Is a party required to accept non-contractual performance during a force majeure event?

The English Court of Appeal made waves in the last part of 2022 with its decision in *MUR Shipping BV v RTI Ltd* [2022] EWCA Civ 1406. On a non-uanimous basis, the Court of Appeal held that a party had not been entitled to rely on a force majeure clause to suspend performance. While the decision turned on the drafting of the particluar force majeure clause in question, it attracted widespread attention because of its finding that the party should have accepted an offer of non-contractual performance.

By Kate Holland

The contract and the force majeure clause

MUR Shipping BV (**MUR**) was a Dutch ship owner. RTI Ltd (**RTI**) was a Jersey-based charterer. MUR and RTI entered into a charterparty (the **contract**) whereby RTI would regularly deliver cargoes of bauxite to MUR at a port in Guinea, to be unloaded onto MUR's ships and transported to Ukraine. The contract required RTI to deposit the relevant freight payments into MUR's account in US dollars, at a specified time for each cargo.

The contract contained a force majeure clause. Its definition of *force majeure event* contained a list of criteria, all of which had to be fulfilled before a party could rely on 'force majeure' to suspend performance. As well as setting out the various types of events and circumstances which would qualify, the definition included a requirement that the event *cannot be overcome by reasonable endeavours from the party affected*. In short, not only did the event in question need to fall within one of the types specified, it only qualified as force majeure if its effects could not be avoided by the reasonable endeavours of the party seeking to suspend performance.

The force majeure event

Although RTI was a Jersey company, its majority shareholder was a company controlled by a Russian oligarch, Oleg Deripaska. Following the outbreak of war in Ukraine, the US Government imposed sanctions on Mr Deripaska and the companies he controlled. It was accepted that this state of affairs would have the effect of restricting or at least delaying US dollar payments by RTI.

MUR sent RTI a force majeure notice claiming it was suspending performance of the contract on the basis that the US sanctions, and resulting inability for RTI to make payment in US dollars in accordance with the contract, was a force majeure event.

RTI objected. It offered to make payment in euros instead of US dollars; that it would meet all costs of converting the euros to dollars by MUR's bank, and cover any shortfall in exchange rates. This proposal would ensure MUR received payment on time, at no detriment to MUR, and thereby 'overcome' the event causing the issue.

MUR refused RTI's offer on the basis that it was a term of the contract that payment had to

be made in US dollars. MUR refused to unload RTI's cargoes onto its vessels, forcing RTI to make alternative arrangements and incur additional costs.

The arbitral award

The parties referred their dispute to arbitration. The arbitral tribunal found in RTI's favour and ordered MUR to pay damages.

The tribunal held that while the imposition of US sanctions preventing or delaying payment in US dollars came within the types of events covered by the contract's force majeure definition, this event failed the final criterion, because it could have been *overcome by reasonable endeavours*.

The tribunal found that in refusing to accept RTI's offer to make payment in euros, MUR had not acted reasonably and therefore was not entitled to rely on force majeure. In fact, as noted later by the Court of Appeal, the arbitral tribunal considered that MUR did not want to perform the contract because it had become disadvantageous.

The High Court overturns the arbitral award

MUR appealed the tribunal's award to the High Court under section 69 of the Arbitration Act 1996, on the basis that the tribunal had erred on a point of law in holding that acceptance of non-contractual performance (payment in euros) was a reasonable endeavour.

The High Court agreed with MUR and upheld the appeal on the basis 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*.[1]

The Court of Appeal overrules the High Court and restores the arbitral award

RTI appealed the High Court's decision to the Court of Appeal, and leave to appeal was granted on the basis that it raised a question of law of general importance.

In a majority judgment, the Court of Appeal found in favour of RTI, overturned the High Court's decision and restored the tribunal's award.

In Lord Justice Males' majority decision, he considered that the parties' force majeure and reasonable endeavours clause should be applied in a purposive and common sense way:[2]

> … [it] 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.

In overturning the High Court's decision on non-contractual perfromance, he went on to hold that:[3]

> I accept that the contract required payment in US dollars, but the purpose of that payment obligation was to provide MUR as the shipowner with the right quantity of dollars in its account at the right time. RTI's proposal achieved that objective with no detriment to MUR and therefore overcame the state of affairs caused by the imposition of sanctions ... It is apparent from the award that the

1 *MUR Shipping BV v RTI Ltd* [2022] EWHC 467 (Comm) at [98].
2 *MUR Shipping BV v RTI Ltd* [2022] EWCA Civ 1406 at [56].
3 *MUR Shipping*, above n 2, at [60] and [63].

> reason why it was not accepted was that the contract had become disadvantageous to MUR, who did not want to perform it... I would hold, therefore, that acceptance of RTI's proposal would have overcome the force majeure event. I would therefore allow the appeal and restore the award of the arbitrators.

The Court of Appeal was keen to emphasise that its decision was confined to the drafting of the parties' specific force majeure and reasonable endeavours clause, stating: *we are not concerned with reasonable endeavours clauses in general, or even with force majeure clauses in general.*[4] It also highlighted that its decision regarding acceptance of non-contractual performance *would be different if RTI's proposal would have resulted in any detriment to MUR or in something different from what was required by the contract.*[5]

However, as noted, the Court of Appeal's decision was not unanimous. In his dissenting judgment, Lord Justice Arnold stated that a party is entitled to insist on contractual performance, and that MUR should not be required to accept non-contractual performance in the absence of clear drafting of that intention:[6]

> I agree that RTI's offer would have solved th[e] problem with no detriment to MUR. The fact remains, however, that what was offered by RTI was non-contractual performance. In my judgment an "event or state of affairs" is not "overcome" … by an offer of non-contractual performance, and in particular an offer of non-contractual performance by the counterparty to the Party affected. … Is the party invoking the clause required to accept that offer? In my view the answer is no, because the party invoking the clause is entitled to insist on contractual performance by the other party. If the parties to the contract … intended [the reasonable endeavours] clause … to extend to a requirement to accept non-contractual performance, clear express words were required and there are none.

Conclusion

The non-unanimous nature of this judgment highlights the tension and discomfort with the ruling, and the Court of Appeal's decision will no doubt cause ripples of commercial uncertainty as to when a party will be required to accept non-contractual performance.

It is also worth noting that the tribunal's award was appealed only on the particular issue of non-contractual perfromance, and therefore both courts' consideration of the matter was somewhat restrained. Furthermore, this case turned (as all force majeure cases do) on the specific drafting of the force majeure clause, as well as the fact that the non-contractual performance caused no detriment. In that regard, this case may be confined to its facts.

However, in the current climate of epidemics, natural disasters and war, the decision has no doubt opened a door, and we anticipate further development and clarification on non-contractual performance in the future.

About the author

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She previously practised as a solicitor in the UK with an international commercial firm and has particular experience in trust law and succession planning.

4 *MUR Shipping*, above n 2, at [47].

5 *MUR Shipping*, above n 2, at [59].

6 *MUR Shipping*, above n 2, at [74].