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Frankincense and *MUR*: A tale of *force majeure*

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Introduction

In our Summer 2022 edition of The Arbiter, we reviewed the history of the doctrine of *force majeure* in English law. It is entirely a creature of contract. *Force majeure* clauses developed as parties made their own agreement to soften, and make exceptions to, the general position in English law, that you can contract to do the impossible, and that it takes a great deal for a contract to be frustrated. *Force majeure* clauses set out the agreed circumstances in which the parties are relieved from performance, and (if they are well drafted) will also say something about who has to bear the additional costs arising in such circumstances.

In *MUR Shipping BV* v *RTI Ltd* [2022] EWHC 467, the Commercial Court (Jacobs J) considered one particular aspect of a *force majeure* clause: what exactly did the parties have to do, based on their chosen contract wording, to overcome a *force majeure* event? When they agreed to use their "*reasonable endeavours*" to perform notwithstanding the existence of circumstances which were meant to excuse further performance, how far did the parties intend that obligation to go? Specifically, could non-contractual, substitute performance ever be sufficient, or can the counterparty always insist on getting exactly what is on their (contractual) wish list?

The last few years have seen more *force majeure* claims than one cares for, arising from, for example, pandemics, sanctions and wars, so this point has definitely gained in practical importance. It is also one on which judicial minds may disagree. The Court of Appeal has recently overturned the first instance judgment in *MUR Shipping*, but has done so (unusually) in a majority ruling (2:1). Males LJ, in delivering the leading judgment of the majority, acknowledged that the point had inspired the parties to make careful and detailed submissions. He quoted a Court of Appeal decision on another *force majeure* clause from 1962, where the Court said:

"*I should also like to record that the questions in this case, one of fact, and four of the construction of the contract, have been resolved with the aid of only 55 authorities.*"

He added:

"*Sixty years on I am tempted to say, "if only things were still that simple".*"

A reminder: the general meaning of reasonable endeavours

Contractual obligations to use "*reasonable endeavours*", or "*best endeavours*" of course also exist outside of the context of *force majeure* provisions. There have been a number of judgments by the English Courts that help to shed light on what such obligations mean in practice.

In *UBH (Mechanical Services) Ltd* v *Standard Life Assurance Company* (1986, unreported), the Court said that a party who had to use its "*reasonable endeavours*" needed to carry out a balancing exercise, weighing up the importance of the contractual obligation to the other party against relevant commercial considerations such as its own relations with third parties, its reputation, and the cost involved in adopting a particular course of action.

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 *force majeure* clause in *MUR Shipping*

The parties in *MUR Shipping* had agreed that they were excused from performing their obligations if there was a *force majeure* event that met all the following requirements.

> "*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.*"

Russian sanctions

The dispute arose because of the (alleged) effect of Russian sanctions on the ability of one party to make payments to the other. The facts were as follows.

In June 2016, RTI, 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 MUR's account with a 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. They were unwilling to provide vessels and carry any consignments of bauxite faced with the prospect of non-contractual or late payments. MUR said that these sanctions amounted to "… *restrictions on monetary transfers and exchanges*", one of the examples of a *force majeure* event that had been expressly included in the contract.

RTI disagreed. They argued that notwithstanding the OPAC sanctions, shipments could still be made. RTI, the charterers, themselves were not a sanctioned entity, and they were ready to ship the bauxite in the contractual quantities. They also pointed out that MUR, the shipowners, could easily be paid in €Euros into the same Amsterdam account. RTI offered to do just that, and on top of that, offered to pick up any additional banking charges or foreign exchange costs. MUR were not satisfied. They declined to nominate any vessels on the basis of *force majeure*, leaving RTI to find other, more expensive, shipping arrangements. 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. This was that 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 also found that the "*reasonable endeavours*" wording required the owners to accept the charterers proposal to make payment in €Euros. 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 €Euros. 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 in the arbitration. 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 to the Court on the grounds that the tribunal had been wrong to find that an obligation to use "*reasonable endeavours*" obliged a party to accept what they said was essentially a non-contractual, or non-conforming, performance.

Non-contractual performance?

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 filling in the currency of all payments. There, the parties had specified US$. Jacobs J concluded that a payment in €Euros was, therefore, tantamount to non-contractual performance. The mere fact that the receiving party's agent – here, the shipowner's Dutch bank – could convert such a payment into US$ did not somehow make that (original) performance contractual. The judge was also not persuaded 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 €Euros 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.

In our June 2022 article, we noted that this seemed a fine distinction, and wondered what might have happened if the arbitrators had said that the bank in Amsterdam "… *would have credited*" the account with a US$ sum. As it turned out, in the Commercial Court, that was a case of 'could have, would have, should have'. In international banking, payments can be made into a currency-denominated account by specifying the sum that should be credited to the account holder as 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$. Jacobs J also noted that the charterers' proposal to bear all the additional costs of making payment in €Euros rather suggested that their proffered performance was non-contractual: were it otherwise, there would be no such 'additional' costs. In response to that, we queried whether it should be open to a party to perform in a manner that is more expensive for the performing party, as long as the counterparty receives the contractually promised benefit, and nothing less. Here, such equivalent benefit or performance would have been the US$ amount due for all relevant bauxite shipments, once automatically converted. Why should this matter, if the party receiving the benefit of performance was not 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 then considered 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. Matters needed to be looked at in the round. The charterers 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 reviewed the earlier decision of *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 at that port. 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 until the strike was over, 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 the 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 found that the charterers acted reasonably by sending the barge to the Regent's Canal port 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 port, 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*.

Jacobs J held that *Bulman* v *Fenwick* was directly applicable, and 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. 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. Accordingly, he held that RTI did not overcome the *force majeure* event by offering to pay in €Euros.

The majority decision of the Court of Appeal

RTI appealed, seeking to restore the damages awarded by the arbitrators. The appeal was allowed by the majority in the Court of Appeal. Males LJ stressed that this was a case confined to the interpretation of the wording of the *force majeure* clause. He noted that in the contract, the parties had said that *force majeure* could be found in a "*state of affairs*", and not just an "*event*". The state of affairs that had to be overcome was, he found, the delay in making US$ payments from entities that were associated with the sanctioned individual. Next, he focused on the fact that it was MUR, the party to be paid, who had given notice of *force majeure*, and

was the "*affected party*". MUR wanted to be relieved from its obligation to have to nominate a vessel because of the anticipated problems with getting paid, due to the sanctions. One therefore had to look at what reasonable endeavours MUR could take. Those endeavours had to be aimed at overcoming the state of affairs that amounted to *force majeure*. They were not an abstract concept. If they could not solve the problem, or overcome it, then it did not matter how reasonable or unreasonable such steps might be.

Males LJ adopted a common sense approach to the construction of the *force majeure* clause, focusing clearly on the intended outcome – solving or overcoming the problem:

> "*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.*"

MUR did not of course have to do very much at all to 'overcome' the problem of not being paid on time (or maybe at all) in US$: it just had to agree to receive the €Euro payment, which would be converted into US$. RTI's proposal would have avoided any detrimental consequences for MUR, and, in Males LJ's view, should therefore have been accepted. The arbitrators had found that there was no adverse consequence for MUR, and that finding should not be disturbed.

The only way in which the tribunal could have made an error of law was if 'overcoming' the *force majeure* event always had to be done by performing the contract strictly – and he did not think that the clause could be read in that way. Reading between the lines, Males LJ also thought that it was apparent from the award in the arbitration that the true reason why MUR had not wanted to accept the proposal was that the contract had become disadvantageous to it, so MUR saw a convenient way out. He distinguished the decision in *Bulman* v *Fenwick* because in that case, there was no equivalent contractual wording showing that the parties were agreed that if a *force majeure* could in practice be overcome, then that was what should happen.

Newey LJ agreed with Males LJ, noting that on a true construction of the contract, the parties had agreed that *force majeure* could be "*overcome*" in a more practical sense, always provided that there were no adverse consequences in so doing. He said:

> "*The question is not whether MUR had a contractual right to payment in dollars (there is no doubt that it did), but whether it was entitled to suspend performance under the terms of clause 36. Those terms expressly made the right to suspend performance conditional on it being the case that the "event or state of affairs" constituting the "Force Majeure event" "cannot be overcome by reasonable endeavors from the Party affected", and said nothing about the "reasonable endeavors" having to facilitate full compliance with the letter of the contract.*"

Dissenting judgment in the Court of Appeal

Arnold LJ disagreed. While he accepted that RTI's proposal could in practice have solved the problem with no detriment to MUR, he did not accept that 'overcoming' *force majeure* in a contract could be done by offering non-contractual performance. In Arnold LJ's view, the principle set out by the House of Lords in *Gilbert-Ash*

(Northern) Ltd v *Modern Engineering (Bristol) Ltd* [1974] AC 689, that a party to a contract is not to be taken as having given up its legal rights absent clear words to that effect, was in play here. MUR had the contractual right to ask RTI to make the payment in US$, and anything other than that was not what it had contracted for (even, it follows, if the alternative performance offered was just as good). He could not see anything in the *force majeure* clause by which MUR had given up its contractual rights, and those had to be construed strictly, based on the express provisions of the agreement. Arnold LJ illustrated his view with an example. He asked whether, in order to overcome a *force majeure* event, a carrier could discharge goods at a different port to the one specified in the contract, provided that this different port was the same distance from the ultimate destination for the buyer's goods as the original, contractually nominated, port. He felt that this would not be permissible.

Conclusion

The Court of Appeal's decision is, we suggest, a good example of interpreting a contract in a commercial and practical manner. The result was that performance was not precluded or excused, consistent with the notion that *force majeure* is meant to apply in exceptional circumstances only. Arnold LJ placed reliance on the principle in the *Gilbert-Ash* case, where Lord Diplock said:

> "*It is, of course, open to parties to a contract for sale of goods or for work and labour or for both to exclude by express agreement a remedy for its breach which would otherwise arise by operation of law … But in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption. … one must be able to find in the contract clear unequivocal words in which the parties have expressed their agreement that this remedy shall not be available in respect of breaches of that particular contract.*"

This principle is aimed at protecting a party's remedies for breach of contract. Suppose that in *MUR Shipping*, without anyone having served a notice of *force majeure*, RIT had sent a €Euro payment which, once converted into US$ by MUR's bank, turned out to be the exact amount that RIT needed to pay to settle its outstanding liabilities to MUR. Could MUR bring a claim for breach of contract? Perhaps yes, but MUR would end up, we suggest recovering nominal damages only, because MUR was already in the position it would have been in if RIT had paid the same amount in US$ (that being the basis on which damages for breach of contract are assessed). Protecting MUR's strict contractual rights even in a 'no loss' situation, and adopting a very strict and literal reading of the *force majeure* provision, seems the less attractive outcome.

Unfortunately, there is an empty stocking for anyone who was hoping for the Court of Appeal to add to the judicial commentary on what "*reasonable efforts*" means. The point did not, in fact, arise. On closer analysis, all that MUR (as the party giving notice of *force majeure* who wanted to be excused from performing) had to do to 'overcome' the problem was to receive money into its bank account. That requires little effort, and one should not look a gift horse in the mouth.