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

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Update

Since publishing this alert, the UK Supreme Court have allowed an appeal which, overturned the decision of the Court of Appeal and, found that force majeure 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. Our alert, May the Force (Majeure) Be With You: Supreme Court Restores Certainty on What Reasonable Endeavours in Force Majeure Clauses Require, looks at the key points from this judgment and considers its practical implications.

In October 2022, the English Court of Appeal delivered its judgment in *MUR Shipping BV v RTI Ltd* 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

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.

Update

Since publishing this alert, the UK Supreme Court have allowed an appeal which, overturned the decision of the Court of Appeal and, found that MUR's rejection of RTI's offer of non-contractual performance did not constitute a failure to exercise reasonable endeavours and therefore the reasonable endeavours provision did not prevent MUR from relying on the force majeure clause. An alert on the judgment from the Supreme Court will be available shortly.

Read the full article here.