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Sanctions on Russia revisited: Using reasonable endeavours in the event of force majeure now excuses strict performance

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In October 2022, the English Court of Appeal delivered its judgment in *MUR Shipping BV v RTI Ltd*[1] overturning the Commercial Court's judgment and restoring the arbitration award and finding that MUR (the **"Owners"**) could not rely on the force majeure clause to suspend performance, as they should have exercised reasonable endeavours and accepted payment of the contractual amount due for freight in an alternative currency from RTI (the **"Charterers"**).

This latest judgment illustrates the difficulties with interpretation of a force majeure clause requiring the exercise of reasonable endeavours.

Facts of the case

The proceedings concerned a contract of affreightment (the **"COA"**) entered into in 2016 between the Owners and the Charterers. In 2018, the Charterers' parent company, Rusal, became the subject of US sanctions, but the Charterers did not. On 10 April 2018, the Owners sent a force majeure notice to the Charterers on the grounds that it would be a breach of sanctions for the Owners to continue contractual performance under the COA and load further cargoes. The notice also pointed out that the Owners were prevented from receiving payments in US dollars from the Charterers. The Charterers responded rejecting the notice and stating that sanctions were unlikely to interfere with cargo operations, payment was able to be fulfilled in Euros (with any additional costs or exchange rate losses being borne by the Charterers) and the Owners were a Dutch company and not a 'US person' caught by sanctions.

Arbitration[2]

The matter went to arbitration and an arbitral tribunal held that the Owners' case failed on the basis that the force majeure clause provided that the force majeure event could have been overcome by '*reasonable endeavours from the Party affected*', that being acceptance of the payment amount in Euros as opposed to US dollars. The Owners appealed the award under section 69 of the Arbitration Act 1996 on a question of law.

Commercial Court Judgment[3]

On appeal to the English Commercial Court, the Owners contended that there was no rule or authority in support of the tribunal's finding that using reasonable endeavours under a force majeure clause can include agreeing to

[1] [2022] EWCA Civ 1406

[2] See Glenn Kangisser and Shu Shu Wong's alert of the arbitration and Commercial Court judgment: Sanctions on Russia – a reasonable endeavours obligation in a force majeure clause does not require a party to accept non-contractual performance

[3] [2022] EWHC 467 (Comm)

non-contractual performance by a counterparty or varying the express terms of the contract. The Charterers argued that the Charterers' offer to pay in Euros, as opposed to US dollars, constituted reasonable endeavours, and that in any event the necessary requirements to establish force majeure did not exist because difficulties in paying in US dollars did not ultimately prevent the loading of cargo.

The judge rejected the Charterers' arguments and found in favour of the Owners. The court held that the obligation to pay freight in the contractually agreed currency is an important contractual obligation and that exercising reasonable endeavours to circumvent force majeure does not mean non-contractual performance or accepting a variation of the terms of the contract.

Issue for determination for the Court of Appeal

Whether the force majeure event, namely the sanctions creating difficulty for the Charterers to make payments in US dollars, could have been overcome by the Owners, as the affected party, using reasonable endeavours and accepting the Charterers' proposal to pay in Euros.

Court of Appeal Judgment

The Charterers' appeal was granted by the Court of Appeal. By a majority of 2-1 the Court of Appeal restored the award of the arbitrators and found that had the Owners accepted the Charterer's proposal to allow them to pay the contractual amount in Euros, this would have amounted to reasonable endeavours and would have overcome the alleged force majeure event.

In reaching this result, Males LJ, who gave the leading judgment, made the following points:

a) They were concerned with the specific terms of the clause in question and were not concerned with reasonable endeavours clauses or force majeure clauses in general.

b) The definition of '*Force Majeure Event'* under the contract extended to both an *event or state of affairs* arising from an event and it was necessary to consider both.

c) It was established that an event or state of affairs must – (a) be outside immediate control of a party giving notice of force majeure, (b) prevent or delay loading the cargo, (c) be caused by one of the specified matters in the clause and (d) be impossible to resolve with the affected party using reasonable endeavours.

d) The *'Party affected'* is the party providing the force majeure notice and seeking to rely on force majeure to suspend its contractual obligations. Therefore, in this case, this was the Owners and it was their reasonable endeavours that was relevant.

e) The clause was not concerned with the exercise of reasonable endeavours *'in the abstract'*. The question was '*whether the relevant event of state of affairs can be overcome by reasonable endeavours from the party affected'.* Here this was whether acceptance by the Owners of the Charterers' proposal to pay the contractual amount in Euros (as well as the additional costs and currency exchange losses) would have overcome the state of affairs arising because of the sanctions.

f) A solution which ensured the payment of the correct amount of US dollars to the Owner at the right time, was therefore an adequate solution and could be regarded as overcoming the state of affairs resulting

> from the imposition of sanctions. By reference to the arbitrators' findings of fact, the Court of Appeal found that acceptance of the Charterers' proposal would have '*achieved precisely the same result as performance of the contractual obligation to pay in US dollars'* and the court therefore concluded that this would have presented no disadvantage or damage to the Owners. The court however noted that the position *would* be different had the Charterers' proposal resulted in detriment to the Owners or something different to what was required under the COA.

Similarly, in the dissenting judgment of Arnold LJ, it was accepted that the Owners would not have been detrimentally impacted by the Charterers' offer. However, the judge went on to state that if what is being offered is non-contractual performance, there must be clear, express wording within the force majeure clause which allows the affected party to give up their contractual rights and accept non-contractual performance.

Implications

It is important to note that, while this judgment will be of interest to those impacted by sanctions on Russia and those with force majeure clauses which require the exercise of reasonable endeavours, the Court of Appeal clearly stated that their judgment was concerned with the specific terms of the clause and was not generally addressing reasonable endeavour or force majeure clauses and therefore does not provide a clear precedent for future cases. Parties must therefore remember that any force majeure clause is likely to be considered on its own terms.

The judgment does however indicate that in the right circumstances exercising reasonable endeavours to overcome a force majeure event or state of affairs can include non-contractual performance which does not align with the express terms of the contract provided that the outcome is effectively the same and would not be detrimental to the other party. To avoid this, and as advised in our previous alert, parties should seek to expressly set out the specific steps the parties are expected to undertake towards achieving the required endeavours standard – whether "reasonable", "all reasonable" or "best", as applicable. In each case, this should include the timescales and the steps to be taken and any limit on expenditure.