



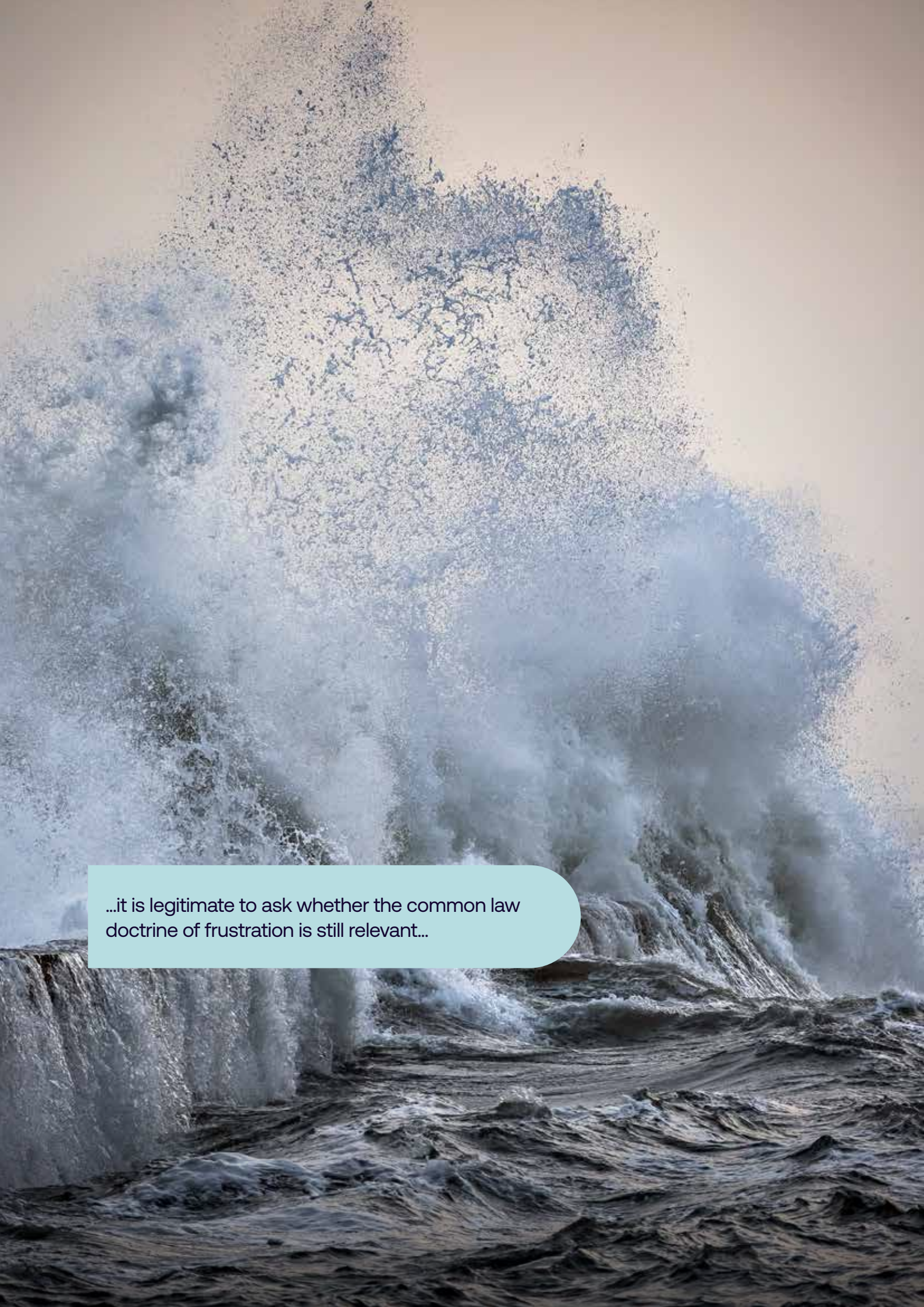
No Way Through: Frustration in an Age of Conflict

UKDC
IS MANAGED
BY **THOMAS
MILLER**



Contents

Introduction	03
Frustration: The basic principles	04
What is the contractual risk allocation?	06
Route closures and frustration	10
Prolonged delay is not necessarily frustrating	11
Charterparty risk clauses vs frustration	14
Is frustration obsolete?	16



...it is legitimate to ask whether the common law doctrine of frustration is still relevant...

Introduction

War, sanctions, governmental intervention and the closure or obstruction of important trading routes are hardly new problems for shipping. These disruptive events have generated much of the modern shipping jurisprudence on frustration, from the World Wars and the Suez crisis to conflicts in the Middle East in the 1960s and 1970s.

A common thread running through many of the commercial disputes arising during those periods was a deceptively simple question: if neither party caused the disruption, who bears the consequences? Or, who agreed to bear the risk of disruption? These questions lie at the heart of the doctrine of frustration. Recent disruption affecting the Black Sea, the Red Sea, the Strait of Hormuz, and the Persian Gulf has again required parties to consider what happens when contractual performance is delayed, made dangerous or, at least by its originally contemplated route, rendered impossible.

Frustration is sometimes described as an event-based doctrine. A charter might, for example, be said to have been “frustrated by war”. However, a closer examination of the authorities reveals a more nuanced enquiry which is explored throughout this publication.

Ultimately, the key points to consider when faced with a disruptive and potentially frustrating event are:

- ▶ Frustration is not triggered simply by the occurrence of war, detention, route closure or other disruption; the focus is on the effect of the event on the parties’ bargain.
- ▶ How does the contract allocate risk: what risks did the parties agree to bear, and what provision did they make for those risks materialising?
- ▶ Modern charterparty clauses increasingly allocate and make provision for disruptive risks (e.g. express war risk and force majeure clauses).
- ▶ If the contract provides an effective answer, frustration should not be used to reallocate an unfavourable bargain. If the contract makes no, or insufficient, provision, frustration may apply only where the remaining obligations have become radically different from those originally agreed.

Against this backdrop, it is legitimate to ask whether the common law doctrine of frustration is still relevant? In our view, frustration survives but its role has changed. It is best understood as operating at the residual boundary of contractual risk allocation.

Frustration:

The basic principles

The “radically different” test

The familiar test is easily stated but notoriously difficult to apply. A contract may be frustrated where, without fault on the part of the party relying on the doctrine, a disruptive event makes performance impossible or transforms the obligation into something “radically different” from what was agreed. The doctrine is deliberately narrow in its application and increased expense, inconvenience, or an unprofitable bargain will not ordinarily suffice.¹

Importantly, the modern approach does not permit the “radically different” test to be applied in isolation. In *The Sea Angel*,² the court observed that contracts allocate risk and that the parties’ objectively ascertainable assumptions “in particular as to risk” were central to the frustration enquiry. The assessment is “multi-factorial” and includes the contract terms and context; the parties’ objectively ascertainable knowledge, expectations and assumptions; the nature of the disruptive event; and the reasonable prospects for future performance in the changed circumstances.

If the consequences of a disruptive event are so severe as to transform the contractual adventure into something “radically different”, frustration operates automatically to discharge the parties from future performance. It does not depend on either party electing to terminate.³ As such, the threshold for frustration is deliberately high.

The enquiry necessarily involves a judgement as to whether circumstances have become so fundamentally different that the law should discharge the parties from future performance. But that judgement cannot be divorced from its consequences. Frustration may substantially reallocate the agreed risk framework. Under a time charter, for example, delay ordinarily falls on the charterer unless an off-hire provision applies. A finding of frustration due to delay reverses that allocation, relieving the charterer of the obligation to pay hire and shifting the financial consequences of the continuing delay to the owner. This is one reason why the contract’s existing allocation of risk features so prominently in the frustration enquiry.⁴

¹ Young KC et al, *Voyage Charters* (5th Ed. 2022) (“*Voyage Charters* (2022)”), para. 22.1

² *The Sea Angel* [2007] 2 Lloyd’s Rep 517 (“*The Sea Angel* (2007)”), para 111

³ *Voyage Charters* (2022), para. 22.1

⁴ *The Sea Angel* (2007), para 112

No such thing as a “frustrating event”

It is common to speak loosely of frustration caused by war, route closure, detention, or strikes. The shorthand obscures the real enquiry. The better question to ask is what has the disruptive event done to contractual performance: has it caused delay or made the agreed route impossible or made performance illegal or changed the bargain fundamentally?⁵

The distinction matters in practice. A declaration of war may leave a voyage capable of performance. Conversely, an administrative order falling short of war may make the agreed performance impossible. A closed waterway may simply require a longer route or it may destroy the only contractual route available. Asking whether war, sanctions, or route closure constitutes a frustrating event puts the question the wrong way around. The relevant questions are: what has happened to the contractual performance and who agreed to bear the consequences?

The relevant questions are: what has happened to the contractual performance and who agreed to bear the consequences?



⁵ Hibbitts, The Impact of the Iran-Iraq Cases on the Law of Frustration of Charterparties (1985) *Journal of Maritime Law and Commerce* 441, pp 443-444

What is the contractual risk allocation?

Start with the contractual bargain

As stated above, it is necessary to consider the contractual terms and whether a party has agreed to bear the risk of a particular event. A helpful, modern illustration of the importance of the parties' contractual allocation of risk is the Commercial Court decision in *The Kyla*.⁶

In that case, the ship was damaged in a collision while under a 12 to 15 month time charter. Repairs were expected to cost about \$9 million, compared to the ship's sound market value of about \$5.75 million. The owner argued that the charterparty was frustrated because the repair cost exceeded the ship's value. The Commercial Court disagreed on appeal.

The charterparty required the owner to maintain hull and machinery insurance at an agreed value of \$16 million throughout the charterparty. The court regarded this as evidence of the parties' risk allocation and held that the repair costs of \$9 million were not "radically different" from the owner's contractual obligation to maintain hull insurance at a level which was comfortably sufficient to meet those repairs. The owner had assumed the relevant repair risk and the charterparty was not frustrated.

The court rejected any inflexible rule that a charterparty is frustrated whenever the cost of repairing a ship exceeds her value. The question was whether the contract, properly interpreted, provided for the contingency which occurred and how it allocated that risk.

There is an important qualification.

The Kyla does not mean an owner's external insurance arrangements will usually decide whether a charter is frustrated. A charterer's rights should not generally depend on an insurance policy to which it is not a party. However, in *The Kyla*, the insurance arrangement formed part of the charterparty itself. External risk management, not ordinarily forming part of the contractual context, may become part of the enquiry when the contract itself requires the arrangement.

Mentioning a risk is not the same as allocating all its consequences

The presence of a clause dealing with a disruptive event does not, however, automatically exclude frustration. The authorities distinguish between clauses addressing some consequences of an event and clauses dealing with those consequences fully and completely.

In *The Florida*,⁷ the voyage charter contained an exceptionally broad liberty clause covering detention, delay, danger and illegality. Before any cargo was presented for loading, Nigeria prohibited the import of the contractual cargo. The arbitrator held that the wide liberty clause prevented the operation of frustration in the circumstances but, on appeal, the Commercial Court disagreed. A clause dealing fully and completely with the consequences of an otherwise frustrating event will leave no room for frustration. But a clause may address one effect without addressing all effects on both parties' rights and

⁶ *The Kyla* [2013] 1 Lloyd's Rep 565 ("The Kyla (2013)"), para 74

⁷ *The Kyla* (2013), paras 77-85

liberties. In this case, the clause did not make full and complete provision for an import prohibition occurring before cargo had even been made available for loading, nor did it provide an alternative contractual means of performance. The charterer was, therefore, entitled to rely on frustration.

*The Evia (No. 2)*⁸ illustrates the difficulty in drawing that line. The time charter contained a war risks clause requiring the charterer to reimburse additional war-risk premiums and pay hire for “all time lost”. The owner argued that this allocated the risk of the ship’s wartime detention to the charterer and excluded frustration. The court disagreed and held that the clause addressed the consequences of a limited interruption, rather than an indefinite detention which effectively brought the ship’s contractual service to an end.

The practical difficulty is clear: a clause may plainly allocate the consequences of a temporary disruption but the harder question is whether that allocation was intended to endure when the disruption becomes so prolonged or severe that it threatens the commercial adventure itself.

Is there an alternative means of performance?

If the contract itself provides a workable alternative means by which the parties’ bargain can still be performed, frustration will not usually apply.

In *The Safeer*,⁹ Iraq invaded Kuwait while the ship was discharging there. The charterparty war-risk wording authorised the owner to follow discharge directions given by a government or belligerent power. Discharge subsequently resumed under Iraqi military orders. The charterer argued that the charterparty had been frustrated but failed. The court held that the owner was performing the agreed adventure under an express liberty clause intended for that kind of supervening event.

The same principle was applied recently in *London Arbitration 8/26*.¹⁰ The ship had loaded ammonium nitrate in the Sea of Azov for discharge at a Black Sea port but Russian authorities refused permission to transit the Kerch Strait. It was accepted by the tribunal that discharging at the original port was impossible, but the charterparty incorporated VOYWAR 1993 terms requiring the charterer to nominate an alternative safe port when war risks prevented performance. Because the clause provided a contractual route to performance, the charterparty was not frustrated.

The important distinction is between failure of the originally contemplated performance and failure of the contractual bargain itself. If the contract provides another way to perform the bargain, the original voyage may be impossible without the contract being frustrated.

⁸ Weale, *Frustration and Constructive Total Loss* (2013) LMCLQ 260, pp 260–261

⁹ *The Florida* [2007] 1 Lloyd’s Rep 1 (“*The Florida* (2007)”), paras 6; c.f. *The Kyla* (2013), at para 79

¹⁰ *The Evia (No. 2)* [1982] 2 Lloyd’s Rep 307, pp 321–322

What is the contractual risk allocation? continued

A commercial alternative is not necessarily contractual performance

Contractual performance is not the same as commercial equivalence. In the recent Supreme Court decision *RTI Ltd v MUR Shipping BV*,¹¹ concerning a force majeure clause rather than frustration, the contract required payment in US dollars. Sanctions made timely US dollar payments difficult, and the charterer offered to pay in euros instead. The issue was whether the reasonable endeavours proviso required the owner to accept that proposal. The Supreme Court held that the owner did not have to accept that substitute. The reasonable endeavours proviso in the force majeure clause was intended to preserve contractual performance, not replace it with different performance.

The frustration cases demonstrate the other side of the same point. In *The Super Servant Two*,¹² the carrier agreed to transport a drilling rig using either Super Servant One or Super Servant Two. Super Servant Two sank. Super Servant One was available but the carrier had other commitments for Super Servant One and chose not to use her for the rig. The Court of Appeal held that the contract was not frustrated because the contract allowed performance by Super Servant One. The carrier's decision to use the ship for other commitments did not convert its commercial difficulty into frustration.

Read together, the cases illustrate the distinction. A party is not ordinarily required to accept a commercially equivalent substitute which falls outside its bargain. But where the contract itself provides an alternative means of performance, commercial inconvenience will not usually amount to frustration.

But where the contract itself provides an alternative means of performance, commercial inconvenience will not usually amount to frustration.

¹¹ *RTI Ltd v MUR Shipping BV* [2024] UKSC 18; [2024] 1 Lloyd's Rep 621

¹² *The Super Servant Two* [1990] 1 Lloyd's Rep 1, p 9



Route closures and frustration

Recent disruption through the Red Sea and Bab-el-Mandeb and resulting diversions around the Cape of Good Hope, has given renewed importance to older cases concerning Suez Canal closures. Those cases remain useful when considering whether loss of an expected trading route fundamentally changes the contractual adventure or merely makes performance longer and more expensive.

In *The Eugenia*,¹³ the ship became trapped in the Suez Canal during the 1956 crisis. Once released, performance required returning through the Mediterranean and proceeding to India via the Cape of Good Hope. The Court of Appeal held that the charter was not frustrated on the basis that there was no contractual obligation to use the Suez Canal; the obligation was to use the customary route at the time of performance. With the Canal unavailable, the Cape became the relevant contractual route. The fact that the voyage was substantially longer and more expensive (about 138 days compared with 108 days via Suez) did not make the performance “radically different”.

That decision was applied by the Court in *The Captain George K*,¹⁴ albeit reluctantly. The ship was chartered for a voyage from Mexico to India via the Suez Canal but by the time the ship reached Port Said, the Canal had closed following the outbreak of war. The owner sent the ship back through the Mediterranean and around the Cape of Good Hope. The expected distance to India had been about

9,700 miles but the actual voyage was about 18,400 miles. Despite the near doubling of distance and substantial additional expense, the court held that the charter was not frustrated because the decision in *The Eugenia* was binding. The judge noted, however, that without that authority he would have concluded that the performed voyage was fundamentally different from the one contemplated.

These cases remain relevant where an expected waterway becomes unavailable. But they do not create a rule that the existence of any alternative route necessarily prevents frustration. The question is what was the parties’ bargain? In the Suez cases, the Canal was the customary route but not the only contractually permitted route.

The position may differ where the charter requires one specified route, and only that route. There is greater scope for frustration in those circumstances because performance by another route may no longer amount to contractual performance at all.¹⁵

Even where another route is contractually permissible, *The Captain George K* demonstrates that there remains a question of degree. Additional distance and expense will not usually be enough. But at some point, the alternative voyage may change the distance, duration, risk, or commercial purpose so much that it is no longer the same adventure in more onerous form. The difficulty is identifying when that boundary has been crossed.

¹³ *The Eugenia* [1963] 2 Lloyd’s Rep 381, p 390

¹⁴ *The Captain George K* [1970] 2 Lloyd’s Rep 21, pp 32–33

¹⁵ Baker et al, *Time Charters* (8th Ed. 2025) (“Time Charters (2025)”), paras 26.62–26.64

Prolonged delay is not necessarily frustrating

Delay is problematic because there is no fixed point at which an interruption becomes sufficiently serious to destroy the contractual adventure. A contract is frustrated when the legal threshold for frustration is crossed. That may occur immediately upon the disruptive event occurring, but in delay cases it may only occur later, when the interruption is reasonably expected to become sufficiently prolonged that the remaining performance is radically different from what was agreed.

*The Nema*¹⁶ illustrates the difficulty. The ship was chartered to perform seven consecutive voyages carrying titanium slag from Sorel to Europe during the 1979 shipping season. After the first voyage, a strike at the shipper's plant prevented further loading. By the time the dispute came before an arbitrator, the strike had lasted for more than three months and showed no realistic prospect of ending, while only about three months of the 1979 shipping season remained. The arbitrator held that the 1979 adventure had been frustrated and that decision was ultimately upheld by the House of Lords.

Lord Roskill rejected rigid categories of delay capable of frustrating a contract and considered that the relevant question is not the nature of the cause of the delay but its effect upon the performance of the

parties' obligations. Where delay is relied upon, the question calls for an "*informed judgement*" based on what has happened and what is reasonably likely to happen.

Two points follow. First, the assessment is forward looking. The question is not how long the interruption ultimately lasted, but what a reasonable commercial assessment at the relevant time would have concluded about its likely duration and effect. The relevant time is the date on which frustration is said to have occurred. The assessment takes account of the delay already suffered and the further delay then reasonably to be expected, without the benefit of hindsight. Later events may assist in testing whether the contemporary assessment was reasonable, but they do not retrospectively determine whether the contract was frustrated. Indeed, in *The Nema*, the strike unexpectedly ended on 5 October, only nine days after the date on which the arbitrator found that the 1979 adventure had been frustrated.¹⁷ That later development did not invalidate the decision.¹⁸ Secondly, duration cannot be considered in isolation: it must be assessed against the nature, purpose, and remaining life of the contractual adventure.

¹⁶ *The Nema* [1980] 2 Lloyd's Rep 339

¹⁷ *Time Charters* (2025), paras 26.47-26.49

¹⁸ *The Nema* (1980), p 349

Prolonged delay is not necessarily frustrating continued

The limits of any numerical approach are starkly illustrated by *The Sea Angel*. The ship was chartered for up to 20 days to assist with salvage operations at Karachi following the grounding and breakup of the tanker *Tasman Spirit*. After only 14 days, all that remained was an anticipated three-day voyage to the contractual redelivery point. Instead, the ship was detained by the Karachi Port Trust for 108 days.

While the charterer's case for frustration appeared compelling, it nevertheless failed. The Court of Appeal held that the likely delay, compared with the time left under the charter, was important but not decisive. The detention could potentially have been overcome through negotiation, diplomatic pressure or legal proceedings. The charter was also entered into against the backdrop of a major salvage and pollution incident, in which governmental intervention and detention were recognised risks. In general terms, the contractual risk of detention-related delay rested with the charterer and a finding of frustration would have reversed the contract's risk allocation.

Crucially, the court did not decide the issue with hindsight by looking back at the eventual 108-day detention. The question was whether, as at the dates the charterer argued the contract had been frustrated, the delay already experienced and the further delay reasonably expected had transformed the adventure into something "radically different". On the information reasonably available at the time, effective relief through the local Pakistani courts remained a realistic possibility, and the charter had not been frustrated.

In short, a frustrating delay is not a numbers game. *The Nema* shows that prolonged interruption, assessed prospectively against the remaining life and purpose of the adventure, can frustrate a contract. *The Sea Angel* demonstrates the converse: even a delay vastly exceeding the period of performance remaining under the charterparty may not do so. Duration matters but only as part of a wider assessment of the parties' bargain, the nature and likely persistence of the disruption, the prospects of overcoming it, and the contractual allocation of risk.

In short, a frustrating delay is not a numbers game.



Charterparty risk clauses vs frustration

Modern reported decisions in which frustration is successfully invoked are relatively few. Charterparties increasingly contain bespoke clauses allocating the consequences of disruptive events. Shipping standard forms have long allocated war, delay, ice, and other risks but today's clauses are broader and more specialised. Rather than leaving disruptive events to frustration, standard forms and clauses can recalibrate the bargain without necessarily bringing the charterparty to an end.

War risks are an obvious example. BIMCO's CONWARTIME¹⁹ and VOYWAR²⁰ clauses may permit an owner to refuse to proceed to or through an area affected by war risks and require the charterer to issue alternative orders. Other clauses may deal with additional war risk premiums, cancellation rights, hire, or piracy or other dangers. These provisions displace an uncertain common law enquiry with an agreed contractual mechanism for managing the risk.

Force majeure clauses provide another example. English law has no general doctrine of force majeure, so the clause's effect depends on its wording. Unlike frustration, the parties can define the qualifying events and the consequences if performance is disrupted.

BIMCO's Force Majeure Clause 2022 provides a topical example. It lists qualifying events including war, piracy, trade restrictions, and obstruction of waterways (the explanatory notes specifically refer to the Ever Given blocking the Suez Canal in 2021 as inspiration for the latter). To qualify, the event must prevent performance, be beyond the affected party's reasonable control, not reasonably foreseeable when the contract was concluded and incapable of being reasonably avoided or overcome (sub-clause (a)).

The important distinction is what follows. The clause requires notice, reasonable endeavours to mitigate, and cooperation between the parties (sub-clauses (c) and (d)). Neither party is in breach to the extent that performance is prevented, and unaffected payment obligations will continue (sub-clauses (e) and (f)). Termination is a "last resort". It may apply if performance becomes "impossible, illegal, or radically different from what was intended at the time of the conclusion of the contract", or if it "substantially [affects] the performance of the contract as a whole" for longer than a period agreed by the parties (sub-clause (g)).

¹⁹ BIMCO, War Risks Clause for Time Chartering 2025 (CONWARTIME 2025)

²⁰ BIMCO, War Risks Clause for Voyage Charter Parties 2025 (VOYWAR 2025)

Put simply, the clause recalibrates the contract before it ends it. If a qualifying disruption prevents performance, notice, mitigation, and cooperation obligations apply first and the contract remains in force. Under a time charter, hire may continue unless another clause places the ship off hire. Likewise, under a voyage charter, laytime and demurrage will continue to be incurred unless an exception applies. Termination is only available if the agreed threshold is reached.

BIMCO's clause is not a universal solution. BIMCO cautions that it may be unsuitable for a period time charter with a broad trading range, where alternative employment orders could overcome the disruption. This is why sector-specific standard forms calibrate response to risk differently. For example, SUPPLYTIME 2005 combines a force majeure clause with an express right to terminate²¹ while TOWCON 2008 allocates extra time costs to the hirer if canal transit becomes impossible for reasons beyond the tug owner's control.²² The broader point is that contracts can be tailored to manage disruption and its consequences.

²¹ BIMCO, SUPPLYTIME 2005, clauses 31(b)(vi) and 32

²² BIMCO, TOWCON 2008, clause 7



Is frustration obsolete?

There is some force in saying that modern drafting has contractualised many issues that, historically, frustration addressed. Instead of choosing between survival or automatic termination, contractual provisions can provide intermediate responses involving alternative orders, notice, mitigation, suspension, continued payment obligations, cost allocation, and termination. The more complete the contractual machinery, the less work there is for frustration to do.

So, is frustration obsolete? In one sense, yes. Sophisticated drafting narrows its practical scope and increasingly regulates risks which once generated frustration disputes. Where the contract provides an effective route to continued performance, frustration should not allow a party to escape merely because the agreed allocation has become commercially unattractive.

But frustration still has a role.

First, it can survive within contractual drafting. In BIMCO's Force Majeure Clause 2022, one of the contractual routes for termination deliberately mimics the doctrine of frustration as one of its thresholds for termination: where the contract has become "impossible, illegal or radically different" from the contractual bargain. This gives parties access to the case law on frustration.

Secondly, no contract can anticipate every event or consequence. Express provision for a limited interruption may not exclude frustration if events move beyond its scope. A clause may address temporary but not indefinite detention or one consequence of an event but not another. The disruption may ultimately develop until the remaining adventure no longer resembles the bargain the parties made.

Frustration survives at the point where the contract runs out of answers. Modern drafting has not abolished the doctrine; it has moved it to the edge of contractual risk allocation.

This publication was produced with the assistance of Ian Teo of Helmsman LLC.





UK Defence Club

Thomas Miller Defence Ltd,
90 Fenchurch Street,
London
EC3M 4ST
T: +44 207 283 4646
tmdefence@thomasmiller.com

Cyprus

Thomas Miller Cyprus Insurance
Agency Ltd,
2 Pavlou Nirvana & Agias Fylaxeos Street,
Limassol, Cyprus
CY-3021
T: +357 25 375020
tmdefence@thomasmiller.com

ukdefence.com