agreement is prevented from, or unable to, perform the obligations under the agreement, due to some event which occurs, which was outside of their sphere of control due to supervening illegality. The doctrine of frustration should be borne in mind in this case as an exception to the Sued Bank's duties under the *pacta sunt servanda* principle, which arose when the Andorran new regulation was passed and made the performance of the contract illegal and beyond the parties' control. As a consequence of this act of government, the agreement became impossible to perform, thus discharging the Sued Bank from its contractual liability.

Notes

1 The Andorran High Court of Justice or *Tribunal Superior de Justicia d'Andorra*, in Catalan, is the highest court in the Principality of Andorra for all matters not pertaining to the Andorran Constitution (which is monitored by the Constitutional Court) and is ultimately responsible for the uniform interpretation of private law jurisprudence in Andorra.

2 *Force majeure* is an expression universally used in French and familiar to civil law jurists. Although it is unusual to Common Law lawyers, other theories, such as impossibility, frustration of purpose and impracticability, come to practically the same result as *force majeure*. According to Black's Law Dictionary, *force majeure* is defined as 'An event or effect that can be neither anticipated nor controlled'.

3 Pursuant to section 311 of the of the USA Patriot Act, FinCEN is authorised to designate foreign financial institutions as being 'of primary money laundering concern' and to take any of five 'special measures' against institutions so designated. FinCEN can impose the most severe, fifth special measure – allowing it to prohibit or restrict domestic financial institutions from opening or maintaining correspondent accounts for designated foreign financial institutions – only by issuing a regulation under the Administrative Procedure Act.

4 By Law 12/2018 of 31 May 2018, INAF was renamed the Andorran Financial Authority (AFA), also assuming the supervision of the insurance and reinsurance sector.

5 Law No 8/2015 of 2 April 2015 on Urgent Measures to Implement Mechanisms for the Restructuring and Resolution of Banking Institutions encompass a set of rules applicable to the restructuring and resolution of banks, in line with Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms.

The Convention on the Contract for the International Carriage of Goods by Road and Food Safety: an original Luxembourg ruling

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The issue recently before the Sixth Chamber of the Luxembourg District Court was who should pay for loss and damage caused by stowaways.

Demonstrating pragmatism but also originality, the Court handed down a decision that adds a new dimension to the jurisprudential structure built up over more than five decades around the application of the Convention on the Contract for the International Carriage of Goods by Road (CMR). It is therefore interesting to take a look at this ruling, especially since Luxembourg's decisions in this area are few and far between.

The case pitted a famous Italian agri-food company against an Austrian transport company to which it had entrusted the transport of food products.

The transport contract, subject to the CMR, concerned the transport of 26 pallets of praline boxes between Germany and the United Kingdom. The chocolates were individually wrapped in aluminum foil, arranged by 24 in a hard plastic box, and grouped by six in boxes placed on pallets and wrapped in plastic film.

At the British checkpoint and before the truck boarded the ferry to Dover, the police discovered the presence of 14 stowaways in the truck's trailer. Once they had disembarked from the truck, it continued to its destination where the consignee refused to take delivery of the cargo. The inspection of all pallets

revealed that the upper layers had compressed, that some cartons were soiled and that some cartons had been opened and their contents eaten or destroyed. Some clothing was also found on the floor of the trailer.

The Italian agri-food company, the shipper, took the decision to destroy the entire cargo and brought an action for liability against the Austrian transport company, the carrier, who refused to compensate it. The case was brought before the Luxembourg Court, which had jurisdiction under a jurisdiction clause contained in a framework contract binding on the parties.

After having declared itself competent on the basis of this jurisdiction clause and having held that a presumption of liability was incumbent on the carrier from which it could not be exonerated on the basis of Articles 17 (2) and 17 (5) of the CMR, the Luxembourg Commercial Court examined the extent of the damage suffered by the shipper, namely the question of the total or only partial loss of the goods.

This is the most interesting point of this decision. The shipper claimed reimbursement for the entire cargo on the grounds that it had been obliged to destroy it completely, because the products intended for human consumption had been compromised.

The shipper availed itself in particular of the provisions of Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs (the 'Regulation') which provides that food safety is the responsibility of food business operators and aims to ensure the hygiene of foodstuffs at all stages of the production process, from primary production to sale to the final consumer.

Chapter IX of the Regulation, entitled 'Provisions applicable to food', states in point 3 that: 'At all stages of production, processing and distribution, *food is to be protected against any contamination likely to render the food unfit for human consumption, injurious to health or contaminated in such a way that it would be unreasonable to expect it to be consumed in that state*' [emphasis author's own].

The shipper also relied on an expert report prepared at the request of its insurer, in the presence of representatives of both parties. In the report it was stated that the migrants:

> 'move[d] all over the pallets and broke some of the top layers and opened some of the cartons. Due to these facts, in our opinion the goods are contaminated and cannot be sold without risk for the consumers. [...]. As a consequence of the above legislation [ie, the Regulation] when food is considered unsafe, like in the present case, business operators are obliged to withdraw or recall it to avoid even the risk of food being unsafe which is destined to human consumption and that must comply with the highest standard of hygiene. Consequently we have been recommended the destruction of the contaminated goods'.

For its part, the carrier argued that there were four layers of protection before reaching the food product, so it seemed obvious that the entirety of the goods could not have been affected by the stowaway's presence given the amount of packaging surrounding the products. The carrier also argued that tests could and should have been performed by the shipper to determine which products were at risk to the consumer.

The Court, after approving the conclusions of the expert, ruled that the precautionary principle on food matters requires the withdrawal of the goods in accordance with the Regulation and that it cannot burden the consignor with proof of positive demonstration of microbiological contamination of the entire cargo, insofar as such examination would entail in particular an exorbitant cost of analysis.

The Court, guided by a well-written and very convincing expert report, granted the shipper's claim for compensation for the entirety of the goods transported.

This decision highlights the precautionary principle that the food producer cannot take any risk in terms of quality and safety. This is not only for its brand image but also for consumer safety.

Note

1 Commercial Judgment 2019 TALCH15/00372, Case N°TAL-2017-00987.