SQUIRE PATTON BOGGS

RTI Ltd v. MUR Shipping BV – The UK Supreme Court Brings Clarity to the Operation of *Force Majeure* Clauses

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Force majeure, a much-needed clarification by the UK Supreme Court in *RTI Ltd v. MUR Shipping BV* [2024] UKSC 18.

On 15 May 2024, the UK Supreme Court handed down its judgment in *RTI Ltd v. MUR Shipping BV* [2024] UKSC 18 (*RTI v. MUR Shipping*). The case provides useful guidance on some important aspects of English law on *force majeure*.

The dispute arose under a contract of affreightment (COA) which provided for payment of freight in US dollars and contained a *force majeure* clause. The charterers became subject to US sanctions, which meant that there would be problems with timely payments of freight if payments were to be made in US dollars as agreed. The owners then served a notice invoking the *force majeure* clause. The charterers rejected it and offered to pay in euros instead, and to bear any additional costs or exchange rate losses in converting euros to US dollars. The owners refused. As a result, a dispute arose as to whether the owners were entitled to reject the offer of alternative performance and rely on the *force majeure* clause.

What Is the Concept of *Force Majeure* in English Law?

English law contracts often contain *force majeure* clauses. Such clauses typically allow a party to suspend its performance if an event identified in the clause adversely affects its performance. The concept of *force majeure* is not a term of art in English law. It is for this reason that *force majeure* clauses typically contain a contractual definition of what constitutes a *force majeure* event.

Freedom of contract is fundamental to the English law of contract. In general, this means that contracting parties have the freedom to decide (i) whether to incorporate a *force majeure* clause; (ii) the form and nature of the *force majeure* events covered, (iii) what types of events are specifically included or excluded, (iv) the timing and form of notice that is to be served as a pre-condition to invoking the *force majeure* clause and (v) the consequences of validly invoking the *force majeure* clause (for example, suspension of performance, an extension of time for performance, termination of the contract, etc.)

Force majeure clauses typically contain a "reasonable endeavours" proviso, requiring a party to take reasonable endeavours to avoid, mitigate or overcome any *force majeure* event as a pre-condition to invoking the *force majeure* clause. Where an English law contract contains a *force majeure* clause that does not include any "reasonable endeavours" proviso, English courts tend to imply such a proviso into the *force majeure* clause. Whether the court will do so will depend upon the wording of the contract and all relevant circumstances of the case.

An Analysis of *RTI v. MUR Shipping*

The Background

RTI v. MUR Shipping involved a COA. By clause 36, the parties agreed that "neither Owners nor Charterers shall be liable to the other for loss, damage, delay or failure in performance caused by a *Force Majeure* Event as hereinafter defined". One of the pre-conditions to an event or state of affairs being a force majeure event was that it should be something that "cannot be overcome by reasonable endeavours from the Party affected". The contractual definition of *force majeure* events included "restrictions on monetary transfers and exchanges".

On 6 April 2018, the US Department of the Treasury's Office of Foreign Assets Control included the charterers' parent company on its sanctions list. As a result, problems were anticipated with timely payments of freight in US dollars. On 10 April 2018, the owners served a *force majeure* notice, invoking clause 36 and noting that "the sanctions will prevent dollar payments". (It was subsequently established that the sanctions did not prevent such payments but would have made timely payments difficult).

The charterers rejected the *force majeure* notice and offered to pay in euros (instead of US dollars as contracted). They also offered to bear any additional costs or exchange rate losses in converting euros to US dollars. The owners refused to accept the proposal, even though payments in euros would have been converted into US dollars by the owners' bank on receipt, and (in reliance on the *force majeure* notice) refused to nominate vessels for a while.

The ultimate issue was whether accepting the charterers' offer of making payments of freight in euros should be regarded as having fallen within the scope of "reasonable endeavours" to overcome the *force majeure* event.

The Road to the Supreme Court in *RTI v. MUR Shipping*

The dispute in *RTI v. MUR Shipping* had a rather bumpy road to the Supreme Court. It was originally determined in arbitration in favour of the charterers.

The arbitral tribunal decided in favour of the charterers. They held that the owners' reliance on the *force majeure* provisions of clause 36 was wrong because it would have been possible to "overcome" the alleged *force majeure* event had the owners' accepted the charterers' offer to pay freight in euros.

The Commercial Court reversed the tribunal's decision. It held that the exercise of "reasonable endeavours" did not require the owners "to sacrifice" their contractual right to payment in US dollars.

It was, however, overturned by the Court of Appeal. Lord Justice Males, who gave the leading judgment, held that the court was "not concerned with reasonable endeavours clauses in general" (see paragraph 47), and that there was "no reason why a solution which ensured the achievement of this purpose [of making timely payments of freight in US dollars] should not be regarded as overcoming the state of affairs resulting from the imposition of sanctions". The crucial factor was that the owners' bank would have converted the euros into US dollars upon receipt of the payment, and that the charterers had promised in effect to ensure that the owners did not suffer any detriment to their interests from accepting the proposal.

The Supreme Court disagreed.

The Supreme Court Judgment in *RTI v. MUR Shipping*

The Supreme Court found that (despite the use of the word "overcome") the "reasonable endeavours" proviso set out at clause 36.3(d) of the COA was, in substance, not different from the "reasonable endeavours" provisos commonly used or implied. It held that the word "overcome" has the same meaning in this context as words such as "avoid", "avoided", "negate", "neutralise", "nullify", "defeat", "prevent" or "remove" (see [29]).

Having made such a finding, the Supreme Court explained the rationale behind the usual types of "reasonable endeavours" provisos. At [36], the Supreme Court said: "… A party is excused from performance by a force majeure event where the failure to perform is caused thereby. **It will not be so caused if the affected party can reasonably prevent the failure of performance**. …" (emphasis added).

The legal significance of this is that typical forms of "reasonable endeavours" provisos, such as the one set out at clause 36.3(d), were only about how to make contractual performance possible again. They were not about whether to allow non-contractual performance in substitution for contractual performance. The Supreme Court held:

> "… *force majeure* clauses in general, and reasonable endeavours provisos in particular, concern the causal effect of impediments to contractual performance. **To be able to rely on the clause, and subject to there being clear words to the contrary, the party affected must be able to show that the *force majeure* event caused the failure to perform**. That means establishing that the failure to perform could not have been avoided by the exercise of reasonable endeavours. **Contractual performance means performance of the contract according to its terms. Failure to perform means failing to perform in accordance with those terms**. The causal question is to be addressed by reference to the parameters of the contract." ([37]; emphasis added).

In essence, the Supreme Court's conclusion was as follows. As a matter of proper construction, typical forms of "reasonable endeavours", such as the proviso set out in clause 36.3(d), are only designed to be about using reasonable endeavours to avoid or overcome what would otherwise cause or amount to be an impediment to performing the contract exactly as agreed. The relevant question therefore was whether the owners' exercise of reasonable endeavours would have removed the impediment in question so that timely payments of freight could be made in US dollars as agreed. This was held to be the only way in which the impediment to contractual performance could have been "overcome". This meant that acceptance of a proposal that would have allowed the charterers to make payments of freight in a non-contractual currency was outside the scope of the "reasonable endeavours" proviso.

Commentary on *RTI v. MUR Shipping*

Invoking *force majeure* clauses often involves complex issues. It is necessary to understand the scope of the types of measures (if any) that the party who invokes or is to invoke the *force majeure* clause is required to take to avoid, mitigate or overcome the event or state of affairs that may otherwise constitute a *force majeure* event. Any misunderstand of such scope could have serious consequences.

It seems from the Supreme Court's reasoning explained above that waiving a contractual right will normally be regarded as falling outside the scope of typical types of "reasonable endeavours" provisos – even if such waiver would cause no harm to the commercial interests of the party who is invoking *force majeure*. Indeed, the key question is: "whether reasonable endeavours could have secured the continuation or resumption **of contractual performance.**" ([38]; emphasis added)

Where it is necessary to consider what kinds of endeavours the party invoking a *force majeure* clause may be required to use before it can be entitled to invoke that clause in relation to performance of its own contractual obligations, the ultimate question may often be about costs of such performance. The fact that it has become more expensive for a party to perform its contractual obligations because of some unforeseen event would not normally be a valid excuse for non-performance or suspension of performance. As is so often the case, each event and contractual clause should be considered based on its own particular factual circumstances.

Contacts

KwangKyu Park
Of Counsel, London
T +44 20 7655 1107
E kwangkyu.park@squirepb.com

Michael Davar
Partner, London
T +44 20 7655 1425
E michael.davar@squirepb.com

Shumi Mararike
Trainee, London
T +44 20 7655 1325
E shumi.mararike@squirepb.com

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