# CONTRACTUAL PERFORMANCE IN TIMES OF PERIL

By Sean Wilken QC

**Anyone who has ever studied or taught contract law recalls the process of learning about the law of frustration – which usually ends with the mantra that a truly frustrating event is almost impossible to establish. Indeed, it is for this reason that *force majeure* clauses were invented, the parties could agree that in a certain limited set of circumstances, the obligations to perform and to pay for performance could be suspended.**

Relying on *force majeure* clauses is itself not without difficulty. Not only does there have to be a *force majeure* event within the terms of the contract – but that *force majeure* event must cause the suspension of performance. Where alternate performance is possible, even if it is commercially unwise, there may well be no *force majeure*.[1] Thus, outside of the context of ship being unable to dock because war has just been declared, *force majeure* may not assist parties trying to ascertain what their performance obligations are in times of peril. This difficulty may be even more acute in the age of global supply chains where there is a time of peril but its extent, severity and impact on performance may vary from place to place. Thus, a seller of goods may not be able to provide all the goods contracted for or from the supplier contracted for but, perhaps can provide a lesser quantity of goods from a different provider – what does the common law do in those situations?

The usual mantra in response is that the seller is obliged to perform and if it does not, then the seller is in breach. There are, however, cases that suggest a more imaginative solution is possible. There are two that seem particularly relevant at present: the impact of times of peril on global supply chains; and what, if any authority, is there on the impact of disease on performance of a contract.

In cases where there has been an event where a global supply chain has been interrupted, the courts may be deploying the doctrine of variation by necessity.

1 See eg *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640 (Comm)

In a series of extremely difficult cases,[2] the Courts considered the issues arising from the Mississippi floods in 1973 and the subsequent ban imposed by the US Government on exports of American soya bean meal. At the time, the market in soya beans was extremely volatile. As a result, trading in soya bean futures could be very profitable and a specific pattern of trading emerged. The purchaser, B, would enter into a sales contract with the seller, A, for delivery of a consignment of soya beans in, say, seven months' time. At that date, B would know that the cargo would be shipped cif under a GAFTA 100 form.[3] B would, however, neither know to which port the soya would be shipped, nor the date of the bill of lading, nor the size of the cargo. Depending on market conditions, B would sell on the benefit and burden of the contract to another purchaser, C, who would then sell on to another, D, and so on. The result was that a cargo could be the subject of a whole 'string' of futures sales before a final sale and purchase took place. Further, the futures market was dominated by a limited number of companies which would be involved in numerous such strings and could be involved on more than one occasion in any one string.[4] At some point during the process, the destination port, the date of the bill of lading, the name of the vessel and the total size of the consignment would be passed to B and then down the string by a Notice of Appropriation.[5]

In mid-1973, the Mississippi flooded destroying the US soya bean crop. The US Department of Commerce therefore embargoed any shipment of soya bean from the US except for those goods afloat or in the course of being loaded. The embargo was then followed by the introduction of a licensing system. Soya bean exports were limited to a fraction of that which they had been with little or no prospect of the restrictions being relaxed. The only readily available source of soya bean comprised the soya bean cargoes afloat, known as the loophole cargoes. The loophole cargoes represented a fraction of the total amount of soya bean cargoes which had already been sold by forward delivery. Therefore, a seller in the string, D, was in the difficult position of having to find soya bean from the loophole cargoes to meet its obligation to the next purchaser in the string, E. Once D had found a loophole cargo, D had a choice. D could probably satisfy one of its purchasers in one string from that cargo. However, D could not satisfy the other purchasers in other strings as well. Therefore, D could only perform its obligation to one party by deliberately not choosing to perform its obligations to others. Further, with regard to those other purchasers, D could not, on traditional principles, argue that the contract had been frustrated, as D had chosen not to perform the contract even though the choice had arguably arisen from *force majeure* or a frustrating event.

In considering these difficulties, the Courts appeared to come to three differing conclusions.

In two cases[6] the Courts held that D could properly perform his obligation to the buyer if he delivered less than the contractual amount, if D had *"contractual commitments to more than one buyer under contracts in identical terms save as to price and quantity, and where without actionable fault on his part he has insufficient goods available to supply all his buyers"* and D distributed his goods pro rata among all the buyers.[7] Mr Justice Goff rationalised the ability to prorate as follows:

> *"[I]n the absence of any term to the contrary, the buyer under a contract containing such a clause must contemplate that the seller has other customers besides himself, and must also contemplate that the seller will take reasonable steps to fulfil the needs of other customers.*[8]"

In *Bremer Handelsgesellschaft mbH v Vanden Avenne Izegem PVBA*,[9] however, the House of Lords appeared to suggest that prorating was one form of performance but it might also be possible for the seller to perform in any reasonable way and still not be in breach.[10] The House of Lords, however, formally left the question open by stating that, on the facts of that case, prorating did not arise.[11] A small shipment of 90 tonnes was at issue and to require prorating would have left each buyer with a de minimis quantity of soya bean meal and was 'destructive of commercial reality'.[12] By way of contrast, in *Pancommerce v Veecheema*[13] Lord Donaldson MR stated:

2 That difficulty was recognised by the Courts at the time, the litigation being described as an 'unattractive piece of forensic history' (*Andre & Cie SA v Tradax Export SA* [1983] 1 Lloyd's Rep 254 at 258 cols 1–2 per Kerr LJ) with those involved being the 'cognoscenti in this recondite field' (*Tradax Export SA v Cook Industries Inc* [1982] 1 Lloyd's Rep 385 at 387 col 2 per Kerr LJ).

3 A Grain and Feed Trade Association cif contract which provided for English law to be the proper law of the shipping contract and for arbitration of the issues arising from the shipping contract to take place in London.

4 The involvement of a company at more than one point in the string would create a 'circle'; ie, the process restarting albeit at a different buying/selling price.

5 The Notice of Appropriation had to be a particular form, defects in which led to particular issues of waiver arising—as to which see paras 4.16 and 4.27 below; para 22.03 below.

6 *Westfaliscbe Central Genossenschaft GmbH v Seabright* per Goff J (as he then was), unrep but cited in *Bremer Handelsgessellschaft mbH v Continental Grain* [1983] 1 Lloyd's Rep 269.

7 See *Bremer, ibid* at 280 col 2 per Mustill J as he then was.

8 *Seabright, supra in Bremer* at 292.

9 [1978] 2 Lloyd's Rep 109.

10 See Lord Wilberforce at 115 col 1. See also *Intertradex SA v Lesieur-Torteaux SARL* [1978] 2 Lloyd's Rep 509 at 513; Bremer *Handelsgesellschaft mbH v C Mackprang Jr (No 1)* [1979] 1 Lloyd's Rep 221 at 224, 228; *Continental Grain Export Corp v STM Grain Ltd* [1979] 2 Lloyd's Rep 378 at 473.

11 See Lord Wilberforce at 115 col 1; Lord Salmon at 128 col 2.

12 See Lord Russell at 131.

13 [1983] 2 Lloyd's Rep 304.

*In the face of unforeseen events, parties are often faced with a stark difficulty of either performing a contract which has materially changed from the bargain originally entered into or alleging that the contract has been frustrated.*

> *"There is no English authority justifying the proposition that where a seller has a legal commitment to A and a non-legal moral commitment to B and he can honour his obligation to A or B but not to both, he is justified in law in potentially honouring both obligations.*[14]*"*

From those conclusions, it is relatively strongly arguable that the parties' obligations were altered by reason of the circumstances. D, the seller, could supply fewer goods than it had contracted to supply and the other parties to the contract were, it appears, obliged to accept that lesser performance as proper performance. It would appear therefore that the contract had been varied. That variation took place in order to preserve the contract in face of a potentially frustrating event. Although it would appear that these cases are anomalous, with none of the requirements for a variation being satisfied, the better view is that these cases do fall within the law as it applies to variation. If one adopts Mr Justice Goff's analysis that the parties are deemed to have agreed to act as commercial men, commercial men in those particular circumstances agreed to vary the agreements as and when commercially appropriate. Thus, the Courts spelt out, from the particular trading conditions, an agreement to prorated or reasonable performance in the event of an embargo. Put another way, where commercial circumstance dictated, the contracts were of necessity varied.

It follows that these cases can be treated as not being anomalous. What is unclear, however, is whether these cases lay down any rule that can be generally applied. On the one hand, in *Bremer*, the decision of Mr Justice Mustill, as he then was, was clearly premised on there being a series of identical contracts. If that is right, then the doctrine of variation by necessity would be of limited application. On the other hand, the doctrine may not be so limited. Thus, for example, the obligation to perform a 'standard' bipartite supply contract will be altered if there is a shortage of the relevant goods even where there is no string of identical contracts.[15]

On a particularly topical note, this idea of a variation by necessity has been considered in areas affected by disease.

In *Lawrence v Twentiman*,[16] a builder contracted to build a house within a certain period. Before that period had started and throughout the period, however, the area in which the house was to be built was badly affected by plague. The Court held that the obligation to build the house was suspended whilst the plague affected the area. Whilst it is doubtful that there is an established doctrine of suspension in English law,[17] *Lawrence* does suggest that the doctrine of variation by necessity is not to be confined to multi-party international trade contracts.

English law may therefore allow for a nascent doctrine of variation by necessity. The existence of such a doctrine would make practical and commercial sense for two reasons. First, in the face of unforeseen events, parties are often faced with a stark difficulty of either performing a contract which has materially changed from the bargain originally entered into or alleging that the contract has been frustrated.[18] Where the parties to the contract are two experienced commercial entities, it seems unnecessary to put the parties to that election if some mechanism can be created for preserving their contract. Second, there is little logical reason for drawing a distinction between the Mississippi Flood cases and other, albeit less factually complex, commercial transactions.

14 At 307 col 1.

15 See *Sainsbury Ltd v Street* [1972] 1 WLR 834; and also *Tennants (Lancashire) Limited v CS Wilson & Co* [1917] AC 495 at 511–12 where Viscount Haldane suggested that there might be lawful pro rata performance of a supply contract.

16 1 Rolle's Abridgement Conditions G p 10 (p 450) cited in Hall v Wright (1858) EB & E 746 at 758, 790; 120 ER 688 at 693.

17 It is clear that there is no right to suspend performance in the light of another party's breach (see *Channel Tunnel Group v Balfour Beatty* [1992] 1 QB 655 at 666; *Terkol Rederierne v Petroleo Brasilero SA (The Badagry)* [1985] 1 Lloyd's Rep 395 at 399; *Canterbury Pipelines v Christ Church Drainage* [1979] NZLR 347). However, it is debatable whether a distinction may be drawn between suspension in response to breach as opposed to suspension in the face of a potentially frustrating event.

18 See eg *British Movietonenews Ltd v London and District Cinemas* [1952] AC 166 at 185.