

FORCE MAJEURE - COURT OF APPEAL RULES ON MUR SHIPPING V RTI LTD¹

The exercise of reasonable endeavours to overcome a force majeure event can require an affected party to accept a variation of what would otherwise have been strict contractual performance - provided the end result is essentially the same.

Introduction

Reinstating the original decision of an arbitration tribunal and reversing a decision of the High Court on appeal from the award of the arbitrators, the Court of Appeal has held that where a force majeure ("FM") clause requires that an FM event "*cannot be overcome by reasonable endeavours from the party affected*", those endeavours can extend to accepting performance that is strictly inconsistent with that required under the contract.

In the case, which involved a long-term COA between MUR as owners and RTI as charterers, RTI's parent company became subject to US sanctions. MUR argued that these sanctions prevented payment 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.

RTI argued that payment could instead be made in Euros and furthermore, 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 payment by RTI in a different currency, Euros, with that different currency then being converted to US Dollars - so that the end result for MUR would be the same as if payment had been made in US Dollars in the first place.

RTI sought damages for MUR's refusal to nominate further vessels.

Decision

The arbitration tribunal found in RTI's favour, on the basis that the FM event (which following consideration of the terms of the relevant sanctions, the tribunal ultimately held to be likely delay resulting from payment in US Dollars, rather than prevention of payment in that currency) could have been overcome by reasonable endeavours, and with no detriment to MUR.

In the High Court, the judge held 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 (ie. non-contractual performance), those express terms requiring payment in US Dollars.

The Court of Appeal - by a majority of two to one - reinstated the decision of the arbitration tribunal. The decision of the majority focussed on whether, as a matter of fact, RTI's proposal would have led to the FM event being overcome by the exercise of reasonable endeavours. That was a matter on which the arbitration tribunal had already made a finding, namely that it would have achieved precisely the same result as payment by RTI in US Dollars. The decision of the majority was that it was not appropriate to interfere with that finding.

The decision of the dissenting Court of Appeal judge echoed the same concern of the High Court judge, that RTI's proposal involved non-contractual performance, concluding that an FM event could not be overcome by such performance. But the decision of the majority prevails.

¹ MUR Shipping BV v RTI Ltd EWCA Civ 1406

Commentary

In summary, the law as it now stands is that the exercise of reasonable endeavours to overcome a FM event can involve performance that is inconsistent with the express terms of the contract if the end result is essentially the same - in the present case, that MUR would end up with US Dollars in its bank account and suffer no additional cost as a result of currency conversion.

For more information, please contact the authors 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

hfw.com

© 2022 Holman Fenwick Willan LLP. All rights reserved. Ref: HFWLDN\54765108-1

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice. Holman Fenwick Willan LLP is the Data Controller for any data that it holds about you. To correct your personal details or change your mailing preferences please email hfwenquiries@hfw.com

Americas | Europe | Middle East | Asia Pacific