

NO REQUIREMENT TO ACCEPT NON-CONTRACTUAL PERFORMANCE TO OVERCOME FORCE MAJEURE EVENT: *RTI v MUR Shipping*

The UK Supreme Court has **held** that the requirement on a non-defaulting party to use ‘reasonable endeavours’ to overcome a force majeure event does not require the non-defaulting party to accept an offer of non-contractual performance absent clear wording to that effect. The Supreme Court has also provided important guidance on the interpretation and operation of force majeure provisions in commercial contracts.

Background

A shipowner (MUR) and charterer (RTI) entered a contract which required contractual payments to be paid in US dollars. The contract contained a force majeure clause which was exercisable where specified force majeure events “cannot be overcome by reasonable endeavours from the Party affected”. RTI became subject to US sanctions (via its parent company) which would delay its payments in US dollars. MUR invoked the force majeure provisions in the contract. RTI rejected the force majeure notice and offered to pay in euros and to bear any additional costs or exchange rate losses suffered by MUR in converting euros to US dollars. RTI commenced London-seated LMAA arbitration claiming damages for the cost of chartering replacement vessels in the period during which MUR had suspended performance. MUR argued that it had been entitled to suspend performance under the force majeure clause.

The arbitral tribunal found in favour of RTI. It held that MUR could not rely on the force majeure clause because the difficulties over payment could have been overcome by MUR’s reasonable endeavours and that MUR would not be detrimentally affected because RTI offered to cover any additional costs. The tribunal’s decision was reversed by the High Court on appeal under section 69 of the Arbitration Act 1996, who found that MUR could rely on the force majeure clause because the contractual right to payment in US dollars formed part of the parties’ contractual bargain and the exercise of reasonable endeavours only required endeavours towards the performance of that bargain. The Court of Appeal (by a majority), however, overturned the High Court’s decision and found in favour of RTI.

Supreme Court’s decision

The Supreme Court found in favour of MUR, holding that MUR was entitled to invoke the force majeure provisions and the obligation to use reasonable endeavours did not require it to accept RTI’s non-contractual offer to pay in euros rather than US dollars. In the Supreme Court’s view, there were several principles that supported MUR’s case:

(1) Object of reasonable endeavours proviso

The Supreme Court considered that force majeure clauses in general, and reasonable endeavours provisions in particular, concern the causal effect of impediments to contractual performance. To rely on a force majeure clause, absent clear words to the contrary, the invoking party must show that the force majeure event caused the failure to perform and that the failure to perform could not have been avoided by exercising reasonable endeavours. The question is therefore whether reasonable endeavours could have enabled the continuation or resumption of contractual performance. The object of a reasonable endeavours proviso is to maintain contractual performance, not to substitute a different performance. In this case, the contractual performance was payment in US dollars and the impediment to performance was banking delays caused by sanctions. The question was whether the exercise of reasonable endeavours by MUR would have enabled the payment of US dollars to be made without delay. Accepting for non-contractual payment in euros would not have enabled the contract to be performed.

(2) Freedom of contract

The Supreme Court noted the importance of the fundamental English law principle of freedom of contract. Parties are generally free to contract on terms of their choosing. This includes the freedom not to contract and not to accept an offer of non-contractual performance.

(3) Clear words needed to forego valuable contractual rights

In the Supreme Court’s view, in principle, a party should not be required to forego valuable rights (here, a right to insist on payment in US dollars) unless the contract makes this clear, either expressly or by necessary implication. The need for clear words was reflected in

the parties' force majeure clause which provided that following the end of a force majeure event, "the Parties shall consult in good faith to make such adjustments as may be appropriate to the shipment schedule."

(4) Importance of certainty in commercial contracts

The Supreme Court emphasised the importance of certainty and predictability in English commercial law. Parties need to know with reasonable confidence whether a force majeure clause can be relied upon at the relevant time, "not after some retrospective inquiry". The Supreme Court preferred MUR's "straightforward" case over RTI's position which the Supreme Court considered was not anchored to the contract and begged various questions giving rise to considerable legal and factual uncertainty, including whether accepting non-contractual performance would involve no detriment or other prejudice to the party invoking force majeure, and achieve the same result as contractual performance.

The Supreme Court acknowledged that the concept of "reasonable endeavours" involves evaluative judgment and therefore an element of uncertainty but considered that to allow it to "ride rough-shod" over required contractual performance would introduce unwarranted uncertainty and undermine the expectations of reasonable businesspeople. The Supreme Court accepted that there is often flexibility as to what amounts to contractual performance, which could lead to a different position on different facts. In this case, however, it was agreed that the contract required payment in US dollars.

What this means for commercial parties

The Supreme Court's decision provides timely guidance on the operation of force majeure clauses against a backdrop of increasing reliance on such provisions in recent years, including in the aftermath of Covid-19 and the changeable sanctions landscape. The Supreme Court emphasised that reasonable endeavours provisos, whether express or implied, are a "very common feature" of force majeure clauses. Even if the clause had not contained express wording relating to "reasonable endeavours," the Supreme Court would have interpreted it as including a reasonable endeavours proviso to similar effect. The Supreme Court's findings therefore have wider implications for force majeure provisions generally. Notwithstanding the polarised views of the tribunal and lower courts, the Supreme Court's decision follows long-established principles of contractual interpretation, placing emphasis on the importance of the parties' freedom of contract and the need for certainty. The Supreme Court repeatedly highlighted that parties are free to negotiate different terms in their contracts. Parties could, for example, allow for optionality over performance, such as a provision for payment in US dollars or euros. The Supreme Court emphasised that, unless there is clear wording to the contrary, a force majeure clause should be interpreted to give effect to contractual performance, not to provide workarounds to allow for non-contractual performance. For the Supreme Court, this was not a question of what is reasonable or unreasonable, but a question of contract between the parties. Commercial parties should consider their force majeure provisions, and what amounts to contractual performance, carefully at contracting stage to ensure their contracts properly reflect the parties' bargain.

CONTACTS

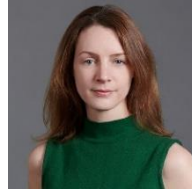


James Stacey

PARTNER

T: +44 (0)20 7090 4124

E: james.stacey@slaughterandmay.com



Samantha Holland

SENIOR PROFESSIONAL SUPPORT LAWYER

T: +44 (0)20 7090 3674

E: samantha.holland@slaughterandmay.com

London

T +44 (0)20 7600 1200

F +44 (0)20 7090 5000

Brussels

T +32 (0)2 737 94 00

F +32 (0)2 737 94 01

Hong Kong

T +852 2521 0551

F +852 2845 2125

Beijing

T +86 10 5965 0600

F +86 10 5965 0650

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