Comm)), I do not accept that this obligation is to be equated to the Charterer's obligation to provide a cargo for loading.

40. The *Nikmary* does not assist Mr. Young. At [11], Mance LJ (as he then was) stated as follows:

> "*As a matter of general law, Mr Hill accepts that (i) a voyage charterer owes an absolute and non-delegable duty to provide cargo for loading and (ii) that charterparty exceptions (e.g. in respect of strikes) will normally be read as protecting a charterer only in respect of its duty to load, and not as covering its duty to provide cargo, although they may cover the latter if sufficiently clear and distinct words are used.*"

41. In the present case, assuming that clause 3.5 imposes a duty on the Charterers to discharge the cargo at the destination, that duty is subject to the force majeure provisions in clause 8. The rule of general law that a voyage charterer owes an absolute and non-delegable duty *to provide cargo* for loading and that charterparty exceptions will not normally be read as covering that duty (to provide cargo) is not the appropriate analogy to make with the present case. If an analogy is to be made, it is with the charterer's duty *to load the cargo* to which charterparty exceptions will normally be read as protecting a charterer, as explained by Mance LJ. Likewise with any duty to discharge the cargo. It follows that the Charterers do not have an absolute duty to

discharge the cargo regardless of the fact that they established on the facts before the Tribunal that they were affected by the two force majeure events.

42. Mr. Young also submitted[47] that the Tribunal erred in concluding that the only entity that could present the bills of lading to the carrier was the identified receiver. Rather, he submitted, it might be the Charterers (if they were the lawful holder) or their sister company Del Monte UAE (if they were), but whichever it was, their identity did not prevent the presentation so that the vessel could lawfully be obliged to deliver. There is no finding, he added, that the Charterers (or Del Monte UAE) were prevented from presenting the bills of lading themselves in Iran to any carrying vessels, even if they could not transfer the bills to the Iranian receivers.

43. Once again, this argument was not raised before the Tribunal and it is not open to the Owners to seek to argue it now in order to set aside the Award. The Owners simply did not argue before the Tribunal that the Charterers could have taken delivery themselves in Iran.

44. However, on the facts as found by the Tribunal it is wrong in any event and it is not open to the Owners to challenge the Tribunal's factual findings.

45. At paragraph 124 of the Award, the Tribunal explained that "*Del Monte's case is that they could only perform their obligations under the Agreement if they had an Iranian receiver to whom they could discharge the bananas. That Iranian receiver must have a valid import permit. Although Del Monte talked in terms of Prime and Marhaba having difficulty in obtaining import permits, the way it worked was that because neither of them were the actual Iranian importers (they were based in the UAE), it was their buyers who were required to obtain import permits. In the case of Prime, that would have been Aryasam and in the case of Marhaba, that would have been Iran Golden Fruit.*" (emphasis added).

46. Having set it out, the Tribunal then went on to accept Del Monte's case that the import permits could only be acquired by the Iranian receivers and discharge in Iran was not permitted without an import permit[48]. At paragraph 161 of the Award, the Tribunal stated: "*On this topic, we had no hesitation in preferring Del Monte's case. Allowing perishable fruit to be discharged without knowing if there is an Iranian receiver with a valid import permit, at a small, but busy, port would undermine the system.*"

47. The Tribunal's factual findings once again prevent the Owners from advancing their argument in this respect.

Conclusion

48. It follows that the alleged questions of law identified by the Owners in their Claim Form do not arise in the light of the Tribunal's factual findings, but in any event the Owners have not identified any error of law of the Tribunal. The appeal under section 69 of the Arbitration Act 1996 is accordingly dismissed.

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[47] In paragraph 30 of Owners' skeleton and orally.
[48] The Owners accept this latter point: see paragraph 39 of their skeleton argument.