Non-Contractual Performance by Sanctioned Party under Force Majeure Clause Not Required

14 June 2024

Introduction and Key Takeaways. Must a party to a contract containing a force majeure clause accept payment in a non-contractual currency in performance of an obligation by way of reasonable endeavours in order to "overcome" a force majeure event? The Supreme Court of the United Kingdom says "No". In unanimously overturning the Court of Appeal's decision in *MUR Shipping BV v RTI Ltd*, the Supreme Court has focused on fundamental principles of contract law, finding that in the absence of express words to the contrary, a party is not obliged to accept payment in a currency that is not the contractually stipulated currency following the imposition of sanctions on the counterparty's parent company.

The decision is particularly significant given many force majeure clauses contain a reasonable endeavours clause or, if they do not, it is frequently implied into existing clauses. It is now clear that parties must incorporate express wording to permit reasonable endeavours provisos in force majeure clauses to capture non-contractual performance so as to avoid the effects of force majeure.

Given the continued expansion of the scope of U.S. secondary sanctions (for example see our article on the new National Security Law); the lack of harmonisation of sanctions regimes in force in the United Kingdom, European Union and United States, together with other allied countries; and the growing uncertainly of potential unilateral sanctions imposed by the United States on China following the presidential elections, the Supreme Court's decision will have a considerable impact on the ability of companies to comply with all sanctions regimes that may impact their operations. This is all the more so because the wording of the force majeure clause in question is fairly common in English commercial contracts. Accordingly, now that the Court of Appeal's decision has been overturned, parties can no longer face the threat of being forced to accept non-contractual performance with an equivalent effect to contractual performance unless the contract specifically allows for this.

This will no doubt be welcome news for parties who might otherwise face U.S. secondary sanctions risks for conduct which may expose them to U.S. secondary sanctions. *MUR Shipping* is itself a good example of the factual context in which such

concerns may arise because acceptance of Euros in place of U.S. dollars may have led to U.S. secondary sanctions concerns in circumstances where (according to the Court of Appeal), MUR Shipping was unable to reasonably refuse such non-contractual performance. The Supreme Court's decision provides a solution to this conundrum, unless, of course, if the contract already permits reasonable non-contractual performance. In some cases, it may be appropriate to provide in the contract for payment in an alternative currency, and such clauses will continue to be enforceable as a matter of English law.

Summary of the Background. We previously considered the Court of Appeal's decision [HERE] and in doing so set out in detail the background to the case. In summary, however, a freight contract between MUR Shipping (the "Owners") and RTI (the "Charterers") required the Owners to transfer goods to Ukraine, on behalf of the Charterers, in return for which the Charterers agreed to make payment in U.S. dollars. The contract contained a force majeure clause that included four criteria, including that a force majeure event was an "*…event or state of affairs which cannot be overcome by reasonable endeavours from the party affected.*"

When the Charterers' parent company was subsequently added to the U.S. sanctions list, the Owners claimed force majeure, which the Charterers did not accept. The Charterers instead offered to make payment in an alternative currency—Euros—instead of U.S. dollars. The Charterers also offered to provide an indemnity against currency conversion costs so that the Owners suffered no detriment through non-contractual performance of the contract. The Owners refused this offer, maintaining that a force majeure event had occurred. This led to lengthy arbitration proceedings before the matter was appealed to the High Court of England and Wales.

Relevantly, Mr Justice Jacobs overturned the arbitral award which had found that payment in the alternative currency of Euros amounted to reasonable endeavours to overcome the force majeure event.

The Court of Appeal, by a 2:1 majority, overturned Mr Justice Jacobs' decision by making a precise and detailed textual analysis of the contractual provisions. The Court of Appeal found that reasonable endeavours to overcome a force majeure event included payment in Euros as opposed to U.S. dollars because that would reasonably "overcome" the force majeure event or state of affairs. This decision was explicitly based on the interpretation of the contractual provisions, which the majority found was the proper way to approach the topic rather than by reference to broader principles. The Supreme Court disagreed.

The Supreme Court's Decision. Instead of taking a textual construction approach, the Supreme Court began with an analysis of a fundamental point of principle, namely,

whether a party seeking to invoke a force majeure clause is required to accept reasonable non-contractual performance of contractual obligations.

The Supreme Court concluded that this was the correct approach because "*reasonable endeavours provisos are commonly found in force majeure clauses, either expressly or impliedly, and in materially similar terms to the clause in this case*". Accordingly, a broader issue of general principle arose beyond the narrow contractual construction exercise undertaken by the Court of Appeal.

In focusing on the distinction between contractual and non-contractual performance, the Supreme Court characterised the issue as whether the reasonable endeavours would have enabled payment to be made in U.S. dollars without delay because this "*is the only way in which the impediment to contractual performance could have been "overcome""*. On the facts of this case, it could not.

The Supreme Court also relied on the importance of the principle of freedom of contract to the effect that the parties could have made specific provision for non-contractual means of performance to amount to reasonable endeavours but did not do so. It was also important that, ordinarily, valuable contractual rights (e.g., the right to be paid in U.S. dollars) should not be overlooked without clear words expressing a contrary intention. In other words, the courts cannot rewrite the parties' contract when they could otherwise have made provision for the circumstances in question.

Finally, the need for certainty of commercial contracts was influential in the decision reached. In the absence of a provision permitting non-contractual performance, the factual investigation required to determine if such performance was without detriment and achieved the same result as contractual performance would lead to uncertainty. Focus on what is permitted under the contract leads to less uncertainty and should therefore be preferred.

Conclusion. The Supreme Court's decision provides welcome clarity concerning the law surrounding force majeure clauses. The simplicity of its approach by way of broader principle over slavish contractual construction means that it is likely to be of wide application given the proliferation of similarly worded clauses and circumstances where courts have tended to imply reasonable endeavours language into force majeure clauses. It also allows companies to observe their sanctions compliance policies without violating their contractual obligations.

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