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.

Read the full article here.