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Supreme Court clarifies limits of force majeure: No obligation to accept non-contractual performance

In *RTI Ltd v MUR Shipping BV*,¹ the Supreme Court has held unanimously that a force majeure clause requiring an affected party to use "*reasonable endeavours*" to overcome a force majeure event did not oblige that party to accept an offer of non-contractual performance.

This article focuses primarily on the Supreme Court's decision and its practical implications for parties agreeing or seeking to comply with force majeure clauses in commercial contracts. A detailed overview of the procedural history of the proceedings can be found [here](#).

Background

In June 2016, MUR Shipping BV (the "**Owners**") entered into a contract of affreightment ("**COA**") with RTI Ltd (the "**Charterers**") for the shipment of monthly consignments of bauxite from Guinea to Ukraine. In April 2018, the US Department of the Treasury's Office of Foreign Assets Control ("**OFAC**") added the Charterers' parent company to the Specially Designated Nationals and Blocked Persons List. Payment of freight under the COA was specified to be in US dollars and it was later agreed between the parties that US dollar payments would be delayed (or possibly rejected) as a result of the sanctions because such transfers would have to be cleared by a US intermediary bank. This led to the Owners invoking a force majeure clause in the COA by sending a force majeure notice (the "**FM Notice**") on 10 April 2018.

The term 'Force Majeure Event' was defined in the COA as an event which, among other conditions, "[could] not be overcome by reasonable endeavours from the Party affected" (the "**Reasonable Endeavours Proviso**"). In sending the FM Notice,

the Owners contended that: (i) the ongoing performance of the contract would constitute a breach of the sanctions placed upon RTI's parent company by OFAC; and (ii) the sanctions would prevent the US dollar payments required by the COA.

In response, the Charterers stated that sanctions would not interfere with cargo operations and noted that contractual payment under the COA could be made in Euros, with any resulting costs to be met by the Charterers. In reply, the Owners submitted that, pursuant to the COA, freight was to be paid in US dollars and that the likely delay in such payments would obstruct the loading and discharge of cargo.

Due to the occurrence of the purported force majeure event, the Owners refused to nominate vessels under the COA and the Charterers were required to obtain alternative tonnage at additional cost. On this basis, the Charterers brought a claim against the Owners for the additional costs incurred in this process, which was ultimately appealed to the Supreme Court.

Court of Appeal

Prior to the Supreme Court's decision (analysed below), a majority of the Court of Appeal found in favour of the Charterers, ruling that the exercise of reasonable endeavours under a force majeure provision required a non-defaulting party to accept non-contractual performance in circumstances where this would have no detrimental effect on the non-defaulting party.² The Owners appealed this decision to the Supreme Court.

¹ [2024] UKSC 18.

² *MUR Shipping BV v RTI Ltd* [2022] EWCA Civ 1406.

Supreme Court decision

The Supreme Court determined that, given the ubiquity of the Reasonable Endeavours Proviso within force majeure clauses, the Court of Appeal erred in interpreting it by reference to its specific wording. Allowing the Owners' appeal, it determined that "*reasonable endeavours*" to overcome a force majeure event does not include accepting an offer of non-contractual performance absent clear wording to that effect. The following principles were applied:

1. The object of reasonable endeavours provisos:

Force majeure clauses excuse a party from performance where the failure to perform is caused by an event of force majeure. However, a failure to perform will not be caused by the force majeure event if the party could reasonably prevent the failure of performance.³

The question of whether a party could have taken reasonable steps to overcome an impediment to contractual performance is a causal one and must be addressed by reference to the parameters of the contract.

The object of the Reasonable Endeavours Proviso (and reasonable endeavours requirements within force majeure clauses more generally) is to maintain performance of the contract according to its terms, not to allow the substitution of different, non-contractual performance. Therefore, the key question which must be asked is: *can the exercise of reasonable endeavours achieve the continuation or resumption of contractual performance?* If the answer is yes, the affected party may not invoke the force majeure clause.

It is worth noting the Court's clarification that no particular significance should be attached to the use of the word "outcome" in the Reasonable Endeavours Proviso and that other synonymous words could be used with the same effect.⁴

2. Freedom of contract:

The principle of freedom of contract includes freedom not to contract, and that includes the freedom to reject an offer of non-contractual performance of a contract. On that basis, the Owners were entitled to reject payment in any currency other than the contractually agreed currency.

3. The importance of certainty in commercial contracts:

The Court noted that, by clear wording, the parties could themselves provide for the Reasonable Endeavours Proviso to include accepting an offer of non-contractual performance from the other party. However, the Court remained of the view that the COA, as drafted, required payment in US dollars and the importance of certainty would be maintained so long as the Reasonable Endeavours Proviso was interpreted as focusing on that as the relevant contractual performance.

4. The need for clear words to forego valuable contractual rights:

It is a general principle of contractual interpretation that parties do not forego valuable rights without making such an intention clear. The Court found that the wording within the Reasonable Endeavours Proviso was not sufficiently clear to require the Owners to forego their right to payment of freight in US dollars and accept the offer of non-contractual performance.

Analysis

Commercial entities will welcome the clarity and certainty brought by the Supreme Court's judgment. By reversing the decision of the Court of Appeal, the Supreme Court has provided parties seeking to rely upon a force majeure event with certainty that they do not have to accept non-contractual performance (however reasonable) as part of their duty to use "*reasonable endeavours*" to overcome the event. This is, in our view, the obviously correct decision.

In the context of the ongoing uncertainty around the effect of sanctions and the approaches of banks to accepting or effecting payments, receiving parties may wish to include in their payment clauses options for the paying party to pay in different currencies upon the occurrence of certain (e.g. sanctions-related) events. If this approach is adopted, the parties are advised to be as specific as possible about the event that will trigger the option, any related requirements (notice, timing, etc.), and how the option interacts with any other relevant contractual clauses, such as sanctions and exceptions clauses.

³ This is because, in such circumstances, the cause of the failure to perform would be the party's inadequate response to the force majeure event rather than the event itself.

⁴ In particular, the Court suggested that the same effect would be achieved by words such as: "avoid" or "avoided", "negate", "neutralise", "nullify", "defeat", "prevent", or "remove".

On the other hand, paying parties may be content for the existing position to continue with force majeure clauses taking full effect whilst sanctions and other force majeure events continue. Much will depend on the balance of the respective parties' negotiating powers.

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