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MUR Shipping v RTI - Court of Appeal rules on interpretation of force majeure clause in a COA

On 27 October 2022 the Court of Appeal handed down judgment in *MUR Shipping BV v RTI Ltd [2022] EWCA Civ 1406,* finding that MUR (owners) could not rely on a force majeure clause in a COA to suspend performance, because they should have accepted payment of freight in euros (as opposed to US dollars, required by the contract) in exercise of their obligation to overcome the state of affairs resulting from the imposition of sanctions on RTI's (charterers) parent company.

Facts

In 2016, MUR entered into a contract of affreightment (COA) with RTI in respect of monthly consignments of bauxite, from Conakry in Guinea to Dneprobugksy in Ukraine. In 2018, OFAC added RTI's parent company (Rusal) to the SDN list. MUR served a force majeure notice on RTI saying that it would be a breach of sanctions for MUR to continue performing the COA. It further noted that the sanctions would prevent RTI making payment in US dollars, which was required under the COA. RTI's position was that (a) sanctions would not interfere with cargo operations; (b) MUR was not a US person caught by the sanctions; and (c) MUR could in any event receive payment in euros instead.

Issue

The key issue (and the subject of appeal to the Commercial Court and subsequently the Court of Appeal) was whether acceptance of RTI's proposal that MUR pay in euros would have overcome the state of affairs caused by the difficulty of making timely payments of US dollars resulting from the sanctions imposed on RTI's parent (such that MUR was not entitled to rely on the force majeure clause).

Arbitral Award

The matter went to arbitration, and the Tribunal found in favour of RTI. It held that MUR's case on force majeure would have succeeded save that MUR could have overcome the force majeure event using reasonable endeavours, specifically to accept payment in euros. The Award was appealed by MUR under section 69 of the Arbitration Act 1996 (appeal on a point of law).

First Instance decision

MUR's primary case before the Commercial Court was that there is no authority to support the argument that the exercise of reasonable endeavours under a force majeure clause requires the affected party to vary the terms of the contract or agree to non-contractual performance. RTI argued that the Tribunal had been correct to find that accepting a transfer made by RTI that would automatically be converted into euros (with all additional charges borne by RTI) constituted reasonable endeavours, and that there was nothing in the COA to exclude the exercise of reasonable endeavours involving non-contractual performance.

RTI also focused on the importance of causally linking the force majeure event with the actual loading of the cargo, and the fact that payment in euros was commercially indistinguishable from payment in US dollars. Mr Justice Jacobs found in favour of MUR and allowed the appeal, holding that exercising reasonable endeavours to avoid a force majeure event does not include non-contractual performance (or accepting non-contractual performance from another party) in order to circumvent the effect of a force majeure or similar clause. RTI appealed to the Court of Appeal under section 69 of the Arbitration Act 1996.

Court of Appeal decision

RTI's appeal was allowed. The Court of Appeal (Males LJ giving the leading judgment) found that acceptance by MUR of RTI's proposal to pay in euros would have overcome the state of affairs in question. The Court gave the following reasons in support:

1. The correct approach was to construe the specific terms of the force majeure clause (in particular clause 36.3(d) which read: *"[The event or state of affairs] cannot be overcome by reasonable endeavours from the Party affected"*), and the Court was not concerned with reasonable endeavours clauses or force majeure clauses in general. Each clause was to be considered on its own terms.
2. Clause 36.3 defined "*Force Majeure Event*" as an "*event or state of affairs*". The former (i.e., something which happens at a particular time and place) was not necessarily the same as the latter (i.e., the situation which results from the happening of one or more events), and accordingly it was relevant to consider not only (a) the event (the imposition of sanctions), but also (b) the state of affairs resulting from that event (the likelihood of delay in making US dollar payments) when deciding whether the force majeure event could not be overcome by MUR exercising reasonable endeavours.
3. Considerations as to whether MUR had exercised reasonable endeavours, in the abstract, were irrelevant, as were broader legal principles (including mitigation of damage and frustration). The real question was whether acceptance of RTI's proposal to pay freight in euros and to bear the cost of converting those to US dollars would have overcome the state of affairs caused by the imposition of sanctions. If it would, MUR's contractual right to receive payment in US dollars would remain unaffected.
4. Applying the wording of clause 36 in a common sense way, RTI's proposal achieved the underlying objective in the contract (namely MUR's right to receive the right quantity of US dollars in its bank account at the right time) with no detriment to MUR, and therefore would have overcome the state of affairs in question.

Comment

The Court of Appeal has given a clear signal that when construing parties' obligations under force majeure clauses, the express wording chosen by the parties will be of key importance, and that more general legal principles are less relevant. As shown by this decision, the wording chosen by the parties may increase or reduce the scope a force majeure clause, with considerable consequences, and parties should closely bear this in mind when drafting such clauses.

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