Recent English Case Law Updates

- Good Faith
- Termination
- Force Majeure
- Exclusion Clauses
- Liquidated Damages and Penalties

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Agenda

- **Good Faith**
- - Express Duty of Good Faith
  - *Re Compound Photonics Group Ltd [2022] EWCA Civ 1371*
  - *Hikari Miso (UK) Ltd v Knibbs & Ors | [2023] EWHC 1340 (Ch)*
  - *Health & Case Management Ltd v Physiotherapy Network Ltd [2018] EWHC 869 (QB)*
- - Implied Duty of Good Faith
  - *Candey Ltd v Bosheh [2022] EWCA Civ 1103*
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  - *Pharmapac (UK) Ltd v HBS Healthcare Ltd [2022] EWHC 23 (Comm)*
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  - *DD Classics Ltd v Chen [2022] EWHC 1404 (Comm)*
- - Rejection
  - *Galtrade Ltd v BP Oil International Ltd [2021] EWHC 1796 (Comm)*

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Agenda

- **Force Majeure**
- - Interpretation
  - *European Professional Club Rugby v RDA Television LLP [2022] EWHC 50 (Comm)*
- - Discretion in exercising rights
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  - *Dwyer (UK Franchising) Ltd v Fredbar Ltd [2021] EWHC 1218 (Ch); [2022] EWCA Civ 889*
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  - *Acerus Pharmaceuticals Corporation v Recipharm Ltd [2021] EWHC 1878 (Comm)*
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  - *Buckingham Group Contracting v Peel L&P Investments and Property [2022] EWHC 1842 (TCC)*

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Good Faith

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What is Good Faith?

- Under English law, there is no presumption of good faith.
- Except where:
  - the contract contains an express duty of good faith;
  - a term of good faith may be implied; or
  - the agreement in question is a ‘relational’ contract which may give rise to an implied term of good faith.

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What is Good Faith?

- *Unwin v. Bond [2020] EWHC 1768 (Comm)*
- Express contractual duty of good faith requires the parties to observe a set of "minimum standards":
  - they must act honestly;
  - they must be faithful to the parties' agreed common purpose as derived from their agreement;
  - they must not use their powers for an ulterior purpose;
  - they must deal fairly and openly; and
  - each party can consider and take into account its own interests, but must have regard to the other party's interests.
- However, the courts have emphasised that good faith clauses must be interpreted by close reference to the particular context in which they appear.

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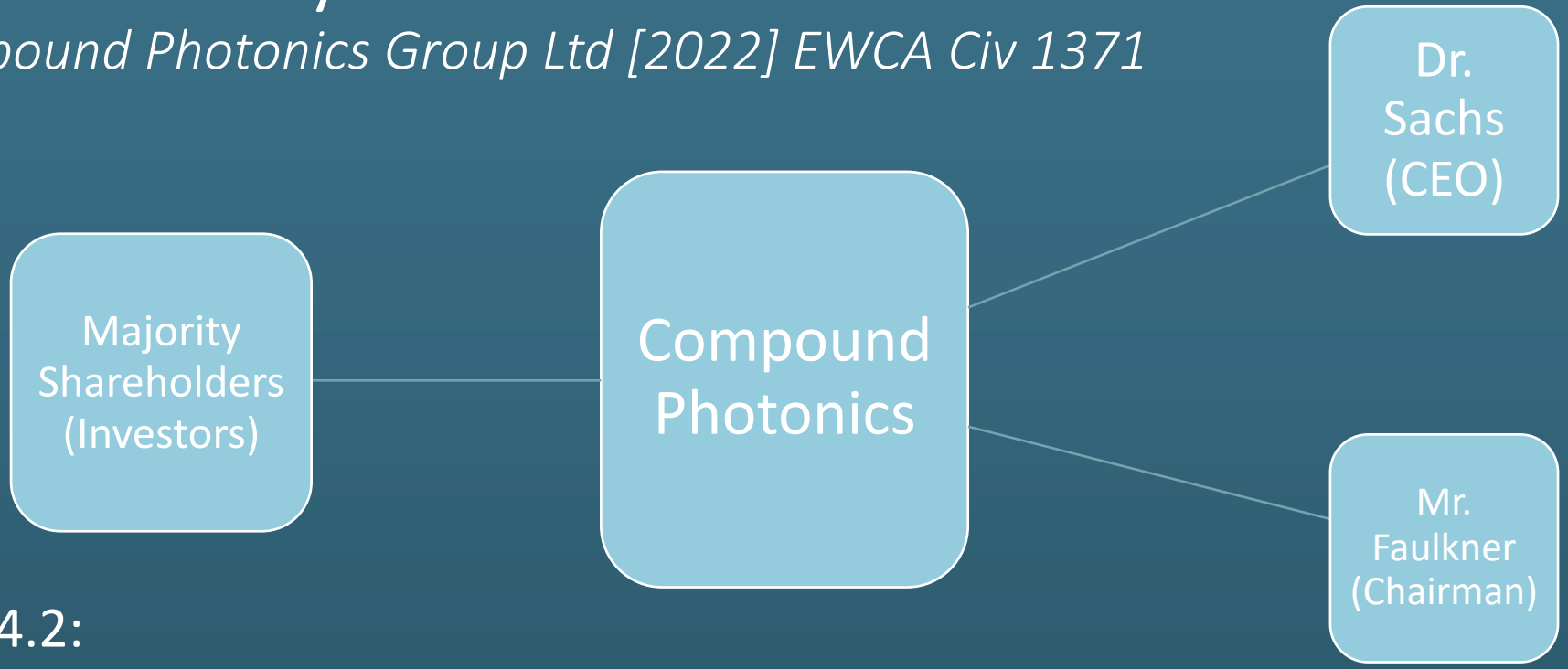
Express Duty of Good Faith

Re Compound Photonics Group Ltd [2022] EWCA Civ 1371



Clause 4.2:

Each Shareholder undertakes to the other Shareholders and the Company that it will at all times act in good faith in all dealings with the other Shareholders and with the Company in relation to the matters contained in this Agreement.

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Express Duty of Good Faith

Re Compound Photonics Group Ltd [2022] EWCA Civ 1371

- The majority shareholders (the "Investors") became disappointed with the progress of a corporate project led by Dr Sachs and threatened to withdraw funding unless he resigned, which he did. The Investors also removed Mr Faulkner by shareholder vote.

- Dr Sachs and Mr Faulker brought a claim against the majority shareholders for amongst other things breach of clause 4.2.

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Express Duty of Good Faith

Re Compound Photonics Group Ltd [2022] EWCA Civ 1371

- High Court Decision:
  - The High Court agreed with Dr Sachs and Mr Faulkner and accepted that, in excluding Dr Sachs and Mr Faulkner, the Investors had acted in breach of clause 4.2 of the Shareholders' Agreement.
- Clause 4.2:

  Each Shareholder undertakes to the other Shareholders and the Company that it will at all times act in good faith in all dealings with the other Shareholders and with the Company in relation to the matters contained in this Agreement.

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Express Duty of Good Faith

Re Compound Photonics Group Ltd [2022] EWCA Civ 1371

- Investors' Appeal:
  - the clause should not have been interpreted to overrule their right to remove Dr Sachs or Mr Faulkner or take control of the Company's management;
  - a duty of good faith could not be breached without a finding of dishonesty or bad faith; and
  - they had genuinely and reasonably formed the view that it was necessary to terminate Dr Sachs and Mr Faulkner for the good of the Company.

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Express Duty of Good Faith

Re Compound Photonics Group Ltd [2022] EWCA Civ 1371

- The Court of Appeal unanimously overturned the High Court decision.
  - The court held that the meaning of a contractual clause encompassing a duty of good faith is contextual.
  - The court did not find any breach of clause 4.2 in respect of the removal of either of the directors as the Investors had rationally and genuinely believed that the decision was in the Company's interests.
  - However, at the same time the court also rejected the idea that a breach of good faith requires evidence of dishonesty.

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Express Duty of Good Faith

Re Compound Photonics Group Ltd [2022] EWCA Civ 1371

- Key Takeaways
  - An express duty of good faith will be interpreted strictly.
  - A contextual approach is required when interpreting an express clause of good faith in a contract.
  - Specific obligations, restrictions or requirements should be clearly expressed – an express duty of good faith will not save you.
  - An express duty of good faith may be breached where the behaviour is commercially unacceptable (by reasonable standards) even if it is not dishonest.

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Express Duty of Good Faith

Hikari Miso (UK) Ltd v Knibbs & Ors [2023] EWHC 1340 (Ch)

- Facts:
  - Hikari Miso acquired the largest shareholding position in a UK-based tofu manufacturing and selling company and entered into a Shareholders agreement (SHA) with the founders and other minority shareholders.
  - The SHA contained a general obligation on the parties to act in good faith toward one another.
  - The SHA also included a buy-out mechanism that would be triggered by a material breach of the SHA.

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Express Duty of Good Faith

Hikari Miso (UK) Ltd v Knibbs & Ors [2023] EWHC 1340 (Ch)

- After Hikari Miso's investment, the company experienced tremendous growth.
- The other shareholders were bullish on the company's continued prospects and wanted to make aggressive capex expenditures.
- Hikari Miso was more cautious about the prevailing economic circumstances and cautioned restraint; often exercising its reserved matters veto rights in respect of those capex proposals.
- Knibbs brought an aggressive claim that Hikari Miso had engaged in a 'strategy of disruption' to the detriment of the Company, breached its duty of good faith by prioritizing its self-interest over the interests of the Company.
- Hikari Miso argued that it was within its rights to act in its own interests when voting on reserved matters. Additionally, its nominee director was not in breach of its duties by acting in accordance with Hikari Miso's instructions.

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Express Duty of Good Faith

Hikari Miso (UK) Ltd v Knibbs & Ors [2023] EWHC 1340 (Ch)

- Decision:
  - The court held that despite competing duties, a shareholder is within its rights to act in its own self-interest, even if that includes acting to the detriment of the company.
  - The court maintained the established position that a nominee director was not required to act in the company's best interests when voting on behalf of his appointing shareholder in a matter reserved to the shareholders. He was merely a messenger.
  - The court also held that the nominee director was not in breach of his fiduciary duty by refusing to vote, or by refusing to participate in discussions about the reserved matter. It was open to him to refer the issue back to the appointing shareholder.

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Express Duty of Good Faith

Hikari Miso (UK) Ltd v Knibbs & Ors [2023] EWHC 1340 (Ch)

- Key Takeaways
  - A shareholder acting in its own self-interest is not inconsistent with an express good faith obligation.
  - Nominee directors will not breach their fiduciary duties to the company when voting on behalf of their appointing shareholder in a matter reserved to the shareholders (even if that is not in the interests of the company).
  - Nominee directors are entitled to refuse to vote or refuse to participate in discussions about shareholder reserved matters.

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Express Duty of Good Faith

Health & Case Management Ltd v Physiotherapy Network Ltd [2018] EWHC 869 (QB)

- Facts:
  - Health & Case Management Ltd ("HCML") and The Physiotherapy Network ("TPN") signed a services agreement under which HCML received a service fee from TPN for patient referrals to its clinics.
  - Clause 3.1 of the services agreement provided that "HCML should act in good faith towards TPN".
  - In 2011, HCML began to build its own network of physiotherapy clinics and requested information from TPN's database of clinics claiming it wanted the information to develop a geographic pricing model.

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Express Duty of Good Faith

Health & Case Management Ltd v Physiotherapy Network Ltd [2018] EWHC 869 (QB)

- Facts:
  - After it had become evident that HCML was setting up its own network of clinics, TPN claimed that the request for its database was a ruse and that HCML had used its database of clinics to develop its own network.
  - TPN alleged that HCML had breached the terms of the contract, breached its obligation of good faith, infringed TPN's database rights, committed passing off and acted in breach of confidence.

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Express Duty of Good Faith

Health & Case Management Ltd v Physiotherapy Network Ltd [2018] EWHC 869 (QB)

- Decision:
  - The court held that HCML had breached the obligation in clause 3.1 to "act in good faith towards TPN".
  - HCML failed to:
    - adhere to the spirit of the contract;
    - observe reasonable commercial standards of fair dealing;
    - be faithful to the agreed common purpose; and
    - act consistently with the justified expectations of the parties.
  - The covert use of TPN's data to establish a rival network while continuing to benefit from the commercial relationship was "opportunistic, underhand and exploitative".

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Express Duty of Good Faith

Health & Case Management Ltd v Physiotherapy Network Ltd [2018] EWHC 869 (QB)

- Key Takeaways:
  - A good faith clause may be upheld when the offending party has:
    - failed to adhere to the spirit of the contract
    - failed to observe reasonable commercial standards of fair dealing
    - failed to be faithful to the agreed common purpose and act consistently with the justified expectations of the parties
    - acted with true intentions that were opportunistic, underhand and exploitative
  - Although, the good faith clause in the services contract 'rescued' TPN, this case emphasizes the high threshold required to enforce a good faith obligation.

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Implied Duty of Good Faith

- What is an implied term?
  - Implied contract terms are items that a court will assume are intended to be included in a contract, even though they are not expressly stated.

- When will a term be implied?
  - the term must be reasonable and equitable;
  - the term must be necessary to give business efficacy to the contract;
  - the term must be so obvious to go without saying;
  - the term must be capable of clear expression and be formulated with sufficient precision; and
  - the term must not be inconsistent with an express term.

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Implied Duty of Good Faith: Relational Contracts

- Implied Duty of Good Faith in Relational Contracts
  - Since *Yam Seng v International Trade Corp* in 2013, it has been clear that English law may recognise an implied duty of good faith in the performance of a contract where that contract is 'relational'.

- A relational contract is one that is long-term and calls for collaboration and co-operation between contracting parties and a greater regard for each other's interests than would ordinarily be required between commercial contracting parties dealing with one another at arm's length.
- Whether a contract is "relational" in nature is highly fact specific.

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Potential Relational Contracts

- Joint ventures or other long-term collaborative contracts.
  - mining/natural resources projects (off-take agreements, long-term supply agreements, subcontracting arrangements);
  - collaborative project management or implementation;
  - technology contracts (research and development agreements, technology outsourcing contracts).
- All of these tend to be long term and involve significant levels of financial commitment. They often involve ongoing relationships between numerous parties and can therefore require separate commercial entities to co-operate for substantial periods of time.

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Implied Duty of Good Faith

Candey Ltd v Bosheh [2022] EWCA Civ 1103

- The claim was brought by a law firm, Candey, against a former client, Mr Bosheh. Candey was engaged by Mr Bosheh in relation to litigation and was retained on the basis of a conditional fee agreement ('CFA') in those proceedings.
- In the event of "Success", Candey would be entitled to its fees based on a doubling of their hourly rates. If the client recovered nothing, no fees would be owed to Candey. A settlement by the client with their opponents would also mean that Candey would not receive any of its fees.

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Implied Duty of Good Faith

Candey Ltd v Bosheh [2022] EWCA Civ 1103

- Facts
  - Bosheh settled the litigation on the understanding that each side would be responsible for its own costs.
  - The settlement meant that under the express terms of the CFA, Candey received nothing by way of fees even though the value of its legal work ran to over a million pounds.
  - Candey alleged that the CFA was a 'relational contract' which imposed an implied duty of good faith on both parties that Bosheh had breached by settling the litigation and denying Candey payment of its fees.

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Implied Duty of Good Faith

Candey Ltd v Bosheh [2022] EWCA Civ 1103

- Court of Appeal
  - In any contract (including a relational contract) the normal test on the implication of terms applies.
  - The term must be necessary to give business efficacy to the contract
    - There was no relevant distinction between a CFA and an ordinary retainer.
  - The term must be so obvious to go without saying
    - There was no authority in support of the idea that a client owes a solicitor a duty of good faith
  - In dealing with the claim that the implied duty of good faith had arisen because the CFA was a relational contract, the court found that a term of good faith would not automatically be implied just because the parties had entered into a relational contract.

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Implied Duty of Good Faith

Candey Ltd v Bosheh [2022] EWCA Civ 1103

- Key Takeaways
  - In any contract (including a relational contract) the normal test on the implication of terms applies.
  - Courts will not rescue a party from a bad bargain.
  - Unwelcome outcomes cannot be resolved by relying on an implied duty of good faith.
  - Clear and precise language is always preferable to relying on implied terms.

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Implied Duty of Good Faith

Essex County Council v UBB Waste (Essex) Ltd (No.3) [2020] EWHC 2387

- Further consideration on Costs:
  - Including an allegation of a breach of an implied duty of good faith as a backstop or alternative allegation can be a dangerous and expensive strategy.
  - In this case, the judge found that because the defendant had made "widespread allegations of a lack of good faith…without any proper foundation", that "of itself" meant it was appropriate to make an order for indemnity costs against the defendant.
  - The judge noted that an allegation of breach of a duty of good faith without proper foundation necessarily involved an attack on the integrity of the individuals alleged to have engaged in commercially unacceptable behaviour.

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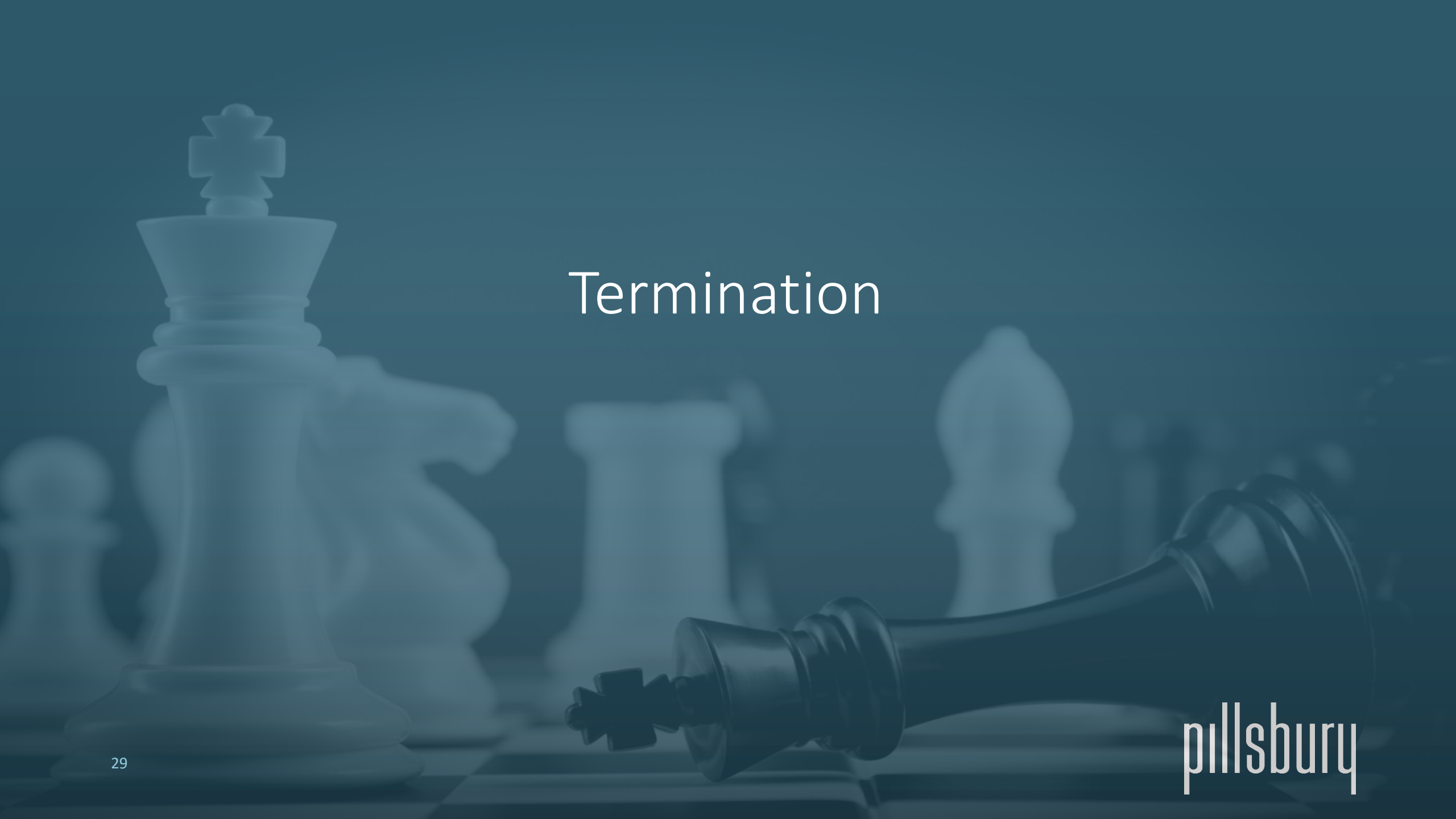

Termination

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Common Law Rights of Termination

Contractual rights of termination and common law rights of termination

- Under common law, right to terminate depends on whether the term breached is a condition, warranty or innominate term
- If innominate term, right to terminate depends on the seriousness of the breach:
  - "go to the root of the contract"
  - "frustrate the commercial purpose"
  - "deprive the party not in default of substantially the whole benefit" of the contract

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Breach and Election

- Breach leading the innocent party to make an election:
  - accept the breach and treat the contract as terminated; or
  - affirm the contract and press the defaulting party to perform
- In both situations, the innocent party can claim damages in the normal way
- Timing of election:
  - Election must be made within a “reasonable” period of time
  - Too early and possibly no legal entitlement (itself a repudiatory breach); too late and risk of affirming the contract

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Affirmation

- Affirmation will often be implied if the innocent party knows of the breach and acts in a manner consistent with treating the contract as continuing
- Doing nothing for too long may be seen as an affirmation
- Once an innocent party has affirmed a contract, the affirmation is irrevocable
- Care must be taken in practice when deciding how to treat a breach to ensure any action taken is not deemed to constitute an election to affirm the contract

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“Time of the Essence”

Contractual deadlines

- General position under English law: time is not of the essence
  - Late performance generally does not entitle the innocent party to terminate
- However, there are three exceptions:
  - Express contractual agreement
  - Implied based on the facts
  - Notice – though ability to terminate on notice expiry will still depend on seriousness of breach unless contract provides otherwise
- Courts will strictly enforce “time is of the essence” deadlines or time periods

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Termination: Time of the Essence and Affirmation

Pharmapac (UK) Ltd v HBS Healthcare Ltd [2022] EWHC 23 (Comm)

- Pharmapac (the Claimant) agreed to purchase five million facemasks from HBS Healthcare (the Defendant) to be delivered in installments of 500,000 per week over the course of 10 weeks. This contract was finalised in an informal email between the parties following an earlier oral agreement.

- The email stipulated that delivery of the first batch of facemasks was due on a specified date, but only commented that the further deliveries were due in nine further "weekly" shipments.

- It did not specify exact delivery dates or whether the time of delivery was a condition of the contract.

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Termination: Time of the Essence and Affirmation

Pharmapac (UK) Ltd v HBS Healthcare Ltd [2022] EWHC 23 (Comm)

- Only the first tranche of facemasks was delivered, as the remaining facemasks were unable to be shipped from India (where the facemasks were manufactured) following the Indian government's export ban on facemasks.
- The Claimant continued to make inquiries about when the next tranche would arrive and the Defendant continued to give multiple reassurances that the facemasks would arrive shortly, and that the Indian government's export ban would soon be lifted.
- After not receiving any additional shipments for three-months, the Claimant sought to terminate the contract.

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Termination: Time of the Essence and Affirmation

Pharmapac (UK) Ltd v HBS Healthcare Ltd [2022] EWHC 23 (Comm)

- Claim:
  - The Claimant argued that "time was of the essence" meaning that delivery was a condition of the contract and it was entitled to terminate the contract for late delivery without compensation and withhold further payment.
  - The Defendant argued that time was not of the essence as it was neither explicitly written in the contract nor was it something that could be guaranteed by the Defendant given the inherent risk when importing goods from abroad.
  - Alternatively, the Defendant argued that if time of delivery was of the essence, the Claimant had affirmed the contract and waived any claims of breach since it appeared willing to wait for the remaining shipments.

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Termination: Time of the Essence and Affirmation

Pharmapac (UK) Ltd v HBS Healthcare Ltd [2022] EWHC 23 (Comm)

- Decision:
  - The judge ultimately concluded that time was of the essence.
  - The judge noted that the parties knew they were entering into a contract during a pandemic, that the tranches were to be delivered "weekly" in short delivery intervals, that demand was high, and that the wider supply market was incredibly volatile.
  - Against this background, the judge concluded that the point of the contract "was not just to get the masks as soon as possible, but to be able to cancel the contract if they had not arrived in time". As such, the Claimant was entitled to terminate the contract.

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Termination: Time of the Essence and Affirmation

Pharmapac (UK) Ltd v HBS Healthcare Ltd [2022] EWHC 23 (Comm)

- Decision:
  - The judge also dismissed the Defendant's argument that the Claimant had affirmed the contract.
  - Importantly, the Defendant gave multiple reassurances that the facemasks would arrive shortly, and that the Indian government's export ban would soon be lifted.
  - The judge commented that the Claimant was entitled to maintain the contract in reliance of these repeated reassurances whilst it considered its position. As such, the judge concluded that the Claimant did not take too long to accept the repudiatory breach, and therefore did not affirm the contract.

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Termination: Time of the Essence and Affirmation

Pharmapac (UK) Ltd v HBS Healthcare Ltd [2022] EWHC 23 (Comm)

- Key Takeaways: Time of the Essence
  - Contractual arrangements should be formalised in detailed written contracts specifying deadlines, performance obligations and the consequences of non-performance. If timing is particularly important, an explicit statement confirming that time is of the essence should be included.
  - Important to remember that there is no presumption in law that the time for delivery will automatically be a condition of a commercial contract.
  - Unless a contract explicitly references whether delivery on a specific date is a condition or a warranty, the clause in question must be construed against the relevant background factual matrix and the words of the contract as a whole.

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Termination: Time of the Essence and Affirmation

Pharmapac (UK) Ltd v HBS Healthcare Ltd [2022] EWHC 23 (Comm)

- Key Takeaways: Affirmation
  - As a matter of law, an innocent party is entitled to a reasonable time from the last breach to consider its position before accepting a repudiatory breach.
  - When deciding whether to accept a repudiatory breach of contract, an innocent party should expressly reserve its position whilst considering its options to avoid any uncertainty.
  - Nevertheless, it is important to ensure that only a reasonable period of time is taken before exercising any relevant rights, otherwise courts may infer that the contract has been affirmed as a result of the inaction.

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Termination: Breach and Affirmation

DD Classics Ltd v Chen [2022] EWHC 1404 (Comm)

- DD Classics Limited (the "Claimant") and Kent Chen (the "Defendant") entered a contract on 24 March 2021 (the "Contract") whereby the Claimant agreed to buy a Ferrari race car for approximately €3.2 million from the Defendant.

- As per clause 3 of the Contract, the Claimant was required to make the payment of the outstanding amount within five business days of the date of the Contract, and failure to make such payment within the specified period would allow the Defendant to terminate the Contract with immediate effect.

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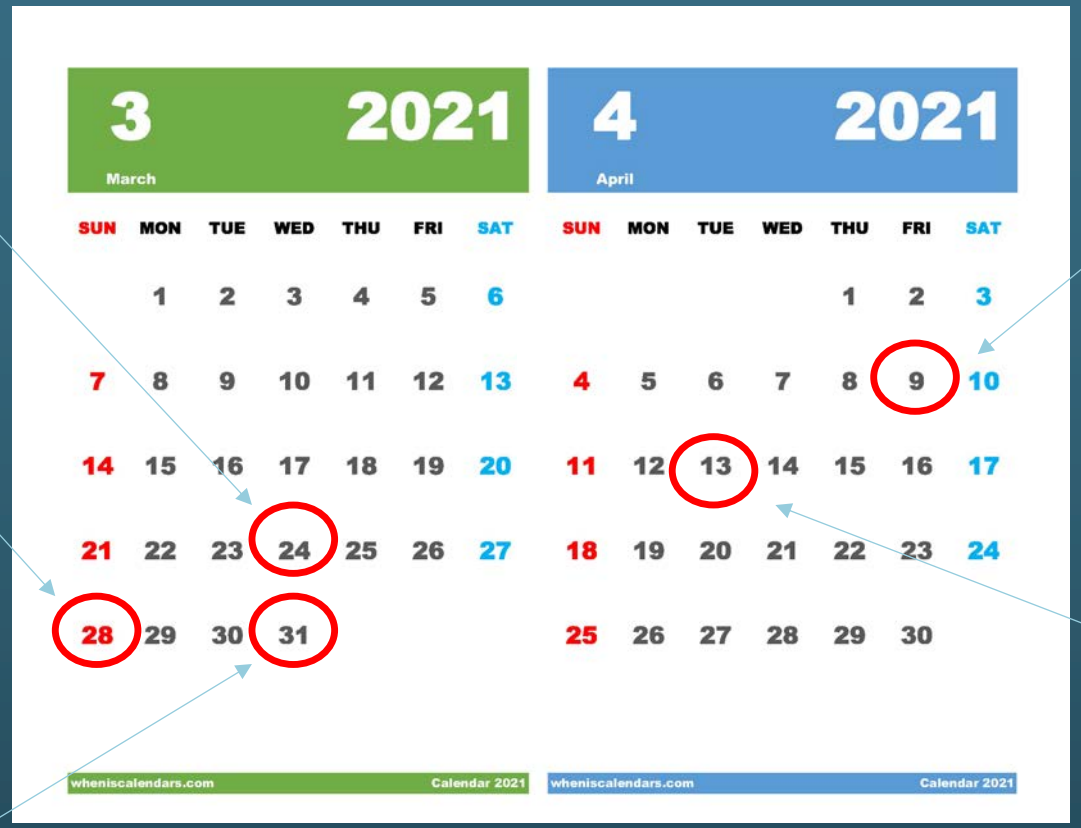
Termination: Breach and Affirmation

DD Classics Ltd v Chen [2022] EWHC 1404 (Comm)

Day 0 (Wednesday): Agreement entered into

Day 2 (Sunday): Deposit paid

Day 5 (Wednesday): Payment due date (not received)



Day 12 (Friday): Claimant informed Defendant remaining amount had been transferred

Day 14 (Tuesday): Defendant purports to terminate Agreement

Termination: Breach and Affirmation

DD Classics Ltd v Chen [2022] EWHC 1404 (Comm)

- Arguments:
  - Although the payment was not made by the Claimant by the due date, the parties were still corresponding with an aim to finalise the transaction.
  - The Claimant argued that the ongoing correspondence between the parties which took place after the payment due date meant that the Defendant had affirmed the contract and therefore had lost his right to terminate.
  - In response, the Defendant stated that he was entitled to terminate the Contract under clause 3 as the payment has not been received on time, and his right to terminate the Contract may be exercised at any time following the breach.

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Termination: Breach and Affirmation

DD Classics Ltd v Chen [2022] EWHC 1404 (Comm)

- Decision:
  - The judge found that the Defendant had lost his right to withdraw from the Contract as he failed to exercise his termination right within a reasonable time period.
  - Clause 3 did not expressly entitle the Defendant to terminate the Contract at any time following the occurrence of a breach.
  - The correspondence between the parties following the due date for the payment was of an affirmative nature and the Defendant actively encouraged the performance of the contractual obligations by the Claimant following its failure to make the payment in time.

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Termination: Breach and Affirmation

DD Classics Ltd v Chen [2022] EWHC 1404 (Comm)

- Key Takeaways:
  - Parties should beware of delaying exercising termination rights because of the risk of affirmation.
  - When engaging in correspondence following the occurrence of a breach, the innocent party should expressly reserve its rights to ensure such correspondence is not interpreted as a waiver of the breach and inadvertently results in the innocent party's loss of its right to terminate.
  - Get legal advice as soon as possible.

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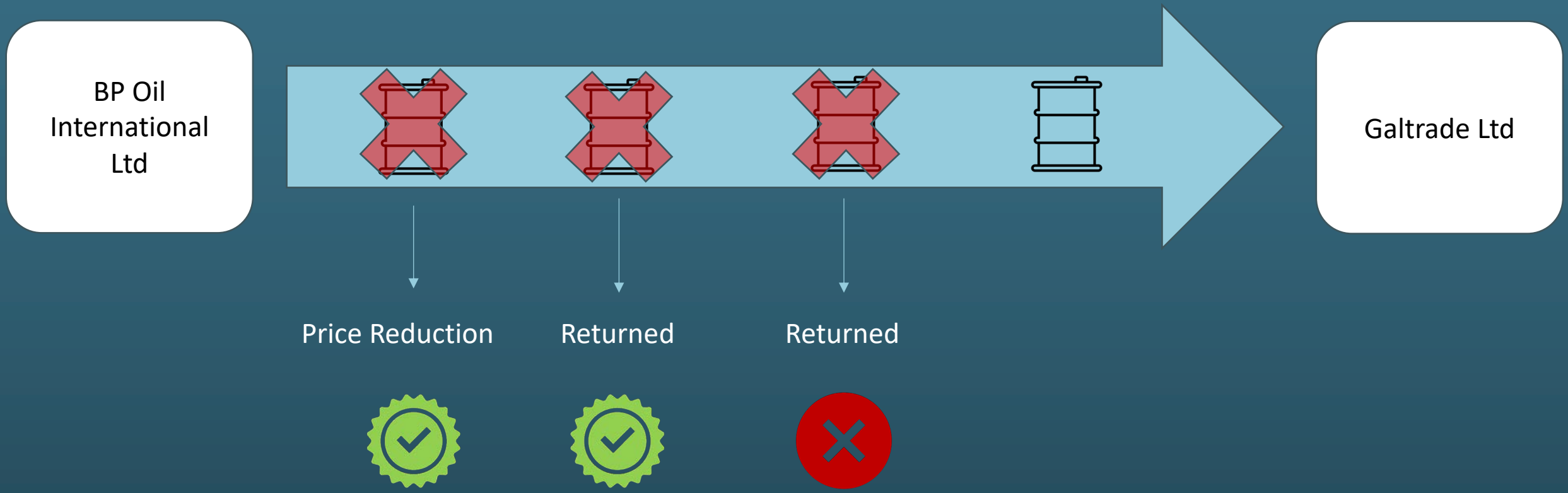
Termination: Rejection

Galtrade Ltd v BP Oil International Ltd [2021] EWHC 1796 (Comm)



Termination: Rejection

Galtrade Ltd v BP Oil International Ltd [2021] EWHC 1796 (Comm)

- Claims
  - The Defendant admitted breach in relation to supplying off-specification fuel oil.
  - Galtrade claimed that it was entitled to reject the cargo, on the basis that the terms as to quality were a strict condition of the contract, or this was a serious breach of an innominate term.
  - BP argued that Galtrade was not entitled to reject the deliveries as the relevant term was not a condition and the breach was minor. BP argued that Galtrade was in breach by rejecting the cargo.

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Termination: Rejection

Galtrade Ltd v BP Oil International Ltd [2021] EWHC 1796 (Comm)

- Decision
  - The obligation to comply with the quality specifications was an innominate term not a condition.
  - The clauses were not described as conditions, and the contract did not state that there was an automatic right to reject if the specifications were not met.
  - Giving Galtrade the right to reject the entire cargo for any deviation would place immense commercial risk on the seller and give immense commercial power to the buyer and would need to be expressly provided for in the contract.
  - It is legitimate to have regard to the nature of the business of the parties when considering whether a term is a condition or innominate.

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Termination: Rejection

Galtrade Ltd v BP Oil International Ltd [2021] EWHC 1796 (Comm)

- Decision
  - The breach did not deprive the Galtrade of “substantially the whole benefit” of the contract and did not give rise to a right to reject.
  - Fuel oil with a sulphur level of 1.53% is not a substantively different product to fuel oil at 1.30% sulphur. Both would be considered to be “low sulphur” fuel oil in the industry.
  - Both experts agreed that the delivery remained marketable at a reduced price.
  - Galtrade had initially tried to re-negotiate the price rather than rejecting the cargo outright and had proved in its past dealings that it could trade (and profit from) off-spec fuel.

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Termination: Rejection

Galtrade Ltd v BP Oil International Ltd [2021] EWHC 1796 (Comm)

- Key Takeaways
  - In the absence of clear agreement to the contrary, the courts will "lean in favour" of construing a provision as an innominate term rather than a condition.
  - If the precise specification of the product is of fundamental importance for the buyer, the buyer may want to reflect this in the drafting of the contract by specifying that the term as to quality is a "condition" or providing that the buyer's remedy for breach is rejection.
  - A buyer must take care when it first realises it has received off-spec goods. Here, the buyer had initially tried to negotiate a revised price with the seller before subsequently rejecting the goods. This indicated that the buyer's problem was one of value, rather than anything more substantial.
  - A buyer in this position should be clear from the start that it is electing to reject the goods, with any negotiations for an alternative solution conducted on a "without prejudice" basis.

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Force Majeure

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Force Majeure in English Law

- Under English common law:
  - No principle of force majeure
  - Doctrine of frustration
- No automatic relief from performance affected by force majeure unless expressly written in the contract
- The purpose of a force majeure clause is to relieve a party from performing its contractual obligations when an unexpected, external event has occurred which prevents it from performing

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Force Majeure: Interpretation

European Professional Club Rugby v RDA Television LLP [2022] EWHC 50 (Comm)

- Under the relevant agreement, European Professional Club Rugby (EPCR) was obligated to stage European Rugby tournaments across four consecutive seasons from 2018 to 2022.
- Under the same agreement, RDA had the rights to transmit live footage of the rugby matches.
- Following the outbreak of the COVID-19 pandemic, the final stages of the 2019-2020 season could not be held as planned. Due to the uncertainty of the pandemic and whether the matches would be able to go ahead, RDA eventually terminated the agreement for force majeure.
- EPCR claimed this termination was unlawful and sued RDA for losses suffered due to their decision to terminate the Agreement.

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Force Majeure: Interpretation

European Professional Club Rugby v RDA Television LLP [2022] EWHC 50 (Comm)

COVID pandemic was caught by the force majeure event definition, which included an "epidemic" and the general wording about events outside a party's control.

> "any circumstances beyond the reasonable control of a party affecting the performance by that party of its obligations under this Agreement including inclement weather conditions, serious fire, storm, flood, … epidemic, embargoes and labour disputes of a person other than such party".

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Force Majeure: Interpretation

European Professional Club Rugby v RDA Television LLP [2022] EWHC 50 (Comm)

EPCR claimed RDA's termination was invalid because EPCR had not given notice per clause 26.1.

Clause 26.1: If either party is affected by a Force Majeure Event which prevents that party from performing its obligations under this Agreement, the affected party shall promptly notify the other of the nature and extent of the circumstances in question.

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Force Majeure: Interpretation

European Professional Club Rugby v RDA Television LLP [2022] EWHC 50 (Comm)

EPCR also claimed that the pandemic-related postponement had also caused difficulties for RDA and therefore was not, under clause 26.4, a party 'not affected by the Force Majeure Event', and was not entitled to terminate the Agreement.

Clause 26.4. If the Force Majeure Event prevents, hinders or delays a party's performance of its obligations for a continuous period of more than 60 days, the party not affected by the Force Majeure Event may terminate this Agreement by giving 14 days' written notice to the affected party.

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Force Majeure: Interpretation

European Professional Club Rugby v RDA Television LLP [2022] EWHC 50 (Comm)

- Decision
  - The court concluded that EPCR's arguments were not consistent with commercial common sense.
    - The obligation to give notice under clause 26.1 was not a condition precedent to the application of the remainder of the force majeure clause.
    - The phrase 'not affected', in clause 26.4, could not be read to mean 'not affected in general' and was clearly a reference to the other party.
  - NB: An appeal to the Court of Appeal has been filed and is currently outstanding.

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Force Majeure: Interpretation

European Professional Club Rugby v RDA Television LLP [2022] EWHC 50 (Comm)

- Key Takeaways
  - Where there are two possible ways of interpreting a clause then the court will prefer the interpretation which is consistent with commercial common sense.
  - Ensure that any force majeure clause includes general language referring to events outside a party's control.

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Force Majeure: Discretion when Exercising Rights

Braganza v BP Shipping Ltd and another [2015] UKSC 17

- Braganza Duty
  - The Braganza Duty is an obligation that may be implied in cases where one party has the right to exercise some form of discretion that affects the rights of both parties to the contract and has a clear conflict of interest.
  - That conflict is heightened where there is a significant imbalance of power between the contracting parties.
  - The Braganza Duty is intended to ensure that such discretion is not abused.

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Force Majeure: Discretion when Exercising Rights

Braganza v BP Shipping Ltd and another [2015] UKSC 17

- The Braganza duty requires a decision maker to exercise its discretion honestly, in good faith and in the absence of arbitrariness, capriciousness, perversity and irrationality.

- There are two limbs that the courts will consider when applying the Braganza Duty:
  - First limb – Did the decision-maker ensure that the right matters were taken into account when reaching the decision?
  - Second limb – Was the decision so irrational that no reasonable person could have made it?

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Force Majeure: Discretion when Exercising Rights

Braganza v BP Shipping Ltd and another [2015] UKSC 17

- Facts
  - In the early hours of 11 May 2009, Mr Braganza, Chief Engineer on one of BP's oil tankers, then in the mid-North Atlantic, disappeared. No-one knows for certain what happened to him.
  - His employer, BP, formed the opinion, based on an investigation involving two internal reports, that the most likely explanation for his disappearance was that he had committed suicide by throwing himself overboard.
  - Under his contract of employment, this finding meant that his widow was not entitled to certain death benefits.

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Force Majeure: Discretion when Exercising Rights

Braganza v BP Shipping Ltd and another [2015] UKSC 17

- Decision
  - *"For the avoidance of doubt compensation for death, accidental injury or illness shall not be payable if, in the opinion of the Company or its insurers, the death, accidental injury or illness resulted from amongst other things, the Officer's wilful act, default or misconduct whether at sea or ashore …"*
  - Mrs. Braganza brought a claim against BP for death benefits owed under Mr. Braganza's employment contract.
  - The Supreme Court decided that BP should have sought more evidence of suicide than it had before finding that suicide had taken place.

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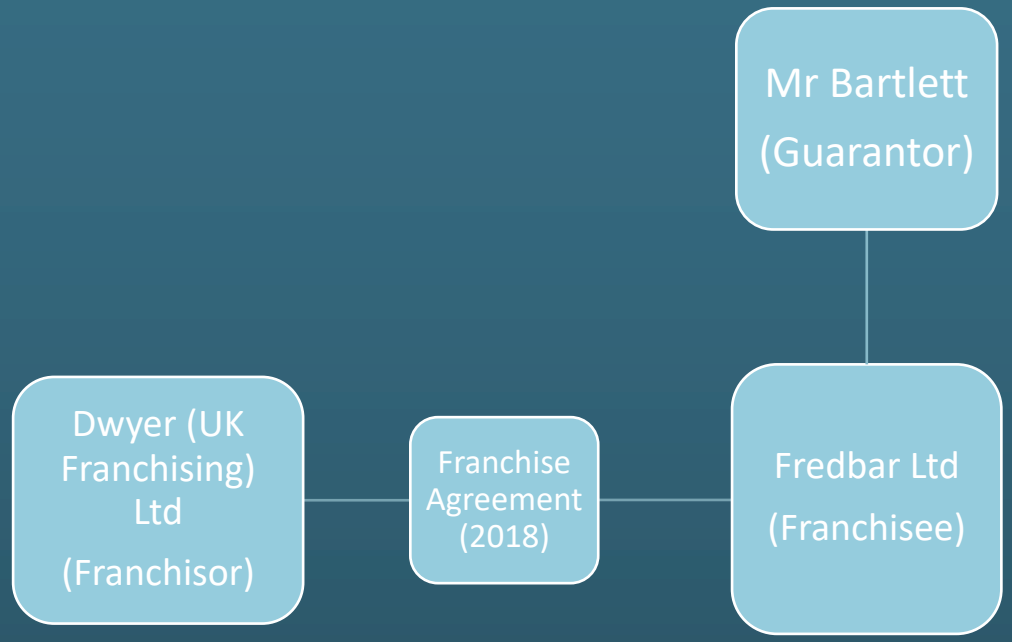
Force Majeure: Discretion when Exercising Rights

Dwyer (UK Franchising) Ltd v Fredbar Ltd [2021] EWHC 1218 (Ch); [2022] EWCA Civ 889

- In 2018 Dwyer (UK Franchising) Ltd, the franchisor of the 'Drain Doctor', a plumbing and drain repair services franchise, entered into a franchise agreement with Fredbar Limited and Mr Bartlett as guarantor.
- Fredbar was run solely by Mr Bartlett, who had formed the company expressly for the purpose of becoming a Drain Doctor franchisee.



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Force Majeure: Discretion when Exercising Rights

Dwyer (UK Franchising) Ltd v Fredbar Ltd [2021] EWHC 1218 (Ch); [2022] EWCA Civ 889

- In March 2020, during the COVID-19 pandemic, Mr Bartlett received notification from the National Health Service that his young son was deemed “vulnerable” and would be best to stay home for the next 12 weeks to avoid the virus.
- Mr Bartlett emailed Dwyer to advise there had been a drop in demand and ask whether the franchise agreement could be suspended under its force majeure provisions.
- Mr Bartlett emailed Dwyer again a few days later, requesting suspension of the agreement on the grounds that he had to self-isolate for his son.

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Force Majeure: Discretion when Exercising Rights

Dwyer (UK Franchising) Ltd v Fredbar Ltd [2021] EWHC 1218 (Ch); [2022] EWCA Civ 889

- Claim
  - Dwyer refused both requests noting that lower demand did not constitute a force majeure event. It disputed that the force majeure clause in the agreement applied.
  - Mr Bartlett purported to terminate the agreement for, amongst other things, breach of the force majeure clause by Dwyer.
  - Dwyer asserted that Mr Bartlett's failure to be bound by the franchise agreement constituted a repudiatory breach and on that basis terminated the agreement, issuing a claim for damages.

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Force Majeure: Discretion when Exercising Rights

Dwyer (UK Franchising) Ltd v Fredbar Ltd [2021] EWHC 1218 (Ch); [2022] EWCA Civ 889

- Unusually, the force majeure clause in the franchise agreement granted the franchisor the discretion to determine whether a particular act or event was a force majeure event.

> Clause 30: 'This Agreement will be suspended during any period that either of the parties is prevented or hindered from complying with their respective obligations under any part of this Agreement by any cause *which the Franchisor designates as force majeure* including strikes, disruption to the supply chain, political unrest, financial distress, terrorism, fuel shortages, war, civil disorder, and natural disasters.'

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Force Majeure: Discretion when Exercising Rights

Dwyer (UK Franchising) Ltd v Fredbar Ltd [2021] EWHC 1218 (Ch); [2022] EWCA Civ 889

- Decision
  - The court found that the there was an implied Braganza duty in clause 30 of the agreement.
  - In exercising its right to designate a force majeure event, the franchisor was obligated to exercise that right honestly, in good faith and in the absence of arbitrariness, capriciousness, perversity and irrationality.
  - The court held that the franchisor had breached its Braganza duty in failing to consider all relevant matters when making its decision not to designate a force majeure event.

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Force Majeure: Discretion when Exercising Rights

Dwyer (UK Franchising) Ltd v Fredbar Ltd [2021] EWHC 1218 (Ch); [2022] EWCA Civ 889

- Decision
  - In choosing to only take into account the general effect of the pandemic on demand and turnover of the business, the franchisor had failed to take account of the specific fact that Mr Bartlett had to self-isolate for 12 weeks for his son's safety, which directly affected Fredbar's ability to supply the services.
  - The judge considered that the force majeure clause was a fundamental term of the agreement and the franchisor's breach of that clause was a repudiatory breach by the claimant which would have allowed Fredbar to terminate the agreement.

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Force Majeure: Discretion when Exercising Rights

Dwyer (UK Franchising) Ltd v Fredbar Ltd [2021] EWHC 1218 (Ch); [2022] EWCA Civ 889

- Key Takeaways
  - Although the terms of this force majeure clause were unusual, this case highlights how the Braganza duty of good faith can be implied even in force majeure clauses where there is an element of discretion.
  - Where a party has discretion in an agreement, care should be taken to check if a Braganza duty would apply and ensure that the party with the power exercises its discretion honestly, in good faith and without arbitrariness, capriciousness, perversity and irrationality.

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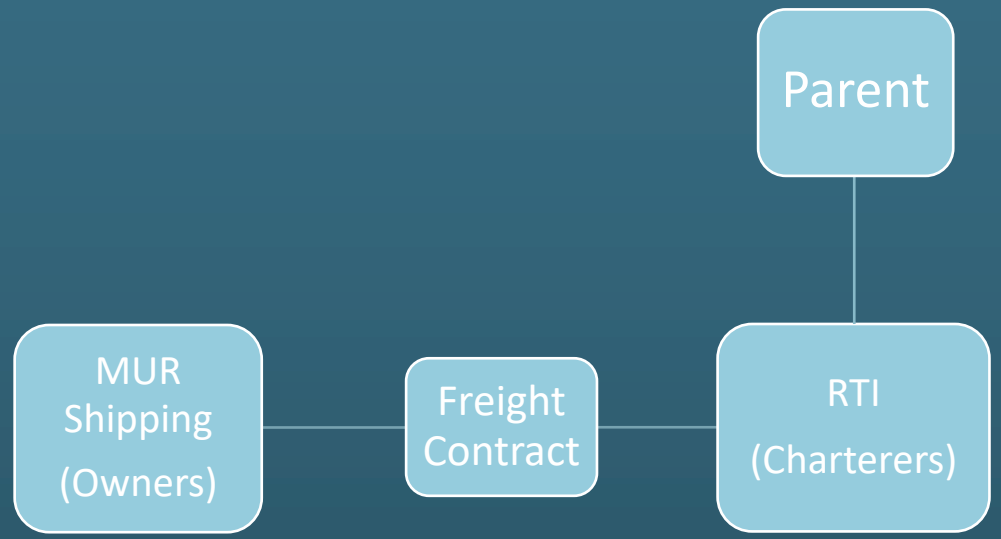
Force Majeure: Reasonable Endeavours

MUR Shipping BV v RTI Ltd [2022] EWCA Civ 1406

- In 2016, MUR Shipping (MUR) entered into a freight contract with RTI Ltd. Under the contract, MUR would transfer goods to Ukraine, on behalf of RTI and RTI would pay for this service in U.S. dollars.
- In 2018, RTI's parent company was added to the U.S. sanctions list. MUR subsequently notified RTI that this was a force majeure event.
- MUR claimed that the U.S. sanctions would:
  - unacceptably delay its receipt of RTI's U.S. dollar payment; and
  - prevent it from being able to load and discharge MUR's goods onto the freight vehicle.



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Force Majeure: Reasonable Endeavours

MUR Shipping BV v RTI Ltd [2022] EWCA Civ 1406

- RTI did not accept that the U.S. sanctions constituted a force majeure event. RTI argued that there was no force majeure event because:
  - MUR were not impacted by the sanctions themselves, so their obligation to load and discharge the freight goods was not impacted; and
  - RTI offered to pay in the alternative currency of Euros and include an indemnity against any costs of conversion so that MUR did not suffer any delay in receiving payment.
- MUR refused to load the freight goods and, accordingly, RTI commenced arbitration for the additional costs of finding another freight shipping company.

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Force Majeure: Reasonable Endeavours

MUR Shipping BV v RTI Ltd [2022] EWCA Civ 1406

Clause 36.3:

A Force Majeure Event is an event or state of affairs which meets all of the following criteria:

d) <u>It cannot be overcome by reasonable endeavors from the Party affected.</u>

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Force Majeure: Reasonable Endeavours

MUR Shipping BV v RTI Ltd [2022] EWCA Civ 1406

- Tribunal Decision (RTI)
  - After analysing the force majeure clause in detail, the Tribunal found that MUR's case failed at the last hurdle (subclause (d)) because the event could have been overcome by "reasonable endeavours."
  - The Tribunal found that payment in Euros was "reasonable endeavours" and would have presented no disadvantage to MUR, and was a completely realistic alternative MUR could have adopted with no detriment.

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Force Majeure: Reasonable Endeavours

MUR Shipping BV v RTI Ltd [2022] EWCA Civ 1406

- High Court Decision (MUR)
  - Referred to the High Court on a point of law under the 1996 Arbitration Act.
  - Is a party is required to accept non-contractual performance if the other party has taken reasonable endeavours?
  - The High Court rejected RTI's argument and overturned the Tribunal's award. The High Court held that the affected party, in this case, MUR, are not "required, by the exercise of reasonable endeavours, to accept non-contractual performance in order to circumvent the effect of a force majeure clause …".

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Force Majeure: Reasonable Endeavours

MUR Shipping BV v RTI Ltd [2022] EWCA Civ 1406

- Majority Court of Appeal Decision (RTI)
  - Although RTI's obligation was to provide US dollars in accordance with its payment obligations, "overcoming" the state of affairs did not mean strictly finding a solution that met such obligation.
  - The state of affairs would be "overcome" if its adverse consequences are completely avoided.
  - In this case, the payment in Euros would "overcome" the state of affairs experienced because of the US sanctions.

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Force Majeure: Reasonable Endeavours

MUR Shipping BV v RTI Ltd [2022] EWCA Civ 1406

- Key Takeaways (for now)
  - Under certain circumstances, a party may have to accept non-contractual performance.
  - In this case, the payment in alternative currency would have entirely "overcome" the state of affairs in question with no detriment to MUR. This may not always be the case and whether non-contractual performance is acceptable will depend on the facts.

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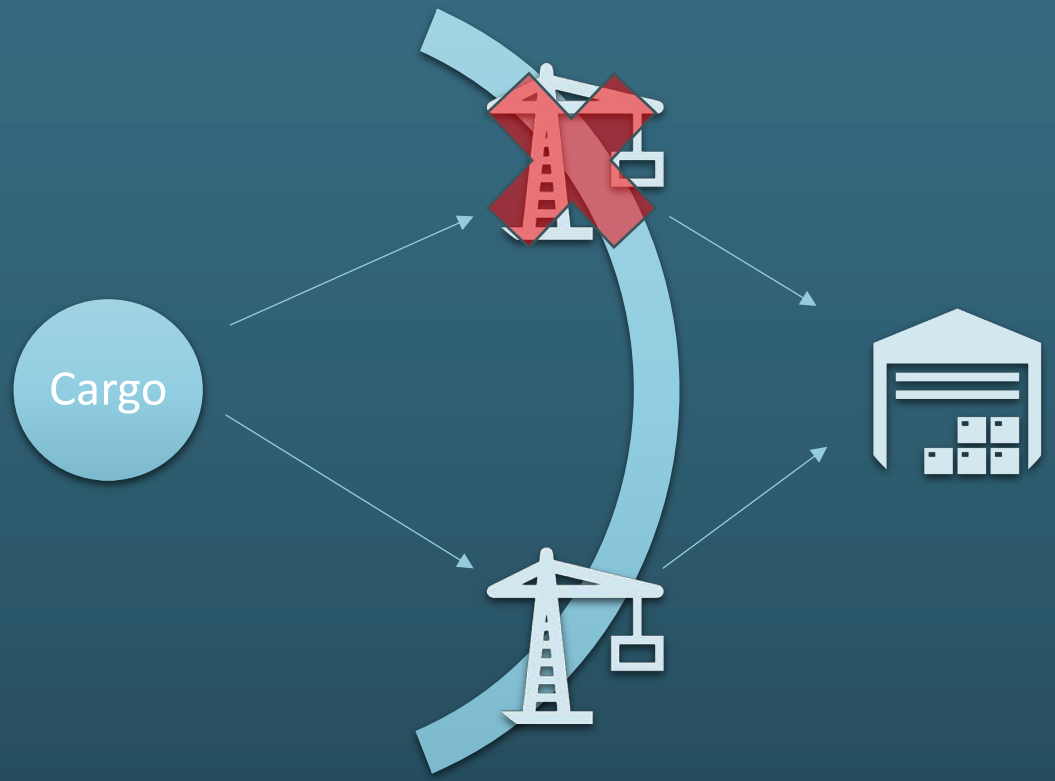
Force Majeure: Reasonable Endeavours

MUR Shipping BV v RTI Ltd [2022] EWCA Civ 1406

- Permission to appeal to the Supreme Court was granted on 6 June 2023.
- “If the parties to the contract intend to allow non-contractual performance, clear express words are required.”
- Is a party required to accept the offer? Or, is a party entitled to insist on strict contractual performance by the other party?



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Exclusion Clauses

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Exclusion Clauses in English Law

- Contra Proferentem Rule
  - An ambiguous contract term will be construed against the party seeking to rely on the term.
  - In practice, the party seeking to include exclusion or limitation of liability clauses must be sure to use clear language.

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Exclusion Clauses: Contextual Interpretation

Acerus Pharmaceuticals Corporation v Recipharm Ltd [2021] EWHC 1878 (Comm)

- Facts
  - Recipharm Limited (Recipharm) was appointed to supply a medicinal product to Acerus Pharmaceuticals Corporation (APC) under a Manufacturing Agreement (the MA).
  - The MA included the following exclusion clause under the third parties indemnities section heading:
    - "… notwithstanding anything contained in this Agreement in no circumstance shall either party be liable to the other in contract, tort… or otherwise howsoever to the other, and whatever the cause thereof (i) for any increased costs or expenses, (ii) for any loss of profit… or (iii) for any special indirect or consequential loss or damage of any nature whatsoever …".

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Exclusion Clauses: Contextual Interpretation

Acerus Pharmaceuticals Corporation v Recipharm Ltd [2021] EWHC 1878 (Comm)

- In breach of the MA, Recipharm failed to supply the medicinal product to APC for over two years. APC sought damages to recover its lost profits and costs.
- APC argued that:
  - despite the wording of the clause, it did not apply to all claims arising out of the contract because the clause was within a section of the contract about indemnities and insurance for third party claims
  - there were other clauses elsewhere in the contract that allowed costs in the event of other failures, which would be inconsistent with a standalone exclusion of liability

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Exclusion Clauses: Contextual Interpretation

Acerus Pharmaceuticals Corporation v Recipharm Ltd [2021] EWHC 1878 (Comm)

- Decision
  - The Court accepted APC's arguments and was also persuaded by the fact that, if the clause was treated as applying to all claims arising from the contract, Recipharm could simply walk away from its obligations without any sanction at all.
  - That outcome would not have been consistent with commercial common sense taking into account the contract and relationship between the parties.

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Exclusion Clauses: Contextual Interpretation

Acerus Pharmaceuticals Corporation v Recipharm Ltd [2021] EWHC 1878 (Comm)

- Key takeaways
  - Courts will consider not only the wording of the clause itself, but also its wider context (such as its position in the contract as a whole) and the commercial consequences of different contractual interpretations.
  - Ensure that any general exclusions of liability are separated out from other provisions in the contract, such as indemnities.
    - Use of separate clauses, numbering and clear sub-headings.
    - If exclusion or liability clauses are particularly wide ranging, consider explaining the rationale or commercial justifications in recitals or in acknowledgments alongside the relevant clauses.

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Exclusion Clauses: Incorporation by Reference

Blu-Sky Solutions Ltd v Be Caring Ltd [2021] EWHC 2619 (Comm)

- Facts
  - On 13 February 2020, Blu Sky, a supplier of mobile phones and telecommunication services, sent an electronic order form (the "Order Form") to Be Caring Ltd ("Be Caring"), a social care provider, for 800 mobile phones.
  - The Order Form stated:
    - "[a]ll orders and contracts are subject to and incorporate our standard terms and conditions by signing this document I agree I have logged on to the Blu Sky website at www.bluskysolutions.co.uk, have read agree and fully understand all terms and conditions regarding the contract and the policy protection scheme & free trial and am bound by the same. I give Blu Sky permission to have third party access to my account. I am duly authorised to sign on the company's behalf."
  - Be Caring did not review the terms of the order form but did return a signed Order Form the following day, on 14 February 2020.

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Exclusion Clauses: Incorporation by Reference

Blu-Sky Solutions Ltd v Be Caring Ltd [2021] EWHC 2619 (Comm)

- Facts
  - On 26 February 2020, Be Caring emailed Blu Sky to cancel the order.
  - Blu Sky immediately responded setting out the cancellation fees under the standard terms and conditions and threatened immediate legal action if an invoice for £180,000 was not paid.
  - Under English common law, if standard conditions include a particularly onerous or unusual condition, such condition will not be incorporated into the contract unless it has been fairly and reasonably brought to the contracting party's attention.

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Exclusion Clauses: Incorporation by Reference

Blu-Sky Solutions Ltd v Be Caring Ltd [2021] EWHC 2619 (Comm)

- Decision
  - The judge found that the relevant clauses were particularly onerous as:
    - a) The sum of the charges bore no relationship to any administration costs incurred or likely to be incurred; and
    - b) The sum under the relevant clause was out of all proportion to any reasonable pre-estimate of its loss resulting from the cancellation.
  - The judge emphasised that the fact that such clauses may also be used by others in the industry did not mean that they were not onerous.

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Exclusion Clauses: Incorporation by Reference

Blu-Sky Solutions Ltd v Be Caring Ltd [2021] EWHC 2619 (Comm)

- The relevant clauses had not been fairly and reasonably brought to Be Caring's attention:
  - Prior to receiving the Order Form, Blu Sky did not tell Be Caring that it would be exposed to a very substantial liability should it decide to cancel its order;
  - Although the Order Form did refer to Blu Sky's terms and conditions, it did not explain their purpose or give any warning that they imposed potentially substantial obligations;
  - It would have been perfectly feasible to include the terms and conditions as part of the Order Form; and
  - Blu Sky made no attempt to highlight the relevant clauses.

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Exclusion Clauses: Incorporation by Reference

Blu-Sky Solutions Ltd v Be Caring Ltd [2021] EWHC 2619 (Comm)

- Key Takeaways:
  - This judgment reinforces the need for businesses to consider very carefully their standard terms and conditions and how they are communicated to counterparties, even when dealing with another commercial entity.
  - With contracts being increasing executed online and referencing terms online, additional care needs to be taken to draw counterparty's attention to any terms that are unusual or onerous .
  - Prudent steps which can be taken in this regard include:
    - Annexing a copy of the terms and conditions to the contract where possible;
    - Bringing potentially onerous provisions to the counterparty's attention (e.g. by use of capitalisation or large fonts to draw the relevant clause to the attention of the counterparty in the contract itself); and
    - if cancellation fees or similar amounts are proposed in the agreement, include a statement that the parties acknowledge that the amount is a genuine pre-estimate of loss and internally prepare documentation that supports that amount.

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Liquidated Damages & Penalties

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Penalties in English Law

- If a provision in a contract constitutes a penalty, that provision is unenforceable.
- *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79*
  - extravagant or unconscionable with the predominant function of deterring a party from breaching the contract instead of compensating the innocent party by way of genuine pre-estimate of loss
- *Cavendish Square Holding BV v Talal El Makdessi [2015] UKSC 67*
  - Does the relevant term seek to protect a legitimate interest of an innocent party?
  - Is the remedy “out of all proportion” to that legitimate interest?
- The pre-*Cavendish* test ("genuine pre-estimate of loss”) continues to be a good rule of thumb in practice.

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Liquidated Damages & Penalties: Uncertainty

Buckingham Group Contracting v Peel L&P Investments and Property [2022] EWHC 1842 (TCC)

- Facts
  - Buckingham Group Contracting Ltd (Claimant) was engaged by Peel L&P Investments and Property Ltd (Defendant) for the design and build of a new manufacturing facility and associated external works.
  - The conditions provided for payment of liquidated damages at the rate stated in Schedule 10 of the contract particulars.
  - Schedule 10 contained a table setting out:
    - a list of milestone dates up to a practical completion;
    - a proposed contract sum;
    - two sets of daily rates for liquidated damages;
    - two sets of weekly rates for liquidated damages; and
    - a liquidated damages cap.

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Liquidated Damages & Penalties: Uncertainty

Buckingham Group Contracting v Peel L&P Investments and Property [2022] EWHC 1842 (TCC)

- Argument
  - The claimant commenced a claim, seeking declarations that the liquidated damages provisions were void for uncertainty.
  - The claimant argued that the provisions were uncertain because:
    - the contract particulars and Schedule 10 referred to different dates for completion
    - Schedule 10 contained two different sets of rates
    - The contract contained different amounts in respect of the contract sum and the proposed contract sum in Schedule 10 which was used to calculate the weekly rates
    - Schedule 10 did not provide a scheme for partial completion/possession

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Liquidated Damages & Penalties: Uncertainty

Buckingham Group Contracting v Peel L&P Investments and Property [2022] EWHC 1842 (TCC)

- Decision
  - The court found that the contract was not uncertain. By including a bespoke milestone date regime in Schedule 10, which included a date for practical completion of the whole of the works, and liquidated damages mechanism, the parties must have intended for that clause to operate as the sole regime in this respect.
  - While negotiations pre-contract are normally considered irrelevant to the determination of how a contract is to be construed, the court found that it was appropriate in this instance to take into consideration witness evidence regarding the factual background as to how and why the parties included Schedule 10.

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Liquidated Damages & Penalties: Uncertainty

Buckingham Group Contracting v Peel L&P Investments and Property [2022] EWHC 1842 (TCC)

- Key Takeaways:
  - This decision reminds us that the courts remain reluctant to hold that liquidated damages provisions are void for uncertainty in circumstances where a clear interpretation can be deduced.
  - It is vital that parties ensure their contract terms (and schedules!) are checked for inconsistencies and ambiguities to mitigate the likelihood of disputes of this nature.

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Thank you

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