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Case No: CL-2025-000359

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23rd July 2026

Before :

Paul Stanley KC
(sitting as a Deputy High Court Judge)

Between :

**ADM Industries Centers Ltd (trading as ADM
Israel)
- and -
Inerco Trade SA**

Claimant

Defendant

John Russell KC (instructed by Hill Dickinson LLP) for the Claimant
Michael Collett KC (instructed by Gateley Legal) for the Defendant

Hearing dates: 16 June 2026

Approved Judgment

Approved Judgment**Paul Stanley KC:**

1. The defendant sellers sold Ukrainian corn to the claimant buyers, to be shipped between 15 April and 15 May 2023. Their contract incorporated GAFTA Form 48, including a force majeure clause dealing with “prevention of shipment”. At that time, because of Russia’s invasion of Ukraine the previous year, a régime called the Black Sea Grain Initiative was operating. Ships entering the Black Sea to load grain were subject to inspection. The MV *Nikolaos S* was nominated to carry the cargo. While it was waiting to be inspected, the Russian inspectors stopped handling inbound vessels. The sellers informed the buyers that, as a result of this hiatus in inspections, they were invoking the force majeure clause. The buyers rejected that attempt, and the sellers treated that rejection as a renunciation of the contract, which they accepted. A GAFTA Board of Appeal has held that the sellers were right, and awarded damages of USD 3.12 million.
2. This is an appeal from that award, under section 69 of the Arbitration Act 1996. Andrew Baker J gave leave to appeal on 25 February 2026, restricted to three points of law (which I have renumbered to what seems to me a more convenient order for exposition):
 - i) On a proper construction of GAFTA 48, clause 20 (Prevention of Shipment), what is the meaning of “unforeseeable” in sub-paragraph (k) of the first paragraph of the clause?
 - ii) Under GAFTA 48, clause 20 (Prevention of Shipment), is it a condition precedent to reliance on that clause that the sellers have served notice on the buyers of the occurrence within 7 days of its commencement (where that is later than 21 days before the commencement of the shipment period)?
 - iii) Can a seller rely on GAFTA 48, clause 10 (Extension of Shipment) to extend time for performance beyond that permitted by clause 20?
3. I must decide whether the board’s award contains any error of law in relation to those matters, and, if so, what the court should do.
4. I have decided, on a true construction of GAFTA 48:
 - i) The board correctly construed the word “unforeseeable”, which means (in the context of sub-paragraph (k) of the first paragraph of clause 20) “of negligible probability”.
 - ii) The board was wrong to hold that compliance with clause 20’s notice requirement is not a condition precedent to the sellers’ right to invoke clause 20. It is. Its award should be remitted to the board to decide whether, as a matter of fact, the sellers’ notice was timely.
 - iii) The board correctly decided that a seller can rely on clause 10 to extend time for performance beyond that permitted by clause 20, by serving a notice under clause 10 no later than one day after the last date for shipment where that date has been extended pursuant to clause 20.

Approved Judgment**The contract**

5. The contract was in writing, dated 10 February 2023. It was for the sale of 60,000 MT +/- 10 percent at the sellers' option, CIF FO Ashdod/Haifa Israel. The shipment period was given as:

“Shipment period: between 15th of April and 15th May 2023 (both dates included) at Seller's option. Extension as per GAFTA 48.”

The “general conditions” clause provided:

“All other terms, conditions and rules, not in contradiction with the above contained in Form 48 of GAFTA of which the parties admit that they have knowledge and notice, apply to this transaction and the details given above shall be taken as having been written into such form in the appropriate places.

GAFTA Form No 48 in force on the date of this contract to apply.”

The contract was expressly governed by English law.

6. Form 48, in the version in force at the relevant time, contains two key provisions. Clause 10 provides as follows (with paragraphs numbered for reference):

“Extension of Shipment

[1] The contract period for shipment, if such be 31 days or less, shall be extended by an additional period of not more than 8 days, provided that Sellers serve notice claiming extension not later than the next business day following the last day of the originally stipulated period. The notice need not state the number of additional days claimed.

[2] Sellers shall make an allowance to Buyers, to be deducted in the invoice from the contract price, based on the number of days by which the originally stipulated period is exceeded, in accordance with the following scale:-

1 to 4 additional days, 0.5%;

5 or 6 additional days, 1%;

7 or 8 additional days, 1.50% of the gross contract price.

[3] If, however, after having served notice to Buyers as above, Sellers fail to make shipment within such 8 days, then the contract shall be deemed to have called for shipment during the originally stipulated period plus 8 days, at contract price less 1.50%, and any settlement for default shall be calculated on that basis. If any allowance becomes due under this clause, the

contract price shall be deemed to be the original contract price less the allowance and any other contractual differences shall be settled on the basis of such reduced price.”

7. Clause 20 provides as follows (paragraphs numbered for reference):

“Prevention of Shipment

[1] ‘Event of Force Majeure’ means (a) prohibition of export or other executive or legislative act done by or on behalf of the government of the country of origin or of the territory where the port or ports named herein is/are situate, restricting export, whether partially or otherwise, or (b) blockade, or (c) acts of terrorism, or (d) hostilities, or (e) strike, lockout or combination of workmen, or (f) riot or civil commotion, or (g) breakdown of machinery, or (h) fire, or (i) ice, or (j) Act of God, or (k) unforeseeable and unavoidable impediments to transportation or navigation, or (l) any other event comprehended in the term ‘force majeure’.

[2] Should Sellers’ performance of this contract be prevented, whether partially or otherwise, by an Event of Force Majeure, the performance of this contract shall be suspended for the duration of the Event of Force Majeure, provided that Sellers shall have served a notice on Buyers within 7 consecutive days of the occurrence or not later than 21 consecutive days before commencement of the shipment period, whichever is later, with the reasons therefor.

[3] If the Event of Force Majeure continues for 21 consecutive days after the end of the shipment period, then Buyers have the option to cancel the unfulfilled part of the contract by serving a notice on Sellers not later than the first business day after expiry of the 21 day period.

[4] If this option to cancel is not exercised then the contract shall remain in force for an additional period of 14 consecutive days, after which, if the Event of Force Majeure has not ceased, any unfulfilled part of the contract shall be automatically cancelled.

[5] If the Event of Force Majeure ceases before the contract or any unfulfilled part thereof can be cancelled, Sellers shall notify Buyers without delay that the Event of Force Majeure has ceased. Sellers shall be entitled, from the cessation, to as much time as was left for shipment under the contract prior to the occurrence of the Event of Force Majeure. If the time that was left for shipment under the contract is 14 days or less, a period of 14 consecutive days shall be allowed.

[6] The burden of proof lies upon Sellers and the parties shall have no liability to each other for delay and/or non-fulfilment

Approved Judgment

under this clause, provided that Sellers shall have provided to Buyers, if required, satisfactory evidence justifying the delay or non-fulfilment.”

The facts

8. The issues before me are solely questions of construction, but it is useful to understand the factual circumstances, as found by the board, from which they arise.
9. In July 2022, following Russia’s invasion of Ukraine, a régime formally known as the Black Sea Grain Initiative (BSGI), and informally as the “grain deal”, was established. It required vessels entering the Black Sea to load grain to be inspected by a body known as the Joint Coordination Centre (JCC). It was in effect when the contract was made in February 2023, and throughout its performance. It was expressly referred to in the contract, a special condition of which provided

“In case corridor [i.e. the BSGI] shall be cancelled—contract shall be considered null and void, however within current corridor time frame execution is possible”.
10. On 30 March 2023, the sellers nominated MV *Nikolaos S* under the contract, giving an ETA at the port of Pivdennyi “subject to passing JCC inspection”. The *Nikolaos S* had arrived at the JCC inspection area two months earlier. The buyers approved that nomination.
11. During April 2023 and up to 1 May 2023, the parties periodically exchanged messages about progress—the upshot being that the vessel was awaiting inspection.
12. On 7 May 2023, Russian inspectors on the JCC stopped inspecting inbound non-Russian vessels. The sellers were told about this by the vessel’s port agents the next day. The agents said that the Russian inspectors were sabotaging the BSGI, allowing Russian vessels to pass uninspected, but not inspecting other vessels. On 9 May 2023 (as the port agents informed the sellers the next day), only two vessels—both outbound with cargo—were inspected. The port agents understood that negotiations were in progress; but they did not expect inspection of unladen vessels. As of 11 May 2023, only a few outbound vessels were being released; there were 60 inbound vessels awaiting inspection. That situation was reported as continuing from 12–17 May 2023. Inspections did not resume until 18 May 2023.
13. The board found that there was “ample evidence showing that the JCC inbound inspections were interrupted from around 7 till around 18 May [2023], preventing any vessel, including Sellers’ nominated one, to enter [the] Ukrainian Black Sea”.
14. The board found that what had happened was unusual. There had been a “few unannounced interruptions” to the BSGI’s operation. But, as the board found, they had been short. The BSGI had operated, up to 6 May 2023, for 288 days. During that time there had been fourteen stoppages in total. Ten had lasted one day. Three had lasted two days. One had lasted more than two days. (The award does not say how long it had lasted.)
15. On 16 May 2023, the sellers sent this message to the buyers:

Approved Judgment

“Please note that as of 9th May 2023 no inbound inspections have been conducted by the JCC. This is preventing all shipments of corn from Ukraine.

Please treat this as our notice under Clause 20 (‘Prevention of Shipment’) of GAFTA 48, as incorporated into the Contract.

We shall keep you posted on any relevant developments and, in the meantime, we must reserve all our rights.”

16. The buyers did not accept that as a valid notice. After further correspondence, on 19 May 2023, the sellers notified the buyers as follows:

“Please note that inbound inspections by the JCC have been resumed today and the event of force majeure alluded to in our notice of 16 May 2023 has therefore ceased.

This serves as notice under Paragraph 5 of Clause 20 (‘Prevention of Shipment[’]) in GAFTA 48, as incorporated into the Contract.

We shall proceed to ship the goods as soon as the vessel is allowed to berth...”

17. Further correspondence followed. The buyers maintained that clause 20 did not apply, and that shipment remained due on 15 May 2023. The sellers charged that the buyers were in renunciatory breach by declaring an intention not to accept and pay for the goods if shipped in accordance with the contract. On 25 May 2023, the sellers purported to accept that renunciatory breach. On 26 May 2023, the sellers resold the intended cargo. It was ultimately shipped to new buyers on 4 June 2023.

The award

18. The contract provided for arbitration under GAFTA’s Arbitration Rules 125, which provide for a first tier arbitration followed by an appeal to a Board of Appeal (“the board”). The first tier arbitration held, in favour of the buyers, that the sellers had not established that they could rely on a force majeure event. The sellers appealed. In an award dated 3 November 2025, the board allowed that appeal, and awarded the sellers damages of USD 3.12 million, and costs.
19. The board first accepted that the sellers had established that the suspension of the JCC’s operations from 7-18 May 2023 did “prevent performance”. Andrew Baker J did not accept that this was a conclusion on which leave to appeal should be given. Although the board did not expressly address the question whether that prevention was “unavoidable”, it may have been implicit in its reasoning that it thought that it was—and in any event, Andrew Baker J refused leave to appeal on this point. So neither of those points has been in issue before me.
20. The board next considered whether the event preventing performance was “unforeseeable”. It accepted that if “foreseeability” could mean simply “an acknowledgement that something can happen”, and if that is what it meant in clause 20, then it was “difficult, if not impossible, to deny that ... the interruption of the inspection

Approved Judgment

and consequential impediment to navigation was possible to happen and was, therefore foreseeable”. It thought, however, that that was the wrong question to ask, and that under clause 20 “foreseeable” requires one to consider not merely whether an event is something one could “reasonably imagine”, but a matter of “probability”. Its assessment of the historical record of events during 2022 and 2023 was that although very short delays in inspection sometimes occurred, they were unlikely. It summarised its conclusions as follows (at para 8.16):

“[Our] analysis provides the basis for two important conclusions: first, that although foreseeable, the stoppage of inspection and prevention of shipment was not likely to happen at all and, second, and more importantly, that in case of a stoppage of inspection, it was extremely unlikely, in fact statistically negligible, that it would last longer than 2 days.”

21. Its overall conclusion (para 8.20) was that the “probability of JCC inspection stoppage lasting longer than two days was negligible”. On that basis, it concluded that it was, for the purposes of clause 20, “unforeseeable”, stating (emphasis in original):

“Expressed in somewhat inadequate terms of governing GAFTA contract form, *the Board FIND that duration of stoppage of [JCC] inspections for more than 2 days was unforeseeable.*”

22. It therefore held that a force majeure event had occurred. Whether it was legally correct to do so is the first of the issues of law that I must consider.
23. The board then turned to the notice requirements of clause 20. The sellers’ notice invoking clause 20 had been given on 16 May 2023. That was nine days after JCC inspections stalled. The buyers argued that the notice was therefore too late.
24. The board rejected that argument. It observed that it made no difference to the buyers whether the notice was given on 14 May 2023 or two days later. It thought that “nothing important turns around the exact date”, and that “simply and most importantly neither party was exposed to, or even less suffered, any prejudice related to that”. It expressed the view that the debate hinged over whether “the technicalities and literal interpretation of the contractual terms should prevail over commercial logic and natural justice”. Without expanding much on the point, it held that the notice had been valid, although given on 16 May 2023. That gives rise to the second issue that I must consider.
25. The board therefore considered that the sellers had been entitled to suspend their obligations between 7 and 18 May 2023. It went on to hold that the buyers were in renunciatory breach, which the sellers had validly accepted. Those conclusions are not as such the subject of this appeal, if the rest of the award was sound.
26. The board therefore turned to damages. It is here that the third issue before me arises. Under clause 20, if it applied, performance would have been suspended from 7 May 2023 or 9 May 2023 until 18 May 2023. At that point, under paragraph 5 of clause 20, the sellers were entitled to the greater of the time that had remained for shipment on 7 May (9 days) or 14 consecutive days. So, in this case, the sellers would have been entitled to ship up to 2 June 2023. But the buyers said that the sellers would not have been able to ship then. Shipment, under the replacement sale, did not happen until 4

Approved Judgment

June. On that basis, the buyers argued, the sellers were entitled only to nominal damages unless they could, before 2 June 2023, have claimed the clause 10 extension “on top of” the clause 20 extension.

27. The board addressed this point as follows:

“8.48 [T]he Board consider it appropriate and important to comment upon Buyers’ suggestion—presented somehow as their alternative argument, with reference to *Bunge v Nidera*—that, in any event, even if the extension was validly claimed and obtained, Sellers would have still defaulted the Contract since they would have not been able to ship the Goods before expiry of the extended shipment period. Their argument is based on the fact that the bill of lading covering shipment under Sellers’ resale contract to Viterra was dated 4 June, whereas the extended shipment period expired on 2 June.

8.49 In view of the Board, while there are a few other reasons for which this Buyers’ argument may be discarded, the one specific is the strongest and renders all others superfluous: there is no reason why Sellers would not be within their rights to claim extension as per contractual extension clause even though the shipment period had been extended. An extension based on prevention of shipment clause does not invalidate or somehow override the extension clause. It follows that, since Sellers did not claim extension as per that clause, nothing prevented them from doing so if they needed it, at any time within, or on the first day after expiry of the shipment time extended by operation of Prevention of Shipment clause. In the event, even if Sellers had not been in position to complete loading till 2 June, which is not certain, using up to 8 days extension they would have certainly completed loading in time.”

28. In effect, then, the board held that where the date of shipment is extended under clause 20, the “originally stipulated period” means that period, as extended by clause 20.
29. The award went on to address various issues relating to the quantification of damages, before arriving at the award of USD 3.12 million. No relevant issues about this reasoning arise on this appeal if the board’s other conclusions were correct.

Legal principles applicable to this appeal

30. An appeal under section 69 of the Arbitration Act 1996 is, by statute, confined to a “question of law arising out of an award”. Unless by agreement, the leave of the court is required, and in deciding whether to grant leave the court considers the legal position “on the basis of the findings of fact in the award”: s 69(3). On an appeal, the court may confirm the award, vary it, remit it (in whole or in part) for consideration by the tribunal, or set the award aside (in whole or in part), but is not to do that unless satisfied that remission is inappropriate. The whole scheme of the section—as of the Act—reflects a philosophy of conservative, if not minimal, interference, and the preservation of the arbitral tribunal’s exclusive power to determine the facts.

Approved Judgment

31. Some questions of construction have hard-edged answers: given a set of facts, there is only one possible result. In those cases, it must always be for the arbitrators to decide the facts, but it may be for the court to determine the law, and if so (so long as the facts have been fully determined) the answer may be obvious. In many other cases, a contract properly construed may still call for an exercise in evaluative judgment. In those cases, the court's role is to determine the test—in the old, but still useful metaphor, to imagine what “direction” the arbitrators should have given themselves. It will then be for the arbitrators to apply that test. If they have properly directed themselves, the fact that the court would or might not have reached the same conclusion is not a good reason to interfere (unless the conclusion is so bizarre that one is driven to the conclusion that whatever they said they were doing, the arbitrators must actually have applied quite different criteria). If they have misdirected themselves, but it is not entirely clear what answer they would have given if they had properly directed themselves, it will at least usually be right to remit the matter to them.
32. There was no dispute before me about the applicable principles of construction, and that my task is to determine the meaning that the words of the contract would convey to the reasonable objective reader, acquainted with the factual background reasonably available to both parties, suitably alert to the practical commercial implications of a contract. (If any summary is needed, see *Providence Building Services Ltd v Hexagon Housing Association Ltd* [2026] UKSC 1, [2026] 1 WLR 538, at [21]–[23] per Lord Burrows JSC.)

First issue: what does “foreseeable” mean in clause 20?

33. For the buyers, Mr John Russell KC argued that “foreseeable” is a term consistently used in ordinary life and in law simply to mean something that can be foreseen, even as a very remote possibility. He pointed to the approach taken by the Privy Council in *Overseas Tankship (UK) Ltd v The Miller Steamship Pty Ltd (The Wagon Mound) (No 2)* [1967] AC 617 (PC). In that case, oil floating on water had been ignited by welding. The trial judge had found that reasonable people would have regarded such ignition as “very difficult”, as something that “rarely happened”, and as something that would require “exceptional circumstances”. Based on those conclusions, he thought that ignition was “not reasonably foreseeable” by the relevant people: see [1967] AC 617, at 633. The Privy Council thought that, given his conclusions of primary fact, the trial judge's conclusion that fire was not “reasonably foreseeable” was wrong. The findings showed that “some risk of fire would have been present to the reasonable man”: [1967] AC 617, 641.
34. The Privy Council went on to discuss the famous case of *Bolton v Stone* [1951] AC 850, which concerned injury caused by a stray cricket ball. The risk of a ball striking someone outside the ground was very small. A “mathematician given the data could have worked out that it was only likely to happen once in a thousand years”. *Bolton* had held that to be a risk that, in that case, could be disregarded. But, as the Privy Council explained, this depended on weighing up not only the magnitude of the risk, but the costs of addressing it. *Bolton v Stone* “did not alter the general principle that a person must be regarded as negligent if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility that would never influence the mind of a reasonable man”. This led the Privy Council to conclude that the trial judge had made a mistake. Unlike in *Bolton*, there was no reason not to address even a small risk; and even if the risk of fire was small, the damage that would be

Approved Judgment

caused would be great. Once there was a “real risk”—one which could not be “regarded as far-fetched” [1967] AC 617, at 643—the foreseeability threshold was crossed, and the question then became whether action to eliminate that risk should have been taken.

35. Mr Russell submitted that this showed that the threshold to be crossed for “foreseeability” is a very low one: a “real risk”, “one that is not far-fetched”, even if extremely unlikely. That, he said, is what “foreseeable” means in law. And in natural language too, he suggested. The board had more or less accepted that, since it had described “foreseeable” as meaning “possible to happen”. It had then, he said, incongruously and wrongly, departed from that correct approach.
36. As a preliminary point, I cannot accept Mr Russell’s suggestion that the meaning of “foreseeable” was simply a question of fact, or that the board reached a determination of fact as to its meaning, or should have done so. It expressed a view about the meaning of the word in ordinary speech, but it needed to do that as part of the back-and-forth “iterative” process of arriving at a construction of a contractual term. That view (equating “foreseeable” with “possible”) seems more extreme than the buyers’ contentions. Although the award’s reasoning is not always expressed in quite the way a professional judge might frame it, on a charitable and fair interpretation its thrust is clear—it thought that “unforeseeable” might sometimes mean “incapable of happening”; but it thought that in clause 20 some more substantial probability than mere “capability” was required to make an impediment “foreseeable”.
37. As a word, “foreseeable” has a range of connotations, like “probable”, “improbable”, “likely”, “unlikely”. Such words take colour from their context, and from the purposes they serve in that context. Their use (and the use of other expressions) in different areas of law with a range of aims does not turn them into technical terms of art for all purposes. They are words which naturally refer to a spectrum, or degree: things are more or less foreseeable, just as they are more or less probable, or more or less likely. Where precise boundaries are to be drawn in particular cases depends very much on context. The Privy Council said as much in *Wagon Mound (No 2)* (my emphasis): “[T]he first question must be what is the precise meaning to be attached *in this context* to the words ‘foreseeable’ and ‘reasonably foreseeable’.” The particular context that the Privy Council had to consider in that case was tort liability, which depends in part on three factors: how likely a damaging event is to be, how much damage it is likely to cause, and how expensive or difficult it would be to prevent. The essential point that the Privy Council was making was not, as I see it, a formalist point about the abstract meaning, always and regardless of context, of the term “foreseeable”. It was rather a substantive point: it would be a mistake to ignore, in tort, small (but not completely fanciful) risks of major damage which could be avoided at minimal cost.
38. The context in which “unforeseeable” appears here is different. This is a force majeure clause, which is about the allocation of residual contractual risk which has not been specifically addressed elsewhere in the contract. If one examines the various things that are recognised in that clause as capable of constituting force majeure, few if any of them are “unforeseeable” in the sense Mr Russell contends: “blockade”, “hostilities”, “acts of terrorism”, “strikes”, and “riots” are rather rare and unpredictable events. But they are not “unforeseeable” in the sense that they are things that nobody would ever imagine could happen. “Acts of God”, as conventionally understood, may come closer; but one may doubt whether even those are “unforeseeable” in the *Wagon Mound* sense.

Approved Judgment

The editors of *Clerk & Lindsell on Torts* (Tettenborn et al, eds, 24th ed, Sweet & Maxwell 2023) at para 19-90 canvass “extraordinarily violent rainfall”, “unusually high tide” or “an exceptionally strong wind” as examples. These are very rare and unpredictable events. But they are not unforeseeable in the sense that they are things that are not “capable of happening”, not “far-fetched”, and certainly more common than the stray cricket ball in *Bolton v Stone*.

39. The various events described in clause 20 (including the final catch-all category in sub-paragraph (l)), have in common that they are rare (but not very rare), most unlikely to occur so as to affect performance of the contract (but more than a merely “fanciful risk”), not the subject of other specific contractual risk allocation, and not usually within the sellers’ control. To construe “unforeseeable” in the narrow sense that the buyers adopt would be to make sub-paragraph (k) stand out starkly from all or most of the other events with which it jostles shoulders.
40. Furthermore, as Mr Collett KC pointed out for the sellers, the word “unforeseeable” does not occur alone in sub-paragraph (k), but is linked to the word “unavoidable”. It is tempting to say that this link must be conjunctive (events which are *both* unforeseeable *and* unavoidable) or disjunctive (events which are *either* unforeseeable *or* unavoidable). Neither party, in my view rightly, contends for the disjunctive reading. And if the words belong together, it is more realistic to treat each of them as lending colour to the other—for it is difficult to see how an event such as Mr Russell demands, which truly beggars belief, would be avoidable. The essence of what is being conveyed is that sub-paragraph (k) applies to impediments that are so unlikely that nobody would expect the sellers to guard against them. By contrast, a force majeure event confined to things whose probabilities are vanishingly remote would not serve much, if any, useful function.
41. In my view, therefore, “unforeseeable” in this clause does not mean more or less inconceivable or, (in the abstract) so far fetched that nobody would ever imagine it could ever happen. Put differently, even if the test were as demanding as the buyers suggest, it falls to be applied in context: what risks are “real” and what “far fetched” always depends on who is asking and why. Whether a risk can be brushed aside as “far fetched” depends partly on the circumstances in which that question is being asked. The risk that I might be struck by a defective airplane or attacked by a lion on the way to work may be “far fetched” when I am considering whether to take the tube or a bus. But the risk that a plane might crash in central London would not be “far fetched” to the CAA, and the risk that a lion might escape from its enclosure would not be “far fetched” to the operators of London Zoo. Here, the relevant context is that of a sale contract, and the risks to be identified are those that are so unlikely that it is commercially justifiable for the parties to disregard them.
42. That is, I think, how the board saw things. The test that it applied was that an event was “unforeseeable” (in the sense envisaged by clause 20) if there was a “negligible” possibility of it occurring, seen from the parties’ perspective. Such a view seems to me to be consistent with one major purpose of the force majeure clause, which is to cater for events which are so unlikely to occur that one could not expect the parties to have specifically allocated their risk exclusively to the sellers. The board’s instinct was to understand as “unforeseeable” events those things which, although conceivable in theory, are so highly unlikely to happen in practice that their occurrence can, in effect, be completely discounted: they have a “negligible” probability.

Approved Judgment

43. In my view, that is a sound and sensible conclusion, consistent with clause 20's function and terms. Its downside is that it requires value judgments, for the point at which a risk shifts from the small but negligible to the small but notable is not capable of being crisply marked. But that is an ineradicable feature of the need to find tipping points in words which describe a spectrum (which are, in the philosophical sense, "vague", with "borderline cases"). Many of the words expressly used in clause 20 are open textured, and the final words ("any other event comprehended in the term 'force majeure'") are markedly so, so that this is not a cogent objection.
44. I would accordingly hold, in agreement with the board, that an event is "unforeseeable" for the purposes of clause 20 if it is one whose probability appears, when the contract is concluded, to be so remotely likely to occur and affect its performance that it can be described as "negligible". In saying that, I do not endorse the view, advocated by the sellers, that it is sufficient if it is simply "unlikely". There are things that are unlikely but whose probability is more than negligible, as Mr Russell pointed out: see *Koufos v C Czarnikow Ltd (The Heron II)* [1969] 1 AC 350 (HL) at 384, per Lord Reid. "Likely" is not the word used. And "likely" is itself a word with a variety of meanings: see *The Heron II* [1969] 1 AC 350, 410 per Lord Hodson. But the test, which I think the board at least implicitly applied, of considering not merely theoretical possibility but practical probability, disregarding probability that is "negligible"—which I take to mean so small that in commercial terms it could be disregarded—seems to me to make good sense of clause 20.
45. That being so, I also think that the board was right not simply to ask whether *any* delay in inspections was a negligible risk, but whether prolonged delay was a negligible risk. The risk of a given event is sometimes a matter of degree: bad weather may be foreseeable, but three days of hurricanes may not be. It was open to the board to think that what occurred in May 2023 was so different in degree from anything experienced in the past, and so different from the predictable occasional short suspensions, as to be unforeseeable. I did not ultimately understand the buyers to dissent from this approach.
46. The board therefore asked itself the right question. It seems to me that (subject to wide limits) the way that it answered it was pre-eminently a matter for the board's judgment applying its commercial experience to the evidence. I do not need to ask whether, given the evidence that the board had considered, I would myself have reached the conclusion that the risk of more than a couple of days' hiatus in inspections was "negligible". That sort of evaluative assessment is eminently one for commercial arbitrators. It suffices to say that the board, in my view, properly directed itself and reached a conclusion that was, on the primary facts it found, rationally open to it. It made no legal mistake. Although Mr Russell had some criticisms of aspects of that reasoning (such as, for instance, its use of statistics, or its inclusion within those statistics of suspensions which occurred after the contract was made), none of them comes close to disclosing any error of law.
47. What if I had reached the view that the board had made a mistake in this respect? A debate surfaced during the hearing, and was continued in written submissions thereafter, about whether, if I thought the board had misdirected itself, I should vary the award, or remit it. The sellers argued that, even if the board was wrong about subparagraph (k), its award recorded that the sellers had relied on other force majeure events, namely blockade (subparagraph (b)), hostilities (subparagraph (d)) and the final

Approved Judgment

“catch all” (subparagraph (l)). Those events had not been explicitly considered, although there were hints that the board found some of them at least plausible. Therefore, the sellers said, even if the board was wrong about subparagraph (k), the award should be remitted. The buyers disagreed. They suggested that the award, at least implicitly, rejected the application of any other force majeure event, choosing to focus on (k) because only (k) was plausible. Besides which, some of the others (such as ‘blockade’) were, in law, *not* plausible. In any event, the buyers argued, it was not open to the sellers to argue for remission on these grounds, because PD 62 para 12.6(2) requires that, at the leave stage, a respondent opposing permission to appeal must file a respondent’s notice which “states whether the respondent wishes to contend that the award should be upheld for reasons not expressed (or not fully expressed) in the award and, if so, states those reasons (but not the argument).”

48. This led to a spirited debate in writing about whether the decisions of Andrew Baker J in *Trans Trade RK v State Food and Grain Corporation of Ukraine* [2025] EWHC 1803 (Comm), [2026] 1 WLR 305 at [29], and Picken J in *Mitsui v Asia Potash* [2023] EWHC 1119 (Comm), [2024] 1 Lloyd’s Rep 639 suggest that “uphold” in the Practice Direction does not cover a situation where what is sought is remission *as a consequence* of a successful appeal. That was the sellers’ contention. The buyers, on the other hand, suggested that they did not decide such a thing, and that Eder J’s decision in *MRI Trading AG v Erdenet Mining Corporation LLC* [2012] EWHC 1988 (Comm), [2012] 2 Lloyd’s Rep 465 at [39] required such an argument to be the subject of a respondent’s notice.
49. These arguments raise points of some difficulty and importance about the effect of the Practice Direction, on which most of the submissions to me were in writing, without the ability to develop or test them in oral argument. I do not think it is sensible for me to express a view upon them based on post-hearing written submissions, when they do not (on the view that I have taken) arise.

Second issue: is the timely notice under clause 20 a condition precedent?

50. The board thought that compliance with the requirement to serve a notice within seven days after the event constituting force majeure was not a condition precedent. The board accepted that it is a requirement of the clause. But it held that in the absence of prejudice to the buyers, non-compliance was irrelevant—a matter of “technicalities and literal interpretation” which can and should, in the absence of proven prejudice to the buyers, be excused and ignored.
51. The sellers accepted that this is wrong: compliance with the notice requirement is indeed a condition precedent, and the board’s conclusion was legally wrong. I agree, for four reasons. First, it seems to me to be most consistent with the language of clause 20, paragraph 2: the words “provided that” are, in this context, unmistakably the language of condition precedent. Second, I do not find anything incongruous in that requirement. It serves the desirable commercial purpose of enabling the buyers to know where they stand, and is not an onerous requirement. Third, I see nothing in the paragraph that encourages or justifies any implied test based on substantial prejudice, so that the construction adopted by the board seems to me to lack any workable yardstick. And leaving the buyers in prolonged ignorance of a force majeure event which is contractually consequential is almost inevitably prejudicial. Fourth, as a consequence, the implicit considerations that the board thought applicable

Approved Judgment

(“commercial logic and natural justice”) seem to me to offer an unrealistically and unnecessarily unpredictable way of measuring compliance with a simple, precise, and unequivocal term. In my view the provision, construed as a condition precedent (which is what it seems to be) is not lacking in commercial logic: it is the commercial logic that gives the sellers a specified reasonable period to inform the buyers of the relevant development, so that both parties know where they stand. Nor is it unjust, for it strikes a fair balance between the buyers’ and the sellers’ interests.

52. For these reasons, the board’s conclusion was incorrect in law. If the notice given on 16 May was later than permitted by paragraph 2 of clause 20, then clause 20 does not apply, because giving notice is a condition precedent.
53. The more difficult question is what I should do about this error of law. Because the board thought that it did not matter whether the notice was late, it did not need to reach a definite decision on when notice should have been given.
54. The sellers say that time for giving the notice starts only once the occurrence in question qualifies as force majeure. The buyers agree. For some continuing events, that may not be when (in fact) the event starts, but only when it has continued or is likely to continue for some time. Again, Mr Russell confirmed, the buyers agree in principle.
55. In considering whether the suspension was “unforeseeable” the board reasoned that a one or two day suspension of inspections would not qualify, because those happened not infrequently: they were not “unforeseeable”. What was unforeseeable, as the board thought, was a longer suspension. The sellers argued that although that began on 7 May 2023, that was apparent in retrospect, and not before 9 May 2023 at the earliest. This, Mr Collett said, had been acknowledged by the tribunal which had said (at para [8.18]) that it explained why the sellers’ notice “indicated 9 May as the first day of stoppage”. The sellers argue, therefore, that until 9 May 2023 there *was* no force majeure event. It was only, at the earliest, when the suspension of inspections had continued for more than two days that anything “unforeseeable” had taken place. If the sellers had given notice under clause 20 on 7 May 2023, they would rightly have been met by the objection that the notice was invalidly early, because no relevant event had occurred.
56. The buyers, on the other hand, argued that the board made no such express finding. In its discussion of notice, it identified 7 May 2023, not 9 May 2023, as the relevant date. The board’s acceptance that the sellers might have *perceived* 9 May 2023 as the starting point did not establish that that *was* the date (Mr Collett expressly confirmed that it was not the sellers’ case that their subjective belief was critical: what matters was when the event started, not when the sellers realised it had started).
57. In principle I accept that it was open to the board to find that the force majeure event commenced not on 7 May 2023, when the Russian inspectors first began their (in)action, but on 9 May 2023 when the suspension passed from the foreseeable to the unforeseeable. However, I am not able to conclude that it made that finding. Although it might, indeed, be the most likely conclusion given the board’s approach, it is not one that it expressly made. The board expressly rejected what it understood to be a submission that the delay had started on 6 May 2023, but only to say that the Russian inaction had not started until the *next* day. Moreover, there are indications that the position may be less than clear. By 8 May 2023, the Russian inspectors’ approach was being described by the vessel’s port agents as “sabotage”. That suggests that it might

Approved Judgment

have been clear from the outset that what was happening was different from the ordinary, occasional and brief suspensions. Such evidence would buttress the board's conclusion that clause 20 applied. But it would undermine the argument that the relevant event began only on 9 May 2023. Because the board did not need to reach a view on that point, it did not. It would not be fair to buyers to assume that, if the board considers the evidence with real focus on this critical point, it could only reach the conclusion that the relevant event began on 9 May 2023 and not earlier.

58. For similar reasons, however, I cannot accept the buyers' submission that the award as it stands decides that question against the sellers. Although the board mentioned 7 May 2023 as the commencement of the delay in its discussion of notice, it did so in the context of its view that the date was not important. It made no difference whether it assumed that the relevant occurrence began on 7 May 2023 or 9 May 2023. The sellers are right to point out that such a conclusion would not sit easily with the board's view that short suspensions were foreseeable and that what made this suspension unforeseeable was its length.
59. Another way of putting the point is this: the award contains no express finding that the relevant "occurrence" (that is, the *unforeseeable and unavoidable* delay to inspections) began on 7 May 2023. It contains a clear finding that it did not begin before then. But it equally contains no clear finding that it began on 9 May, though there are some indications that this might have been the board's most likely view. I have neither the power nor the evidence to make a finding on a point of fact such as that myself. I should not draw any inference from the award in the absence of a clear finding of fact unless the inference is "one which inevitably follows from the findings which have been made": *Sharp Corp Ltd v Viterro BV* [2024] UKSC 14, at [74] per Lord Hamblen JSC. I do not accept that it does "inevitably" follow. The proper course is to remit the award.
60. So far as this aspect of the award is concerned, therefore, I shall remit the award to the arbitrators, who should decide whether the relevant event (that is to say, delay in inspection that was unforeseeable and unavoidable so as to fall within sub-paragraph (k)) began before 9 May 2023. If it did, the proper conclusion as a matter of law is that the sellers never properly invoked clause 20. It will follow, if so, that their claim should have failed. If it did not, the rest of the award will stand.

Third issue: Interaction of clause 10 and clause 20

61. The point of law on which leave is given is widely framed. However, the buyers' skeleton argument simply presented the issue as one about notice, as follows:

"The issue is whether the relevant day [i.e the day on which notice must be given under clause 10, namely the "next business day following the last day of the originally stipulated period"] is the next business day following the last day of the shipment period stipulated in Clause 6 of the form, or whether it is the next business day following the shipment period as extended by Clause 20."
62. That argument, as so described, turns entirely on the meaning of "originally stipulated period". The buyers' contention is that even if there is an extension under clause 20, the

Approved Judgment

“originally stipulated period” remains the date on which the period for shipment would have ended, without any such extension. It does not involve a contention (theoretically, at least, arguable) that the “contract period for shipment” should include any extension under clause 20, so that if that has—thanks to how clause 20 operates—been extended to last more than 31 days, then no further extension is permissible, though the question on which leave to appeal was given would have been broad enough to permit that argument.

63. Given the way that the argument has proceeded, I am provisionally minded, consistently with the approach taken by Hamblen J in *Cottonex Anstalt v Patriot Shipping Mills Ltd*, [2014] EWHC 236 (Comm), [2014] 1 Lloyd’s Rep 615 at [20], and approved by Lord Hamblen JSC in *Sharp Corp v Viterra*, at [55]–[56], to refine the question of law so that it reflects the real argument before me, so that it reads:

“Can a seller rely on GAFTA 48, clause 10 (Extension of Shipment) to extend time for performance beyond that permitted by clause 20 *by serving a notice pursuant to clause 10 not later than the next business day following the last day of the shipment period as extended by clause 20?*”

64. The board did not give detailed reasons for treating the “originally stipulated period” in clause 10 as meaning “that period, including any extension under clause 20”. Perhaps it was thought obvious. It is a pure question of construction.
65. There are two possible meanings of “originally stipulated period” in clause 10. It could mean simply “period first stipulated regardless of any contractual extension whatever”. Or it could mean “period stipulated by the contract regardless of any extension under this clause”. The first interpretation would make it a fixed period. The second would serve only to make it clear that clause 10 itself permits only one extension, not repeated extensions.
66. Mr Russell submitted that “originally” was, linguistically, an injunction to go back to the very first in time. But I do not think it need have that meaning; and in any event, what is “originally stipulated” includes the possibility of extensions under clause 20, which are part and parcel of the original “stipulations” that collectively determine the relevant date. After all, if the contract did not “originally” stipulate a calendar period, but (for instance) a period fixed by reference to an event that might occur at some point in the future, it would do no violence to the language to treat that as the “originally stipulated period”. So, although I would be inclined to agree that the buyers’ construction sits marginally more comfortably with the adverb than the sellers’, the advantage is but slight.
67. The term “originally stipulated period” is used in three places in clause 10. The first place—at issue here—concerns when notice must be given. The second two places relate to the consequences of invoking the extension. There is value in considering whether those later uses cast useful light on the meaning of the expression, which surely has the same meaning in all three places. In particular, do the consequences of either interpretation point either way?
68. Suppose the following. The contract contains a shipment period of 15 April to 15 May, as here. On 14 May, a force majeure event occurs. On 15 May, the sellers give the

Approved Judgment

buyers notice both of that event (under clause 20) and that they will exercise their option to extend delivery (under clause 10). The force majeure event ceases to operate on 30 May. It is common ground that it would have suspended the sellers' obligation to deliver and resulted in an extension under clause 20 of the date for delivery until 13 June. Unless "originally stipulated period" means something different in the three places it appears in clause 10, that has the following consequences:

- i) On either party's construction, the sellers would be entitled to an "additional delivery period" of 8 days after 13 June. (As I have explained above, the buyers' argument is not that this becomes impossible if there is any extension under clause 20. It is simply that the notice needs to be served no later than one day after the first originally specified period ends. On the hypothetical example I am considering it would have been.)
- ii) On the buyers' construction, even if the sellers delivered on the very day the suspension ended, on 30 May, it would already be more than 8 days later than the "originally stipulated period". So the sellers would have to give the maximum allowance of 1.5 percent to the buyers. On the sellers' construction, it would have delivered within the "originally stipulated period", and no allowance would be due.
- iii) If the sellers failed to deliver during the extended period, compensation would be due to the buyers. On the buyers' construction, the compensation would be assessed as at the "originally stipulated period plus 8 days", i.e. at 23 May, whatever had happened to the market between 15 May and mid-June, since clause 24 of Form 48 requires damages to be assessed on the "date of default", and clause 10 provides that they are to be assessed "on the basis" that the contract required performance "during the originally stipulated shipment period plus 8 days". On the sellers' construction, the compensation would be assessed at 21 June (treating 13 June as the "originally stipulated shipment period" and assessing compensation on the basis that the contract required shipment at that period plus 8 days).

69. In those cases, I find the sellers' construction of "originally stipulated period" more consistent with what seems commercially sensible than the buyers':

- i) In the case of timely delivery, it seems peculiar that sellers who *have* invoked clause 10 before a force majeure event intervened should be worse off than those who have not. In either case, given the force majeure event, delivery on 30 May would be contractually permissible without regard to any clause 10 extension. But sellers who had invoked the extension would suffer a price reduction, whereas those who had not done so would receive the full contractual price, despite delivering (in both cases) on the same day and within the period permitted apart from any clause 10 extension.
- ii) In the case of non-delivery, there seems to be no commercial logic in "reaching back" to 23 May when assessing compensation, which would transmute the exercise into one very far removed from the assessment of compensation to put the buyers in the position they would have been if the contract had been properly performed. That might operate unreasonably to the advantage of either buyers or sellers. It is still more peculiar since sellers who have *not* served notice to

Approved Judgment

extend under clause 10 will pay compensation assessed at 13 June. It is difficult indeed to see why the invocation of a right to extend delivery should result in the date for assessment of compensation being moved backwards in time, to a date before delivery was contractually required.

70. Mr Russell suggested a countervailing consideration. He pointed out that clause 20 permits an extension over 8 days. That being so, since sellers were already being given a “free” extension—whose effect is to produce a shipment window (disregarding the period during which the force majeure event operated) of more than 31 days—he submitted that there could be no justification for a longer extension.
71. Although there is force in this point, it seems to me to be outweighed by the commercial considerations that point the other way. Indeed, the buyers’ proposed construction does not really meet it. The buyers’ submission was not that, whenever the shipment window (as a result of clause 20) extends to more than 31 days, clause 10 ceases to apply. It was simply that whether it does or not depends on the service of a notice under clause 10 prior to the latest shipment date originally agreed, disregarding any extension under clause 20. It is true that one consequence of that is that a different meaning is given, on the sellers’ construction to the words “contract period for shipment” at the start of clause 10 (which, the sellers say, always mean the period explicitly specified in the contract, disregarding extensions) and the words “originally stipulated period” later in the clause. That is not entirely comfortable (though they are, at least, different words). But, as I have made clear above, the buyers’ argument was not that those words should be interpreted consistently so that no extension could ever be claimed if the total shipment period had, by extension, come to exceed 31 days (i.e. that both expressions should take into account any clause 20 extension), but only that the “originally stipulated period” must do so (i.e. that neither expression should take into account any clause 20 extension). That argument, I am satisfied, results in consequences that are sufficiently illogical, and the language sufficiently equivocal, that I cannot accept it.
72. In my judgment therefore, on the point as argued before me, the board’s instincts were right, although its reasoning was compressed. The effect of the word “originally” in clause 10 is that an extension under that clause may only be claimed once, and that the notice claiming it must be served no later than the first day of the extended period, and not after it has ended. It means simply “the period extant prior to any extension under this clause”. Where an extension occurs as a result of clause 20, the period as so extended is the “originally stipulated shipment period” for the purposes of clause 10, and a clause 10 notice may be served at any point up to the first day after that period ends.
73. It follows that I should simply confirm the award in this respect. Had I concluded that the buyers were correct, I would have remitted the award, not varied it. That is because the board expressly said that it had other (unexpressed) reasons for rejecting the buyers’ overall argument, and because it did not reach any factual conclusion—applying the proper standard of proof—on the question whether the sellers could in fact have shipped by 2 June 2023, if that was a critical question.

Conclusions

74. For the reasons given above, I consider (in agreement with both the parties) that the board erred in law in one respect, but that on the other points for which Andrew Baker

Approved Judgment

J gave leave to appeal, its conclusions were legally correct. The appropriate course is to remit the award to the tribunal so that it can decide whether the sellers' notice under clause 20 was given in time, and to make any consequential changes to the award based on that conclusion. I shall hear counsel, for whose succinct and focused submissions I am grateful, on the precise form that order should take, and on any consequential matters.