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A creature of contract: *force majeure*

By Markus Esly

Introduction

Prince Rupert of the Rhine was born in 1619. He was of German-British descent. He became a soldier as a youth and stuck with that career. Prince Rupert proved a capable cavalry commander, though (it is said) he was hampered by his youthful impatience and exuberance. During the English Civil War (1642-1651), he rose through the Royalist ranks and became a prominent commanding officer. Prince Rupert had his troops requisition lands to use them as camps or staging posts for the Royalist campaign. In doing so, Prince Rupert, probably unwittingly, made a great contribution to the development of the common law.

On 26 March 1647, in *Paradine* v *Jane* the Court of King's Bench gave judgment in a dispute concerning arrears of rent under a lease. The judgment is still quoted today as establishing that the English law of contract recognises no general defence of supervening impossibility: if a party agrees to do something that turns out to be impossible, they will be held to their bargain. In that venerable case, the tenant admitted that he owed the landlord three years' rent, but argued that he should not have to pay because Prince Rupert had forcibly expelled him from the land, aided by a foreign 'hostile army of men' who had then kept him out for the three years in question. That state of affairs had somewhat lessened the tenant's ability to enjoy the land. The landlord sued nonetheless, arguing that the tenant had no good defence to the claim.

One reason relied on by the landlord was that the tenant had failed to prove that the entire army had indeed consisted of aliens (in the sense of foreigners) and enemies of the king, absent evidence of what country each individual soldier hailed from. Prince Rupert was only half-German after all, and it could not be ruled out that some of the soldiers had been Scots. The point in issue appears to have been that if some of the invaders had been subjects of the Crown, then the tenant might have had some form of redress and could have sought to recover his loss (the rent due) from them in the English courts, whereas if he had been forcibly evicted by enemies of the Crown, he would be unable to do so, and (the tenant hoped) would not have to pay out in the first place.

The Court of King's Bench dismissed the tenant's defence on the assumption that the entire army had been alien enemies (even though that had not been proven), holding that:

> "*… where the law creates a duty or charge and the party is disabled to perform it and hath no remedy over, there the law will excuse him … but when the party of his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.*"

Even 375 years ago, the English Courtswere thus prepared to hold a party to its bargain, expecting them to spell out any circumstances in which they might be excused from having to perform in the contract.

In this article, we look at how that stance has softened somewhat since then, before turning to the way in which parties do precisely what the Court of King's Bench advised them to do – namely to "*provide against …*" supervening impossibility of performance by including *force majeure* clauses in their agreement. The essence of

a *force majeure* clause is to relieve a party from any liability to the other, and excuse non-performance, if a qualifying 'event' prevents them from doing what they have contracted to do. However, many such clauses state that during any period of *force majeure*, the parties are not entirely relieved from any and all obligations, and should do what they can to overcome the event in question, and resume performance. The contract might expect them to use their "*reasonable endeavours*" in that regard. Recently, in in *MUR Shipping BV* v *RTI Ltd* [2022] EWHC 467 (Comm), the Commercial Court had the occasion of considering precisely what such a "*reasonable endeavours*" obligation in a *force majeure* clause in a shipping contract meant.

The doctrine of frustration in English law

Before turning to *force majeure* provisions and reasonable endeavours, it is worth recalling that English law does recognise the doctrine of frustration, which provides some relief to the strict rule in *Paradine* v *Jane*. Frustration is a creature of the common law, first recognised in *Taylor* v *Caldwell* (1863) 3 B. & S. 826. In that case, the plaintiff had contracted to hire the defendant's music hall for concerts to take place on four specific dates. After the contract, but before the first concert, the music hall burnt down through no fault of the defendant. The plaintiff sued for the losses suffered as a result of having to cancel the concerts. The Court of Queen's Bench found for the defendant, holding that they were not unconditionally liable, despite having undertaken something that turned out to be impossible. *Taylor* v *Caldwell* is often referred to as introducing a 'doctrine' of frustration into English law, but the Court's reasoning was actually based on an implied term (rather than a wholly extraneous legal doctrine that stood beside the parties' agreement). The Court interpreted the contract for the hire of the venue as being:

> "*… subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing, without default of the contractor … The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. In none of these cases is the promise other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel.*"

Since then, frustration has been extended beyond the destruction of the subject matter of the contract to include the frustration of the commercial venture that the contract represents. Frustration has, however, always had (and continues to have) a high threshold, and will only rarely apply. It does not assist a party whose performance has suddenly become more expensive, even though the reasons for that might have been quite unexpected or unforeseeable. Instead, as the House of Lords made clear in *Davis Contractors Ltd* v *Fareham UDC* [1956] A.C. 696, there has to have been a fundamental or radical change in the nature of the contractual obligation, compared to the original undertaking, before frustration can operate. Doing the same thing but at greater cost will not bring frustration into play. As Lord Radcliffe said in *Davis*:

> "*… frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. … There must be … such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.*"

In that case, the contractor had undertaken to build 78 houses for a fixed price, within eight months. Exceptionally bad weather and a severe labour shortage (caused by delayed demobilisation of troops following the end of the Second World War) meant that the work took almost three times longer, 22 months, and cost considerably more. Their Lordships unanimously held that the contract had not been frustrated.

Force majeure is contractual in nature

No doubt the narrow scope of the doctrine of frustration continues to be an important reason why parties include *force majeure* provisions in their contract. These must be drafted carefully, and they should list out with as much precision as possible all the events that relieve a party from its obligations. This is because the term *force majeure* has no recognised meaning in English law: it is a label that has been borrowed from French law, and its use in a contract does not automatically lead to any substantive legal principles being imported or incorporated. In *British Electrical and Associated Industries (Cardiff) Ltd* v *Patley Pressings Ltd* [1953] 1 WLR. 280, the parties had included the following wording in a contract for the sale of steel:

> "*Subject to force majeure conditions that the government restricts the export of the material at the time of delivery.*"

The High Court held that these words were too obscure and could not be given any definite meaning. On a true construction, the reference to "*force majeure conditions*" meant conditions of contracts (terms), and not circumstances that might be seen as amounting to *force majeure* events. At the time, the industry used a number of different *force majeure* clauses, and there was insufficient evidence that the parties had intended to incorporate any particular form of wording into their contracts.

Everything therefore depends on exactly what the specific *force majeure* clause provides. No overriding, or purposive, approach to the construction of such a provision will be applied under English law. *Force majeure* clauses are interpreted in the usual manner, by giving effect to the contractual wording. *In Coastal (Bermuda) Petroleum Ltd* v *VTT Vulcan Petroleum SA* [1996] 2 Lloyd's Rep 383, the Court of Appeal noted that the judge below had fallen into error when he had construed a *force majeure* clause by reference to what he saw as the general intention of the parties, rather than starting by looking at the words that the parties had used. The clause in that case was relatively widely worded, as it extended to:

> "*… any breach … or non-performance … which directly or indirectly results from any cause beyond sellers or buyers control, whether such other causes be of the classes herein specifically provided or not.*"

The contract was on back-to-back terms with another transaction. The Court of Appeal held that the word "*seller*" was only a reference to the party to the contract that contained the provision, and not to other sellers in the chain of contracts, which were to be treated as separate agreements from the present contract unless the parties had provided otherwise.

The decision in *Tandrin Aviation Holdings Limited* v *Aero Toy Store LLC., Insured Aircraft Title Service, Inc* [2010] EWHC 40 (Comm) further illustrates what does not amount to *force majeure*. A contract for the sale of a private jet contained the following provision (emphasis added):

> "*Force Majeure*
>
> *Neither party shall be liable to the other as a result of any failure of, or delay in the performance of, its obligations hereunder, for the period that such failure or delay is due to: Acts of God or the public enemy; war, insurrection or riots; fires; governmental actions; strikes or labor disputes; inability to obtain aircraft materials, accessories, equipment or parts from vendors; or any other cause beyond Seller's reasonable control. Upon the occurrence of any such event, the time required for performance by such party of its obligations arising under this Agreement, shall be extended by a period equal to the duration of such event.*"

Following the global financial crisis, the buyer found itself unable to raise finance to pay the balance of the purchase price for the jet when that fell due, and thus refused to accept delivery of the aircraft. The buyer sought to rely on the *force majeure* clause as giving it reprieve, and relied on the reference to "… *any other cause beyond the Seller's control*", arguing that this should be read as also including the "*Buyer*". The buyer argued that the global financial crisis was an unanticipated, unforeseeable and cataclysmic event of the kind that those words in the contract were concerned with. The judge disagreed. He referred to a line of cases which held that changes in economic or market conditions, affecting the profitability of the contract or the ability of any party to finance the transaction, are not to be regarded as *force majeure* events (or as frustrating the contract) – absent clear and express wording to the contrary. He followed an earlier decision of the House of Lords, *Tennants (Lancashire) Ltd* v *CS Wilson & Co Ltd* [1917] AC 495, where their Lordships had warned that:

> "*The argument that a man can be excused from performance of his contract when it becomes "commercially impossible" seems to me to be a dangerous contention which ought not to be admitted unless the parties plainly contracted to that effect.*"

The judge also noted that the clause only referred to a "… *cause beyond the Sellers reasonable control*", but made no mention of the buyers. He found that this part of the provision was one-sided, and was intended only to benefit the sellers. This was not surprising because the sellers had the primary obligations to construct and procure the aircraft, and those obligations were far more likely to be affected by the kind of *force majeure* events that the clause listed than the buyer's obligations, which were concerned with payment and accepting delivery.

References to *force majeure* events may well bring to mind the notion that those events must be unforeseeable, or should not have been anticipated by the parties to the contract. However, there is no general principle or rule of construction that would limit *force majeure* to matters that are unforeseeable. Even events that have already occurred at the time of the contract are not automatically excluded from being *Force Majeure*. For example, the English Courts have held that bad weather, which delayed the berthing of a vessel, fell within a *Force Majeure* clause despite the fact that the adverse weather conditions existed at the time of the contract (see *SHV Gas Supply & Trading* v *Naftomar Shipping & Trading* [2005] EWHC 2528 (Comm). It does not matter that the party seeking to rely on a such pre-existing event as constituting *force majeure* knew of it, or could with reasonable diligence have found out about it, provided that the clause does not expressly require the event in question to be unforeseeable. The High Court said that:

> "*Insofar as the expression "force majeure" has even a general meaning in English law, I would for my part doubt whether it necessarily conveys the* [element of unforeseeability]*, or at any rate I doubt if the notion was held by the draftsman of this contract. Some wars may be foreseen, some strikes and some abnormal tempests or storms. I would suggest it is more a question of causation,*

> *whether the incidence of a particular peril which could have been foreseen can really be said to have caused one party's failure of performance.*"

That brings us on to another important requirement, namely that the qualifying event must have caused the failure to perform. For instance, the clause may say that the event must have 'prevented' performance - meaning that performance must have been rendered legally or physically impossible. Other clauses may impose a lower threshold, that performance must merely have been 'delayed' or 'hindered'. In any case, a causal link between the *force majeure* event and the inability to perform will need to be established. In *Classic Maritime* v *Limbungan Makmur* [2019] EWCA Civ, the Court of Appeal had to decide whether an exceptions clause in a charterparty (a provision very similar to a *force majeure* clause) afforded a defence in circumstances where, but for the relevant occurrence, the party seeking to rely on the clause could not have performed in any event. The case arose out of a long-term contract for carriage by ship of iron ore from Brazil, where it was mined, to Malaysia. The charterer had undertaken to ship a certain amount of ore, but was prevented from doing so when a dam burst, flooding the area and forcing a stop to all mining operations. At trial, the judge had, however, found that by the time the accident happened, the charterers were already unwilling or unable to ship iron ore: they would not have performed in any event. The judge found that this inability to perform meant that the charterers could not rely on the 'exceptions' clause. The Court of Appeal's decision again turned on the specific contract wording of the provision, set out below with added emphasis:

> "*EXCEPTIONS*
>
> *Neither the Vessel, her Master or Owners, nor the Charterers, Shippers or Receivers shall be Responsible for loss or damage to, or failure to supply, load, discharge or deliver the cargo resulting From: Act of God, act of war, act of public enemies, pirates or assailing thieves; arrest or restraint of princes, rulers or people; embargoes; seizure under legal process, provided bond is promptly Furnished to release the Vessel or cargo; floods; frosts; fogs; fires; epidemics; quarantine; Intervention of sanitary, customs or other constituted authorities; Blockades; Blockages; riots; insurrections; civil commotions; political disturbances; earthquakes; Landslips; explosions; collisions; strandings, and accidents of navigation; accidents at the mine or Production facility or to machinery or to loading equipment; accidents at the Receivers' works, Port, wharf or facility; or any other causes beyond the Owners', Charterers', Shippers' or Receivers' Control; always provided that any such events directly affect the performance of either party under This Charter Party. If any time is lost due to such events or causes such time shall not count as Laytime or demurrage (unless the Vessel is already on demurrage in which case only half time to count).*"

The Court of Appeal agreed with the judge that this clause did impose a strict requirement of causation, the main reasons being that (i) the clause referred to a specific shipment "… *the cargo*" – and if none could be supplied in any event, the clause had nothing to bite on, (ii) it expressly required the loss, delay or damage to be "*resulting from …*" one of the matters listed out in the clause, and further emphasised the such an event had to "… *directly affect the performance*" of a party, and (iii) it concluded by expressly addressing any time lost due to such events – and if there was no actual cargo, no time could in fact be lost.

What do reasonable endeavours mean anyway?

Against that background, the Commercial Court's recent decision in *MUR Shipping BV* v *RTI Ltd* [2022] EWHC 467 (Comm) is a good illustration of what happens when a party has brought itself within a *force majeure* clause, but is subject to a continuing obligation to use "*reasonable endeavours*" to try and overcome it. That phrase also

appears in other clauses outside of the context of *force majeure*. Sometimes, a contract will require that 'best', as opposed to 'reasonable', endeavours are used. While the effect of such clauses will depend on the specific obligation or outcome, the English Courts have given some general guidance as to how onerous such clauses are. Starting with reasonable endeavours, in *UBH (Mechanical Services) Ltd* v *Standard Life Assurance Company* (1986, unreported), the Court said this required a balancing exercise, weighing up the importance of the contractual obligation to the other party against relevant commercial considerations such as the obligor's relations with third parties, its reputation, and the cost of that course of action. More recently, in *Minerva (Wandsworth) Ltd* v *Greenland Ram (London) Ltd* [2017] EWHC 1457, the Court proposed an objective approach, asking a reasonable and prudent person acting properly in their own commercial interest and applying their minds to their contractual obligation would have done to try and meet the objective of the clause. 'Best endeavours' imposes a more onerous standard. O'Farrell J in *CIS General Insurance Limited* v *IBM United Kingdom Limited* [2021] EWHC 347 (TCC) explained that:

> "*Although an obligation to use best endeavours is likely to encompass all reasonable steps that could be taken, it might extend to more than an accumulation of moderate or sensible steps. It is conceivable that the circumstances of a particular case could require the party with such an obligation to go further, such as taking steps that were against his own financial interests, or steps that required extraordinary efforts. Such steps are unlikely to fall within the scope of a 'reasonable endeavours' obligation.*"

The facts – *MUR Shipping v RIT*

In June 2016, RIT, the charterers, entered into a contract of affreightment with MUR, the shipowners. By that contract, the charterers committed themselves to ship, and the owners to carry, a total of 280,000 metric tons of bauxite per month from Guinea to Ukraine (Guinea has the world's largest reserves of bauxite). The contract required the charterers to pay US$ 12 per metric ton of bauxite shipped to the shipowner's bank in Amsterdam. On 6 April 2018, the US Department of the Treasury's Office of Foreign Assets Control ("**OFAC**") imposed sanction against the parent company of the charterers: RTI's parent company was linked to an oligarch who had personally become the subject of sanctions. On 10 April 2018, MUR, the shipowners, promptly gave notice of *force majeure* under the contract. They claimed that the OFAC sanctions would effectively preclude any US$ payments due to be made to them by the charterers, and they were unwilling to provide vessels and carry any consignments of bauxite faced with the prospect of non-contractual payments.

The *force majeure* clause in the contract absolved either party from liability to the other for any loss, damage or delay or failure in performance caused by a *force majeure* event, which had to meet all the following contractual requirements:

> "*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.*"

The shipowners claimed that the sanctions amounted to "… *restrictions on monetary transfers and exchanges"* (included in the contract next to a throwback reference to Prince Rupert), and that this would have the effect of 'preventing or delaying' the shipments.

The charterers disputed that the OFAC sanctions amounted to a *force majeure* event. They argued that there was nothing preventing the shipments from being made. The charterers themselves were not a sanctioned entity, and were ready to ship the bauxite in the contractual quantities. They also pointed out that the shipowners could easily be paid in € into the same Amsterdam account, and offered to do just that, picking up any additional banking charges or foreign exchange costs. The shipowners nonetheless declined to nominate any vessels on the basis of *force majeure*, and the charterers had to secure other, more expensive, tonnage. RTI then commenced an arbitration in London against MUR, claiming the additional costs they had incurred.

Decision of the arbitrators and appeal on a point of law to the Commercial Court

The arbitrators held that the owners' *force majeure* claim was well founded in all but one crucial respect. The contract required that the event in question be one that could not be "… *(d) overcome by reasonable endeavours from the Party affected*." The arbitrators found that virtually all US$ payments have to be routed through US correspondent banks. Since RTI was the subsidiary of a sanctioned entity, the tribunal concluded that as a matter of common sense, any US bank would exercise extreme caution before making payments that could be in breach of OFAC sanctions. However, the tribunal concluded that the 'reasonable endeavours' wording required the owners to accept the charterers proposal to make payment in €. If the owners had done that, they would not have suffered any detriment, because the charterers had made it plain that they would bear any additional costs or exchange rate losses resulting from the conversion of the contractually due US$ amounts into €. The tribunal found that the charterers proposal:

> "*… would have presented no disadvantages to MUR because their bank in the Netherlands could have credited them with US dollars as soon as the euros were received.*"

RTI's claim for the additional costs thus succeeded. The shipowners were dissatisfied with the award. The arbitration agreement between the parties did not exclude the right to appeal to the English Courts on a point of law, under Section 69 of the Arbitration Act 1996. The shipowners took advantage of this right, and appealed on the basis that the tribunal had been wrong to find that an obligation to use "*reasonable endeavours*" obliged a party to accept what was essentially non-contractual, or non-conforming performance.

Was the tendered performance non-contractual?

In the Commercial Court, Mr Justice Jacobs paid close attention to the nature of the payment obligation in the contract. He noted that the parties had adopted a particular form for their contract of affreightment (Gencon). This form had a specific box for the currency of all payments, and there the parties had specified US$. Jacobs J concluded that a payment in € was, therefore, tantamount to non-contractual performance. The mere fact that the receiving party's agent – here, the shipowner's Dutch bank – could convert such a payment into US$ did not make that performance contractual. The judge was also unpersuaded by the suggestion that the arbitrators had made a finding of fact (which the Commercial Court would have been bound by) that the Dutch bank would 'automatically' convert € into US$ dollars. He noted that the arbitrators had only found that the Dutch bank "… *could have credited*" the shipowner's account with US$ dollars.

This may seem a fine distinction, and it is perhaps unfortunate that the arbitrators did not say that the bank "… *would have credited*" the account with a US$ sum. Payments can be made into a currency-denominated account by specifying the sum that should be credited to the recipient. The payee's bank will work out how much (in whatever currency) the payee needs to remit to ensure that the appropriate sum is received at the other end, in the denominated currency. That process could be described as an 'automatic conversion'. However, the way in which the arbitrators expressed themselves in their findings of fact left room for disagreement. The Commercial Court was able to interpret the contract (deciding a point of law that comes within Section 69) as expressly requiring that payment be *made* (and not just *received*) in US$. Jacobs J also noted that the charterers' proposal to bear all the additional costs of making payment in € rather suggested that their proffered performance was non-contractual: were it otherwise, there would be no such 'additional' costs. In response to that, one might argue that it should be open to a party to perform in a manner that is more expensive, as long as the counterparty receives the contractually promised benefit (here, the US$ amount due for all relevant bauxite shipments), without being held responsible for the additional costs of procuring that benefit by another route. However, Jacobs J took a different view.

Did reasonable endeavours require the acceptance of non-contractual performance?

Jacobs J went on to consider whether the "*reasonable endeavours*" obligation in the *force majeure* clause obliged the shipowners to accept the charterers' proposed non-contractual performance. The charterers argued that the significance or importance of the contractual obligation that could not be performed had to be assessed, and matters needed to be looked at in the round. They said that there should be a weighing-up exercise of all relevant factors, similar to the approach taken when the extent of "*reasonable endeavours*" in other contractual provisions is considered. The core of their argument was that, since the shipowners would not be worse off, it would be reasonable to expect them to agree to a deviation from the strict contractual position.

Jacobs J considered an earlier decision *Bulman* v *Fenwick* [1894] 1 QB 179 in which the discharge of a barge in London had been delayed by strike action. The charterer had instructed that the barge go to the Regent's Canal, to be unloaded there. They were entitled to do this under the terms of the charterparty, but they also had the option to nominate any of four other ports in London for unloading. When the order to go to the Regent's Canal was given, the charterers did not know of the impending strike. However, they learnt of it after they had issued their instruction. Nonetheless, they declined to order the vessel to a different port of discharge, even though the four other contractual alternatives were unaffected by the strike, such that unloading could have proceeded in the normal course. The vessel could, in the event, not be unloaded for some time at the Regent's Canal, and the charterers could not take delivery of the goods. The owners claimed demurrage. The Court of Appeal found that the charterparty, which contained a *force majeure* or 'excepted perils' clause that extended to industrial action, required the charterers to do their best to accept delivery: they could not "… *fold their arms and do nothing*". Nonetheless, since the charterers had been contractually entitled to nominate the Regent's Canal as port of discharge, and the delay had been entirely caused by the strike there, the *force majeure* provision relieved the charterers from any liability to the owners for demurrage.

In 1894, civil and commercial cases were still tried before judge and jury. In *Bulman* v *Fenwick*, the jury had found that the charterers acted reasonably by sending the barge to the Regent's Canal before they knew of the strike, but that their refusal to divert the vessel to another London port after they had learnt of the strike had been unreasonable. The Court of Appeal, bound by the jury's findings on this point, noted that this was not a question of what conduct was reasonable or not as between the charterers and the owners. Instead, the sole question was what the charterers had been contractually entitled to do. Because they had the contractual right to nominate the Regent's Canal, their unreasonable refusal to change their mind when they heard of the strike did not matter, and they were absolved from any liability. In essence, it was their right to say that they preferred to receive their goods

at their chosen port, even if that took longer, because the parties had agreed that the delay would be *force majeure*.

Certainty is key

Jacobs J held that *Bulman* v *Fenwick* was directly applicable: it showed that there was no need to accept performance different to that which the contract required, and no need to assess the relative importance of contractual obligations. As the judge explained:

> "*… an important feature of Bulman is the existence of a range of 5 contractual options, as to the discharge port, in the charterparty. … One might have thought that the existence of a contractual choice would lend weight to an argument it would be reasonable for the charterers to be required to perform differently, if their originally selected choice was affected by the strike. However, once a valid order had been given for discharge at Regent's Canal, the charterparty in Bulman entitled (indeed required) the charterers to discharge at that place. Despite the fact that they could not "sit on their hands", there was nothing which required the charterers to perform the contract in a different way. The answer to the case was therefore the same as it would have been if Regent's Canal had been the only discharge port named in the charter.*
>
> *Accordingly, … Bulman shows that a party is not required, by the exercise of reasonable endeavours, to accept non-contractual performance in order to circumvent the effect of a force majeure or similar clause. It also shows that a relevant contractual obligation is not simply a factor to be weighed in the balance when coming to an overall assessment of reasonableness.*"

He rejected the suggestion that the obligation to pay in US$ in the present case was sufficiently qualitatively different from an obligation to nominate a port of discharge that the shipowners might have to accept non-contractual performance here:

> "*However, I can see no basis for concluding that its different character leads to the result that reasonable endeavours does not require a change in contractual performance in one category of obligation (for example, the place of discharge or the contractual cargo to be loaded), but does require a party to accept a change in contractual performance in relation to the payment obligations. It seems to me that all of these terms are important contractual terms, and that it is undesirable and difficult for there to be a need to weigh up the relative importance of different aspects of the contract.*"

To allow any kind of weighing up or differentiating between different contractual obligations in this context would introduce uncertainty, something that was undesirable in a commercial contract.

The duty to mitigate does not apply

The judge also rejected an analogy with mitigation that the charterers had sought to draw. An innocent party claiming damages for breach of contract is under a duty to take reasonable steps to mitigate its loss. Taking such reasonable steps can extend to having further dealings with the contract breaker, and accepting less valuable, non-contractual performance from them where that in fact reduces the loss (*Payzu* v *Saunders* [1919] 2 KB 581). Jacobs J held that the principles governing mitigation only came into play where there had been a breach of contract that entitled the innocent party to damages. *Force majeure* clauses, by contrast, governed whether there

was a breach of contract in the first place. They operated before the legal rules relating to mitigation or damages came into play, and independently of such rules.

Causation

The decision in *MUR Shipping* v *RTI Ltd* also features some interesting findings as to how causation works in the context of a *force majeure* clause. It will be recalled that the clause required any *force majeure* event to "… *prevent or delay the loading of the cargo at the loading port and/or the discharge of the cargo at the discharging port."* Jacobs J concluded that while the relevant event, being the "*restrictions on monetary transfers and exchanges*" imposed as a result of the sanctions, might not directly lead to such prevention or delay (because there would need to be intervening decisions – notably a decision not to proceed with the loading or unloading in the face of such restrictions), the parties had evidently agreed that it could be a *force majeure* event. Whether sanctions or restrictions had the necessary causative effect had to be considered in light of the particular circumstances – and the tribunal's findings of fact would be binding on the Commercial Court here.

The arbitrators had only found that any US$ payments to be made by the charterers to the shipowners would initially be stopped pending investigation. They had nevertheless gone on to decide that the *force majeure* claim satisfied all the contractual requirements, including that it prevented and delayed the loading of cargo – before dismissing the claim on their reading of the 'reasonable endeavours' obligations. Under the contract, payment to the shipowners was only due to be made 5 days after completion of loading. That raised the question of whether sanctions or anticipated difficulties in receiving payment could ever excuse a refusal to allow the charterers to load their cargo, since contractually, payment would only become due after loading had already completed.

Based on the submissions of the parties before him, Jacobs J had to consider whether the arbitrators had been right on the causation point – was their view within the range of decisions that were permissible as a matter of law? He held that this was so, noting that a reasonable decision by a party (not to perform a future, or subsequent obligation) in response to a *force majeure* event did not break the chain of causation. Jacobs J illustrated this by reference to a blockade of a port of discharge:

> "*When considering whether loading or discharging is delayed, there must be a prospective element when a vessel or vessels have not actually been loaded. The purpose of the clause is to suspend the obligation of each party to perform, and it would make no commercial sense for the parties to be required (for example) continuously to load ships which will then be unable to discharge, or would be subject to delays in discharge, on arrival at the discharge port.*"

The same reasoning applied with regard to the sanctions. If, as the tribunal had found, the sanctions would in all likelihood interfere with payment to the shipowners, they had not committed any error of law in concluding that the chain of causation remained unbroken despite the shipowner's subsequent (but reasonable) decision not to allow loading. Jacobs J did not, of course, decide whether causation had been established on the facts before the tribunal, since that is not something the Commercial Court can review under Section 69.

Conclusion

Under English law, *force majeure* is purely a creature of contract. However, the decided cases – including *MUR Shipping* v *RTI* – show that there are a number of points that parties can and should bear in mind:

- Spell out what events qualify as *force majeure* as clearly as you can. *Force majeure* itself is not a legal term of art. You need careful, clear and complete drafting. An English Court or arbitral tribunal will not apply a purposive construction to *force majeure* provisions, based on the general intentions of the parties.

- Economic difficulties or severe market conditions are unlikely to be accepted as *force majeure* events (or as leading to the frustration of the contract). English law does not recognise 'commercial impossibility'. If you want to excuse non-performance on that basis, you have to say so very clearly in your *force majeure* clause. The same applies for matters that are within the control of the party seeking to rely on a *force majeure* clause.

- Pre-existing, pre-contractual states of affairs or matters, or anything that the parties specifically anticipate is likely to happen, must be excluded expressly from the list of events in a *force majeure* clause (otherwise, for example, a reference to 'political unrest' might be read to refer to a situation that already existed when the parties signed their contract).

- *Force majeure* clauses govern whether there has been a breach of contract. Rules relating to mitigation of damages (which only come into play when the contract has been breached) will not therefore apply.

- Any obligation to use "*reasonable endeavours"* to overcome a *force majeure* event is limited by the parties' contractual rights or obligations. The question is not whether a deviation from the strict contractual position, or tendering alternative performance, is reasonable in all the circumstances. Instead, the question is whether the affected party can do something that will enable it to perform as originally agreed. How far they would need to go in that regard would be assessed by applying the authorities on what "*reasonable endeavours*" mean generally. Often, *force majeure* events are catastrophic in nature, and they will also (almost always) be beyond the control of the parties. There may, therefore, be little that can reasonably be done to overcome the event – but an affected party that is subject to a "*reasonable endeavours*" clause should still stop and think if there is a reasonable option open to them.