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MUR SHIPPING REVISITED: WHEN FORCE MAJEURE AND REASONABLE ENDEAVOURS COLLIDE

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SUMMARY

Case update: On 15 May 2024, the UK Supreme Court overturned the decision of the Court of Appeal. The Supreme Court held that there are good reasons of principle supporting MUR's case that "reasonable endeavours" to overcome a force majeure event do not include accepting an offer of non-contractual performance absent clear wording to that effect.

In **MUR Shipping BV v RTI Ltd** the English Court of Appeal has overturned by majority the judgment of the Commercial Court in MUR Shipping BV v RTI Ltd [2022] EWHC 467 (Comm) and provided fresh guidance on when alternative performance can be required as a reasonable endeavours obligation in circumstances of a force majeure event created by sanctions.

In June 2016, MUR Shipping BV and RTI Ltd entered into a freight contract under which RTI agreed to ship, and MUR agreed to carry, consignments of bauxite from Guinea to Ukraine. The contract contained a force majeure clause which prevented liability on the part of either party for any loss, damage, delay or failure in performance caused by a force majeure event.

The definition of a force majeure event included a specific criteria (clause 36.3(d)) that it must be an event or state of affairs that *"cannot be overcome by reasonable endeavors of the party affected."*

In April 2018, RTI's parent company, Rusal plc, became subject to US sanctions. MUR invoked the force majeure clause stating that it would be a breach of sanctions for it to continue to perform its obligations. In particular, MUR stated that the sanctions prevented payment from being made in US dollars, which was an express term of the contract. RTI argued that sanctions were inapplicable to MUR, as it was a Dutch company, and that payment could instead be rendered in EUR.

THE ARBITRATION

MUR declined to perform its contractual obligations and RTI commenced an arbitration for its costs in securing alternative freight during the suspension of the contract by MUR.

The tribunal found in favour of RTI on the ground that the definition of a force majeure event included a requirement to use reasonable endeavours to overcome the relevant event. The tribunal held that accepting payment in EUR was a realistic alternative that MUR could have adopted with no detriment to it, as RTI would have paid the costs of conversion.

MUR challenged the award in the English Commercial Court under section 69 of the Arbitration Act 1996 on the limited and specific ground that the reasonable endeavours' obligation could not extend to accepting payment in EUR when the Agreement had specified currency in US dollars.

THE COMMERCIAL COURT JUDGMENT

The Commercial Court allowed MUR's section 69 challenge, finding that the reasonable endeavours provision in the force majeure clause did not require MUR to accept non-contractual performance - in this case, payment in a different currency to that specified in the contract.

However, Mr Justice Jacobs granted RTI permission to appeal on the basis that the appeal had a real prospect of success and raised a question of general importance, as required under section 69(8) of the Arbitration Act 1996.

THE COURT OF APPEAL JUDGMENT

The Court of Appeal, in a majority decision, overturned the judgment of the High Court.

The majority (Lord Justice Males and Lord Justice Newey) determined the appeal based on the proper construction of the specific terms of the force majeure clause. They held that the key question in the case was whether the acceptance of RTI's proposal to pay freight in euros and to bear the cost of converting those euros into US dollars would have overcome the state of affairs caused by the imposition of sanctions on Rusal.

The crux of the issue then became whether, in order to overcome the state of affairs caused by the imposition of sanctions, it was essential for the contract to be performed in strict accordance with its terms (as MUR submitted). In other words, whether the state of affairs could only be overcome if RTI found a way to make payments in US dollars.

The majority took the view that this was too narrow an approach to the construction of the clause. *"Terms such as "state of affairs" and "overcome" are broad and non-technical terms and clause 36 should be applied in a common sense way which achieves the purpose underlying the parties' obligations – in this case, concerned with payment obligations, that MUR should receive the right quantity of US dollars in its bank account at the right time. I see no reason why a solution which ensured the achievement of this purpose should not be regarded as overcoming the state of affairs*

resulting from the imposition of sanctions. It is an ordinary and acceptable use of language to say that a problem or state of affairs is overcome if its adverse consequences are completely avoided."

In particular, the majority held that if the state of affairs could be overcome, a party cannot rely on the force majeure provision in the contract.

In reaching its decision, the majority distinguished two earlier judgments (Bulman v Fenwick [1894] 1 QB 179 and Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries & Food [1963] AC 691). In those cases the Court of Appeal and the House of Lords held that an offer of alternative performance would not overcome problems created by a force majeure event because accepting an alternative performance would not have given a counterparty the substance of what it was entitled to under the a contract.

Lord Justice Arnold dissented from the majority. He relied on the presumption in Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1974] AC 689 that the parties do not give up their legal rights in the absence of clear express words. In his view, an *"event or state of affairs*" was not "*overcome*" by an offer of non-contractual performance, and, in particular, an offer of non-contractual performance by the counterparty to the party affected by a force majeure event. The party invoking a force majeure clause should be entitled to insist on strict contractual performance by the other party. On this basis, he held that MUR was entitled to insist upon its strict contractual right to receive payment in US dollars.

COMMENT

It remains to be seen if permission to appeal the judgment of the Court of Appeal to the Supreme Court will be granted. On a first glance, the judgment provides guidance for parties who are dealing with difficulties in making payments in contractually specified currencies as a result of sanctions imposed in connection with the conflict in Ukraine. Notably, the guidance issued by the Loan Market Association provides that facility agreements may include provision to specify that a payment by a borrower can be made in an alternative currency where a repayment would otherwise be blocked as the result of sanctions. However, given wide-ranging sanctions imposed on Russia in a variety of jurisdictions since February 2022, payment in an alternative currency may not be always a viable option and may even be considered an attempt to circumvent applicable sanctions in some jurisdictions.

Overall, the judgment of the Court of Appeal has turned on the interpretation of the wording of a specific force majeure clause in the same vein as it happened in a number of other recent cases, which involved the interpretation of force majeure clauses. It should be borne in mind that the term force majeure is not a term of art under English law and each case will turn on its own facts and the interpretation of the contract in question. Accordingly, it does not mean that the judgment of the Court of Appeal will enable other parties to succeed with the same argument because relevant force majeure provisions may be drafted differently. Care therefore should be taken when drafting force

majeure clauses to ensure that they cover every potential eventuality, including in the context of sanctions.

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