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DEEP DIVE OR SHALLOW SWIM: WHAT IS REQUIRED OF A PARTY IN THE FACE OF FORCE MAJEURE?

Reversing the original decision of an arbitration tribunal and a subsequent ruling by the Court of Appeal, the UK Supreme Court in ***RTI Ltd v MUR Shipping BV***[1] has held that where a force majeure (**FM**) clause requires that an FM event *"cannot be overcome by reasonable endeavours from the party affected"*, i.e. contains a so-called "reasonable endeavours proviso", those endeavours cannot extend to accepting non-contractual performance.

The case involved a long-term contract of affreightment (**COA**) between MUR as owners and RTI as charterers. RTI's parent company became subject to US sanctions. MUR argued that these sanctions prevented timely payment of freight being made in US Dollars as expressly required under the terms of the COA and declined to nominate further vessels in reliance upon what it maintained to be an FM event, the effect of which would be to relieve them of their contractual obligations.

RTI argued that payment could instead be made in Euros and offered to bear any additional costs or exchange rate losses suffered by MUR in converting the Euros back into US Dollars. In effect, it maintained that any FM event could be overcome by reasonable endeavours by MUR, namely by them accepting performance which was strictly inconsistent with that required under the terms of the contract, but the end result of which would be the same as if payment had been made in US Dollars in the first place.

RTI issued arbitration proceedings for breach of contract, seeking damages for MUR's suspension of performance under the COA.

The arbitration tribunal approached the matter on what might be termed a pragmatic basis, holding, essentially as a matter of fact, that the FM event could have been overcome by reasonable endeavours, and with no detriment to MUR. On appeal, the judge in the High Court allowed MUR's appeal on what might be termed the principled basis that the exercise of reasonable endeavours by MUR could not require it to accept performance that was inconsistent with the express terms of the contract.

The Supreme Court's judgment

Although on appeal and by a majority of two to one, the Court of Appeal reinstated the decision of the arbitration tribunal, holding that it was not appropriate for it to interfere with the arbitration tribunal's finding of fact, the view of the dissenting Court of Appeal judge echoed the principled concern of the High Court judge. That principled concern has clearly been shared by the Supreme Court, which has held that a "reasonable endeavours proviso" does not require acceptance of an offer of non-contractual performance.

Holding that this conclusion is supported *"by principle and the authorities"*, the Supreme Court has highlighted a number of reasons of principle in support of their decision. Key to these is that FM clauses and "reasonable endeavours provisos" concern the causal effects of impediments to *contractual performance*, i.e. performance of a contract according to its terms, including whether a failure to perform *in that way* could have been avoided by the exercise of reasonable endeavours. The causal question therefore had to be addressed by reference to the terms of the contract, the object of a "reasonable endeavours proviso" being to *maintain*, not *alter* contractual performance.

Clear words would have been required for a party to be required to give up its contractual rights - in the present case, the right of MUR to receive payment in US Dollars, and not in any other currency such as Euros.

Separately the Supreme Court was concerned that RTI's case was *"not anchored to the contract"*, requiring inquiries as to whether the acceptance of non-contractual performance would or would not cause detriment to MUR, and would or would not achieve the same result as if payment had been made in US Dollars. It held that there was no

[1] [2024] UKSC 18

justification for creating what it termed *"needless additional uncertainty"* by departing from the standard of performance required by the contract.

MUR's long battle has accordingly ended with the Supreme Court finding in their favour by asserting the primacy of the express terms of the parties' contract.

Conclusion

The Supreme Court's judgment helpfully examines the case law in this area, and clarifies the position on FM, making it clear that the contractual rights of the parties will trump attempts to arrive at work arounds not anticipated in the contract.

As the Supreme Court put it:

> "*The focus of the reasonable endeavours inquiry is clear: what steps can reasonably be taken to ensure contractual performance. The limits to that enquiry are also clear; they are provided by the contract*." [2]

Following this judgment, parties can be confident that the English courts will uphold their contractual intentions, giving certainty to their business dealings.

For more information, please contact the author(s) of this alert.

BRIAN PERROTT
Partner, London
T +44 (0)20 7264 8184
E brian.perrott@hfw.com

PATRICK KNOX
Legal Director, London
T +44 (0)20 7264 8553
E patrick.knox@hfw.com

Maria Alexandroff, Trainee Solicitor, London assisted with the preparation of this briefing.

[2] Para 48, page 16