Invalid Force Majeure Notice? Get Your Termination Strategy Right

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PRACTICES Shipping Dispute Resolution, Europe, Middle East and Africa, Offshore Oil and Gas, Offshore Oil and Gas Dispute Resolution, International, Shipping

Olam Global Agri Pte Ltd v Holbud Ltd[1] is an interesting example of the pitfalls that can be encountered when terminating a contract. Under English law, where one party is in repudiatory breach of a contract, and a termination right thereby arises for the other (innocent) party, essentially two options arise for the innocent party. Either terminate the contract and redeploy any resources that were needed by the innocent party to perform its obligations; or keep the contract alive and keep those resources available.

If the innocent party declines to terminate, but still redeploys those resources (so that it can no longer perform its own obligations under the contract), it runs a very serious risk of forfeiting its right to claim damages.

This is why, when presented with a termination scenario, an innocent party must urgently seek legal advice in order to ensure that its position is not unintentionally compromised.

Background

The dispute arose in respect of a FOB sale contract under which Olam International Ltd[2](“**Olam”**) agreed to supply Holbud Ltd (“Holbud”) with a cargo of yellow corn between 1 and 15 March 2022 (the “**Contract**”). The Contract incorporated the general terms of GAFTA Contract No 49 dated 19 November 2021 (“**GAFTA 49**”). Under the Contract, Olam was permitted to choose corn of Ukrainian or Romanian origin and nominate a Black Sea port for delivery from one Romanian and three Ukrainian ports.

On the day of the invasion, but before the closure of the Black Sea ports later that day, Olam declared that the corn would be of Ukrainian origin. Olam was no doubt looking for a way out of the Contact, anticipating that it would not be possible to supply Ukrainian origin corn.

Holbud rejected this, stating that it would not accept any declaration of force majeure (if one were to be made). Holbud stated that the cargo should be loaded from Romania and nominated the “MV The Finder” (the “**Finder**”) to perform Holbud’s obligations under the Contract. The estimated time of arrival of the vessel was 6/7 March. Two days later Olam nominated a (by then) closed Ukrainian port. Following correspondence between the parties, on 2 March, Olam sent a force majeure notice – Olam stated that its declaration of Ukrainian origin was made before the closure of all Black Sea ports and so could not be changed.

Holbud pressed for Olam to withdraw its force majeure notice, which Olam refused to do. On 9 March, Holbud indicated that Olam’s refusal to do so amounted to a repudiatory breach of the Contract. However, it was not until 26 April that Holbud actually terminated the Contract (by accepting Olam’s repudiatory breach as bringing the Contract to an end). In the meantime, as from 16 March (the last day of the contractual delivery period) and therefore prior to its termination of the

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Contract, Holbud employed the Finder on other work, i.e. the Finder was not in a position to perform Holbud's obligations under the Contract.

GAFTA Arbitration

Holbud referred the dispute to arbitration before GAFTA's First Tier Tribunal, who found that Olam had been in repudiatory breach and was liable to Holbud for substantial damages.
On appeal by Olam, GAFTA's Board of Appeal ("**BOA**") found that Olam's declaration of force majeure was invalid because a seller cannot nominate an unsafe port after it has become subject to an event of force majeure and then use that nomination to claim relief. Olam was therefore found to be in repudiatory breach of contract.

Olam, however, also advanced a key argument in the BOA proceedings and which was central to the appeal before the Commercial Court. Olam argued that Holbud was unable to perform the Contract because the Finder was employed on other work from 16 March and that Holbud no longer had a right under Clause 6 of the Contract to substitute another vessel. On this basis, Olam argued that, even if Holbud established a repudiatory breach of contract by Olam (which it did), the damages caused to Holbud by the breach must be assessed at nil. This was on the basis of the "compensatory principle". The compensatory principle, as explained in *Flame v Glory Wealth Shipping* [2014] QB 1080, requires a hypothetical exercise to establish what would have happened had there been no repudiation in order to assess the loss of the innocent party. Holbud (the innocent party) was therefore required to prove that it could still perform the Contract, notwithstanding Olam's repudiatory breach (the declaration of force majeure).

The BOA rejected this argument by Olam, but its reasoning was in a very condensed form. In short, the BOA took the view that, because Olam had declared force majeure, this argument was "*unattractive*" – however there was no analysis by the BOA of whether Holbud could (and would) have substituted the Finder.
Olam was therefore liable in damages for breach of the Contract in the sum of €4,820,760 (being the difference between the contract price and the market price).

Appeal to the Commercial Court

Olam was granted permission to appeal on a point of law on two questions. Those questions were both linked to its case that Holbud was unable to perform the Contract because the Finder was employed on other work and Holbud could not substitute.

1. Performance and Estoppel

Question 1 – Where a party is in repudiatory breach of a contract having wrongly declared force majeure, is the innocent party (Holbud) required to prove (in order to recover substantial damages) that, but for the repudiation, it would have been able to perform its obligations under the contract?

Olam argued that the BOA's award was wrong in law as the compensatory principle was applicable. It was again Olam's case before the Court, as it was before the BOA, that Holbud was required to prove that it could still perform the Contract. Olam submitted that, on the facts found by the BOA, Holbud had failed to prove any loss. This was because, as at the date Holbud terminated, the Finder had been redeployed elsewhere. This meant that, absent a valid substitution (see Question 2 below), Holbud did not have a vessel with which it could perform its obligations.

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This was a difficult issue for Holbud because there was plainly a deficiency in the evidence that it had put forward at the GAFTA hearings. In short, Holbud had not taken steps to try to demonstrate that it could have performed its obligations under the Contract. As such, Holbud's case in response to Olam's appeal was based on estoppel – often an argument of last resort. According to Holbud, Olam represented that it did not require the Finder, or any other vessel, to take delivery of the corn. This was because performance of the Contract was suspended by its force majeure declaration. Holbud argued that it relied upon this representation to its detriment, i.e. in redeploying the Finder so that the vessel was not available to perform Holbud's obligations under the Contract. On Holbud's case, it was thereby not required to show that it could perform its obligations.

However, Holbud's arguments unravelled before the Court. The main difficultly was that Holbud's estoppel case had not been argued in the GAFTA hearings. In particular, the BOA had not in fact made any finding that such a representation had been made by Olam or that there had been any reliance by Holbud. Holbud's case on reliance was particularly weak in that, up until the date it terminated the Contract, it had in fact maintained that it intended to perform the Contract – that was very different to its position in the court proceedings, that it was relying on Olam's representation that it did not have to perform. This was no doubt why Holbud tried, unsuccessfully, to introduce further witness evidence to the Court. That was impermissible because Olam's appeal was on a point of law. The time for Holbud to adduce evidence was at the GAFTA hearings and that time had now passed.

Without those factual findings the Court simply could not conclude that Holbud's case on estoppel had been made out. And it was only if a finding of estoppel was made out, that the answer to Question 1 would have been "no". Accordingly, the answer to Question 1 was "yes" and Holbud did have to prove that, but for the repudiation, it would have been able to perform its obligations under the Contract.

2. Substitution

Question 2 – On the true and proper construction of Clause 6 of GAFTA 49, and where an innocent party (Holbud) has already nominated a vessel, and the counterparty (Olam) is in repudiatory breach of the contract, having wrongly declared force majeure, is the party entitled to nominate a substitute vessel at any time prior to acceptance of such repudiation?

Clause 6 provided that notice of substitution by Holbud was to be given as soon as possible, but in any event no later than one business day before the ETA of the original vessel (the Finder).

The Court held that the substitution notice provision in Clause 6 was a condition to Holbud's right to substitute. It was not, as Holbud had argued, a warranty or an innominate term that would still render the substitution valid (i.e. if made out of time) and instead entitle the other party (Olam) to damages. Therefore in circumstances where the ETA of the Finder was 6/7 March, the deadline for Holbud to substitute had long passed. This finding was not affected, and the right to substitute was not extended, by the fact that the nominated (Ukrainian) load port was unsafe.

Furthermore, even if the Court was wrong about Holbud's legal entitlement to substitute, as a matter of fact the Court could not conclude that Holbud would have actually done so. This was because Holbud did not adduce evidence at the GAFTA hearings to prove that there was a substitute vessel available. It was not sufficient for Holbud to assert that it would have taken steps to find another vessel. In the Court's view Holbud had to go further and prove that a substitute vessel was "in fact" available to perform.

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The answer to Question 2 was therefore “no”.

The outcome

There was some attempt by Holbud to have the matter remitted to the BOA for further findings to be made. That suggestion was given short shrift by the Court – Holbud (and Olam) had to live with the case (and evidence) which was put at the time. There was no scope for either party to go back later with further arguments, which would undermine the policy of finality.

Accordingly, the BOA’s decision was set aside by the Court and replaced with a finding that Holbud’s claim for substantial damages (EUR 4m) should be dismissed. This must have been a painful outcome for Holbud, made all the worse because it could have been avoided had Holbud adopted a different termination strategy. Even then, Holbud’s claim might have been salvaged had evidence been adduced at the GAFTA hearing – and a finding of fact made by the GAFTA tribunals – to support the case that Holbud relied upon a representation by Olam that it did not require any vessel to take delivery.

[1][2025] EWHC 3187 (Comm), 5 December 2025
[2]The current claimant, Olam Global Agri Pte Ltd, is the assignee of Olam International Ltd.

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