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Insights

RTI LTD V MUR SHIPPING BV: CERTAINTY V COMMERCIALITY

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SUMMARY

In this Insight, first published in PLC, James Clarke, Richard Shaw and Anna Blest consider the Supreme Court's decision in RTI Ltd v MUR Shipping BV [2024] UKSC 18, which confirmed that a party's obligation to exercise reasonable endeavours to overcome force majeure does not extend to having to accept non-contractual performance.

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The question of what a "reasonable endeavours" obligation might require a party to do in the context of a force majeure clause has been considered by the Supreme Court in *RTI Ltd v MUR Shipping BV [2024] UKSC 18*. It concluded that an obligation to exercise reasonable endeavours does not extend to requiring the party relying on the force majeure clause to accept non-contractual performance, even where it would have suffered no detriment in doing so. In reaching that conclusion, the Supreme Court has reinforced the primacy of the parties' bargain as documented in the contract, emphasising the importance of contractual certainty and predictability.

For more information, see Legal update, Force majeure does not require affected party to accept non-contractual performance (Supreme Court).

FORCE MAJEURE CLAUSES AND REASONABLE ENDEAVOURS OBLIGATIONS

Various events that have impacted the local and global economies have recently drawn increased focus on the operation and effect of force majeure clauses. These clauses form part of the contractual allocation of risk between parties to a transaction and are intended to provide a party (or both parties) relief from claims of breach of their obligations where performance is impacted by the occurrence of defined "neutral" events.

A "reasonable endeavours" obligation is typically used as a means to bridge a gap in contracts. It creates a contractual mechanism enabling the parties to meet a specified objective without being held to an absolute contractual obligation to perform in a certain way while at the same time avoiding an unenforceable agreement to agree.

Such an obligation is often included (and the Supreme Court confirmed that it is implied) in force majeure clauses to temper the suspension of a party's contractual obligations by requiring the party relying on the clause to do something to overcome the effect of the event of force majeure before relying on the forbearance that the clause provides.

What that something extends to was considered by the Supreme Court in this case.

For more information about force majeure and reasonable endeavours obligations generally, see Practice notes:

- Contracts: force majeure.
- Best or reasonable endeavours?.

RTI V MUR: THE FACTS

MUR (a shipowner) contracted with RTI (as charterer) for the carriage of a defined volume of bauxite from Conakry in Guinea to Dneprobugsky in Ukraine. In return, RTI agreed to make freight payments to MUR and RTI was specifically required to make those payments in US dollars.

On 6 April 2018, US sanctions were applied to RTI's parent company, which extended to RTI. MUR gave notice to RTI of an event of force majeure and noted that the sanctions prevented RTI from making payment to MUR in US dollars as required by the contract.

The relevant clause of the contract included the following definition of force majeure:

> *"36.3. A Force Majeure Event is an event or state of affairs which meets all of the following criteria:*
>
> *(a)It is outside the immediate control of the Party giving the Force Majeure Notice;*
>
> *(b)It prevents or delays the loading of the cargo at the loading port and/or the discharge of the cargo at the discharging port;*
>
> *(c)It is caused by one or more of acts of God, extreme weather conditions, war, lockout, strikes or other labour disturbances, explosions, fire, invasion, insurrection, blockade, embargo, riot, flood, earthquake, including all accidents to piers, shiploaders, and/or mills, factories, barges, or machinery, railway and canal stoppage by ice or frost, any rules or regulations of governments or any interference or acts or directions of governments, the restraint of princes, restrictions on monetary transfers and exchanges;*

(d)It cannot be overcome by reasonable endeavours from the Party affected."

RTI disputed MUR's reliance on the force majeure clause. It offered to make the freight payments in euros instead of US dollars and bear any resulting additional transaction costs or exchange rate losses. MUR declined. On the basis that it could rely on its contractual right to payment only in US dollars, it suspended performance of its obligations and refused to nominate vessels for the affreightment of bauxite.

RTI contended that MUR could not rely on the force majeure clause as the force majeure could have been overcome by MUR accepting RTI's offer of payment in euros and that doing so would constitute reasonable endeavours for the purposes of clause 36.3(d).

The matter was referred to arbitration and then went on appeal to the High Court, Court of Appeal and finally to the Supreme Court.

SUPREME COURT'S APPROACH

The Supreme Court concluded that reasonable endeavours to overcome the effect of sanctions did not extend to accepting RTI's offer to make freight payments in euros.

In reaching this conclusion, the Supreme Court drew on the following principles:

- The object of reasonable endeavours provisos.
- Freedom of contract.
- The need for "clear" words before a party can be said to have foregone valuable contractual rights.
- The importance of certainty in commercial contracts in English law.

As to the first of these, the Supreme Court characterised the reasonable endeavours proviso as follows:

"... the relevant question is whether reasonable endeavours could have secured the continuation or resumption of contractual performance. It is reasonable steps towards that end with which the reasonable endeavours proviso is concerned. It is concerned with the steps which the affected party should have reasonably taken to enable the contract to continue to be performed. It is not concerned with the steps that could or should have been taken to secure some different, non-contractual, performance. The object of the reasonable endeavours proviso is to maintain contractual performance, not to substitute a different performance." (*Paragraph 38, judgment.*)

The Supreme Court considered the nomination of freight payments specifically in US dollars constituted a valuable contractual right on the part of MUR and that RTI's proposal to make

payment in euros was a non-contractual alternative that MUR was entitled to reject. The Supreme Court confirmed that the principle of freedom of contract means that parties are free not to accept performance which is not in accordance with their contractual entitlement and that clear words in the contract would be required to show the parties intended to deviate from this position.

The Supreme Court considered that to decide otherwise would import "considerable legal and factual uncertainty". In this case, that would involve consideration of whether accepting RTI's offer would (i) involve any detriment or other prejudice to MUR; and (ii) achieve the same result as performing the original contractual obligation. It is striking that the Supreme Court prioritised the principle of contractual certainty over consideration of these issues in the circumstances where, at face value, RTI's offer would probably not cause detriment or prejudice to MUR and would result in MUR receiving payment as substantively envisaged by the contract.

NAVIGATING "NEUTRAL" RISK EVENTS IN PRACTICE

In recent years, contracting parties have had to navigate a combination of significant "neutral" risk events that have impacted their ability to perform their respective obligations. Construction projects, in particular, have faced extreme challenges in the availability of labour and materials resulting from the combination of Brexit, COVID-19, the war in Ukraine (and sanctions), a period of high inflation and, more recently, attacks on cargo ships en route to and from the Suez Canal.

Such has been the extreme impact on viability of particular projects, many parties in the industry have looked beyond their strict contractual entitlement and negotiated solutions to navigate the challenges presented by these events. This is in circumstances where the contract in question may or may not have provided for relief to be given or specific risks to have been allocated between the parties.

While we continue to see disputes playing out due to the effects of these events, in large part employers and contractors have managed to work together to craft a way forward "for the good of the project". This frequently involves alternative working arrangements, re-sequencing of activities, extensions to the programme, alternative procurement or specification of materials and amendments to payment terms to include solutions such as advance payments, additional milestone payments and direct payments to suppliers.

In most cases, these solutions venture far outside the existing scheme of contractual obligations that the parties originally signed up to. The Supreme Court's more rigid approach to enforcing certainty and upholding the parties' strict contractual bargain in this case thus creates a certain tension. It raises questions as to whether parties should "hold firm" and rely on the certainty that English law provides in the terms of contract or whether they should attempt to make express provision for the consideration of "extra-contractual" solutions to overcome neutral risk events. Alternatively, whether they should rely on commercial pragmatism and their working relationships in the administration and execution of their contractual obligations to overcome those risks.

DRAFTING FOR CERTAINTY… AND FLEXIBILITY

While the Supreme Court identified that "clear, express words" would do the trick to identify when a party would have to accept non-contractual performance, being able to predict the sorts of circumstances in the context of various force majeure scenarios where an alternative performance would deliver roughly the substance of what was intended and then provide for this in the drafting could be an uphill battle.

The Supreme Court also identified that there may be scenarios where it is necessarily implied into a contract that a party can no longer insist on strict performance of an obligation and would be required to accept an alternative performance (*paragraph 44, judgment*). However, the test for necessary implication sets a high bar, and does not seem to leave much room for the sorts of commercial pragmatism you might expect parties to demonstrate when encountering an unexpected obstacle to performance.

In the series of force majeure judgments considered by the Supreme Court (*paragraph 60 onwards, judgment*), the relevant contracts did not specify expressly that there were alternative methods available that would enable the contract to have been performed. Therefore, while there may in practice have been an alternative "business" option to the parties, there was no contractual compulsion requiring the affected party to elect for that other option. This all suggests that if the parties can craft in their drafting the objective that is to be achieved and the alternative means of achieving it (if the originally specified performance becomes impossible or illegal), then a party may be held to perform, even in a manner which is outside the strict contractual language of the agreement.

DRAFTING FOR ALTERNATIVE CONTRACTUAL PERFORMANCE

If the parties can identify particular situations where they can foresee the benefits of accepting non-contractual performance (for example, accepting payment in a different currency, delivery at a different time/place, accepting alternative specification of materials), there may be merits in specifying the alternative ways in which an obligation can be performed (either specifically or generically).

Following this decision, this could be done by providing at the outset for a menu of alternative obligations (giving a party the right to choose between two or more specified performances or between two or more specified ways in which performance of a single obligation is to occur, with the power to make the election given to either one of the parties). This has the consequence that if one or more of the specified alternatives becomes impossible or illegal after the contract is made, the relevant obligation will not be held to have been discharged as long as at least one of those alternative means of performance remains possible and lawful.

Commentary suggests that where a contract imposes a true alternative obligation, it is not possible to tell at the time the contract is concluded which alternative a party is bound to perform. This

differs from the scenario where a party must perform in a specific way but is free to substitute a different performance. In the latter case, the specified performance alone is originally due and remains due until the substitution is made. When the substitution is made, the substituted performance becomes due (and the originally specified performance ceases to be due). This has consequences for establishing when the relevant contractual obligation is discharged if, for example, the originally specified performance becomes impossible or illegal before the substitution is made.

It looks as if, given the formulation of the arguments by the Supreme Court, that even including the requirement to use "best endeavours" (which would import the obligation to act against your own commercial interests (*Jet2.com v Blackpool Airport [2012] EWCA Civ 417)*) would still not require a party to accept non-contractual performance, even in circumstances where to do so would involve no detriment to the affected party.

Recent case law has however highlighted the dangers of reflecting commercial positions in an agreement without considering the risks if these cannot be achieved. For example, in *Capita Business Services Ltd v IBM UK Ltd [2023] EWHC 2623*, where the parties were held to the "commercial" language used (which assumed a certain event would have happened by a certain date, failing which, IBM was under no obligation to continue to provide a service when a replacement service provider had not been made operational by a specified date). This had the effect that the service provider could effectively walk away from the contract at the specified date, notwithstanding no replacement provider had been appointed. This is a good example of failing to address what should happen if an assumption proves to be wrong – and could be a pitfall for those trying to embed more alternatives in drafting, in response to the Supreme Court's judgment in *RTI v MUR*.

ADMINISTERING CONTRACTS WITH FLEXIBILITY

Practically speaking, if circumstances occur during the lifespan of a contract that suggest a party has expressly/impliedly given up a valuable right to insist on "by the book" contractual performance (perhaps past elections to waive strict terms of the contract) it would be wise to document these carefully, in case that party later wishes to insist on strict compliance with the hard-edged standards set out in the contract. Clearly, you might expect significant modifications to be documented in a contractual variation, but waivers of performance accepted between business teams on a day-to-day basis can be harder to document and track.

CONCLUSION

If you are in the school of ensuring certainty in the administration and enforcement of contractual rights, the Supreme Court's judgment will be welcome confirmation of English law's principles of freedom and interpretation of contract and should not come as a surprise.

That will provide limited reassurance for parties navigating significant commercial risks in a global economy that is subject to combinations of shock events that are not always predictable. They must decide whether to attempt to cater for these events in the allocation of risk in their contract (which will be upheld), or rely on commercial pragmatism and relationships to navigate risks as and when they materialise, and to explore extra-contractual solutions in the interests of common venture. Given the challenges in legislating for the unknown, these two approaches are not mutually exclusive.

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