# May the Force (Majeure) Be With You: Supreme Court Restores Certainty on What Reasonable Endeavours in Force Majeure Clauses Require

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PRACTICES International, Shipping, Litigation, Shipping Dispute Resolution, Energy Litigation, Offshore Oil and Gas, Offshore Oil and Gas Dispute Resolution, Oil and Gas Litigation

The Supreme Court has confirmed that force majeure ("FM") clauses which provide that an event must not be capable of being overcome by reasonable endeavours do not require a party to accept non-contractual performance unless there is clear wording requiring it.[1]

**The Dispute**

RTI and MUR entered into a Contract of Affreightment ("COA") under which freight payments were to be made by RTI to MUR in US dollars ("USD"). Following the imposition of sanctions by the United States on RTI's parent company, MUR argued that sanctions prevented USD payments, and suspended performance in reliance on the FM clause. A dispute arose between the parties with RTI claiming the payment issue was capable of being overcome by reasonable endeavours which would have involved RTI paying MUR in Euros, to be converted to USD by MUR, with RTI covering any conversion losses.

**The Prior Decisions**

RTI commenced arbitration proceedings, claiming that, because the FM clause was not properly engaged, MUR was in breach of contract by suspending performance without justification. The Tribunal agreed and found that the exercise of reasonable endeavours required MUR to accept payment in Euros which they held was a "*completely realistic alternative.*"

MUR successfully appealed this decision to the High Court with the Judge finding that reasonable endeavours did not require MUR to "*sacrifice their contractual right to payment in US dollars, and with it their right to rely upon the force majeure clause.*"[2]

RTI appealed to the Court of Appeal. The majority in the Court of Appeal held that the reasonable endeavours required MUR to accept alternative performance, where it caused no "*adverse consequences*" or "*detriment*".[3]

**What did the Supreme Court say?**

The Supreme Court disagreed with the Court of Appeal and preferred the decision of the High Court. It unanimously found that a reasonable endeavours proviso did not require a party to accept non-contractual performance because:

1. reasonable endeavours wording in FM clauses ensure that the event causing a failure of *contractual* performance could not have been avoided. They are geared towards whether contractual rather than *alternative* performance was possible [38];

2. freedom of contract entails the right to refuse non-contractual performance [42];
3. clear words are required to forego contractual rights. MUR should not be forced to forego its right to contractual payment (or to rely on the FM clause), unless clear words provided so [44];
4. significant uncertainty would be caused by requiring consideration of whether alternative performance would cause detriment. Certainty should be preferred and any enquiry limited to the contract [48, 49];
5. parties can, if they wish (by very clear words), provide that alternative performance needs to be considered [59].

The Court reached this decision as a general "*matter of principle*" [25] and the reasoning will therefore apply to reasonable endeavour provisos (whether express or implied) in FM clauses generally [30].

**Why does it matter?**

Considerable uncertainty was caused by the Court of Appeal's decision as to when FM clauses require consideration of alternative performance, and what alternatives were reasonable.

The Supreme Court's decision has confirmed that reasonable endeavours must be capable of facilitating *contractual* performance – restoring certainty and avoiding the need for parties to consider whether alternative performance would cause prejudice.

This decision applies to FM clauses generally. If a party wants to require that non-contractual performance must be considered under a FM clause then this should be expressly, and clearly, provided for in the contract and will require very careful drafting. A preferable route may be to expressly identify acceptable means of performance (such as, in this case, payment in different currencies).

Please do not hesitate to contact the below or your relevant Haynes Boone contact if we can assist in reviewing your FM clauses or advising on issues relating to FM. As an example of our experience dealing with FM, see our alert "Risky Business? English Court Rejects Force Majeure Claim in Offshore Drilling Contract" on the decision in *Seadrill Ghana Operations Limited v Tullow Ghana Limited* [2018], where we were successful in obtaining a significant judgment for our client.

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[1] RTI Ltd v MUR Shipping BV [2024] UKSC 18

[2] MUR Shipping BV v RTI Ltd [2022] EWHC 467 (Comm)

[3] MUR Shipping BV v RTI Ltd [2022] EWCA Civ 1406