

**Page 724**

In *CTI Group Inc v Transclear SA* [2008] EWCA Civ 856, [2008] 2 Lloyd's Rep 526 the Court of Appeal underlined the fact that the doctrine of frustration operates within very narrow confines and also emphasized the need to examine the terms of the contract with care before deciding whether or not a contract has been frustrated. More particularly, they affirmed that, as a general rule, a contract for the sale by description of unascertained goods of a specified origin will not be frustrated simply by a failure on the part of the ultimate supplier to make goods available for delivery.

The facts of the case can be set out as follows: (i) the sellers entered into a contract to sell a cargo of cement FOB the Mary Nour at Padang; (ii) the intention of the buyers in entering into the transaction was to import the cement into Mexico in breach of a cartel then operated in Mexico by a company known as Cemex; (iii) the sellers made arrangements with a local supplier, PT Semen Padang, for the shipment of the cargo but did not enter into a binding contract with it for the loading of the vessel; (iv) Cemex used its commercial influence to persuade PT Semen Padang not to provide the goods and to dissuade other potential suppliers in the region from supplying them; (v) the sellers failed to deliver the cargo; (vi) the buyers brought an action to recover damages from the sellers and (vii) the sellers sought to rely (*inter alia*) on the doctrine of frustration in order to absolve them from liability.

The dispute was referred to arbitration and the arbitrators held that the contract had indeed been frustrated because performance of the contract had become impossible. The buyers appealed and Field J held that the contract had not been frustrated. The sellers in turn appealed to the Court of Appeal who dismissed the appeal and held that the contract had not been frustrated.

In deciding that the contract had not been frustrated, the Court of Appeal confirmed a number of points. First, that the doctrine of frustration operates within very narrow limits. It is necessary to establish that the performance of the contract in the new situation would be fundamentally different from that originally contemplated. Further,

‘in deciding whether that is the case it is necessary to have regard to the general nature of the contract as well as its specific terms, the context in which it was

made, and the contemplation of the parties as to the range of circumstances in which it might come to be performed.'

Second, they affirmed that the principles of frustration are capable of applying to a contract for the sale by description of unascertained goods of a specified origin. But they also affirmed that, in the absence of some exceptional supervening event, such a contract will not be frustrated simply by a failure on the part of the ultimate supplier to make goods available for delivery. The reason for this is that it is implicit in the arrangement that the seller will either supply the goods itself or (more likely) will make arrangements, directly or indirectly, for the goods to be supplied by others. In this way the seller undertakes a personal obligation to procure the delivery of contractual goods and thereby takes the risk of its supplier's failure to perform.

Third, it is not the case that such contracts can never be frustrated. They can be but this will only arise in exceptional circumstances. Before it can do so, however, the supervening event must render performance impossible or fundamentally different from what was originally envisaged. An example might be a prohibition of export rendering the shipment of the goods unlawful.

The fourth point concerns the role of choice. In concluding that the contract had not been frustrated, the court attached importance to the fact that, however much pressure Cemex put on suppliers, the nature of the obligation remained the same. In this context Moore-Bick LJ attached importance to the role of choice. He stated that 'whether the suppliers chose to succumb to [the] pressure was a matter of choice' and that 'the operative cause of the failure to ship the goods was still the supplier's decision to succumb to pressure from Cemex.' One might quibble with this on the ground that the choice was not really a meaningful one but it would appear that the law does not require the existence of a meaningful choice: it suffices that a choice exists (see further on this *The Super Servant Two* [1990] 1 Lloyd's Rep 1 (on p.730 of the textbook).

The fifth point concerns the role of risk. The Court of Appeal concluded that it was the sellers who bore the risk of a refusal on the part of the supplier to make goods available and, this being the case, they could not resort to the doctrine of frustration in order to shift that risk to the buyers.

The sixth point concerns the ability of a court to review a finding by an arbitrator that a contract has (or has not) been frustrated. The Court of Appeal affirmed that, where frustration is in issue, the court should generally accept the arbitrators' conclusion (see *The Nema* [1982] AC 724). This is especially so where the issue is one of fact and degree, which requires a careful evaluation of a range of factors which a commercial tribunal is particularly well equipped to undertake. But in cases where the issue calls for the 'application of established principles to a clearly defined event rendering performance impossible', matters are otherwise because the case then gives rise to a 'clear-cut issue of law' and a court is able to intervene in the finding of the arbitrator. The present case was held to fall within the latter category. Thus, while the court had to accept 'loyally the findings of fact made by the arbitrators' the court did not need to be 'unduly inhibited by the arbitrators' conclusion that the facts they have found are sufficient to satisfy the legal test for frustration.'

The final point is that the case affirms the need to include in a contract a carefully drawn force majeure clause. Given the inability of the seller to rely on frustration in a case of this nature, the seller must look to the terms of its contract for protection and that is most likely to be found in a force majeure clause.