Alternative Performance to Overcome Force Majeure: UK Supreme Court Clarified the Issue

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On 15 May 2024, the UK Supreme Court in *RTI Ltd* v *MUR Shipping BV* [2024] UKSC 18 ruled that when the charterparty expressly provides for payment of freight in USD, the shipowner has no obligation to accept the charterer's offer to pay it in EUR to overcome the adverse effects of sanctions. The court made it clear that the scope of reasonable endeavours of the party relying on the force majeure to overcome its effects does not extend beyond acceptance of the contractual performance.

Facts of the Case

In 2016, RTI Ltd ("**Charterers**") concluded a charterparty with MUR Shipping BV ("**Shipowners**"), under the terms of which vessels owned by the Shipowners should have carried bauxite from Guinea to Ukraine, performing regular voyages from 2016 to 2018. The freight payments should have been made regularly in USD.

In April 2018, the USA imposed sanctions on Charterers' parent and sister companies belonging to the Russian aluminium-producing group Rusal. Several days after this, the Shipowners sent a force majeure notice, stating that although the Charterers were not sanctioned, sanctions against their affiliated companies would preclude or delay payment of freight in USD due to bank compliance.

The Charterers rejected the force majeure notice, offering to pay the freight in EUR and cover additional costs of converting EUR to USD. The Shipowners rejected this proposal and refused to nominate vessels, thereby suspending the contractual performance. By the end of April 2018, the USA allowed the said sanctioned companies to make payments under already existing contracts. The Shipowners resumed the nomination of vessels and accepted payments in EUR with the conversion costs being covered by the Charterers.

However, the Charterers commenced arbitration to recover the costs of affreighting seven replacement vessels during the period when the charterparty's performance was suspended. The arbitral tribunal admitted the claim, stating that the Shipowners were not entitled to invoke the force majeure clause since the respective force majeure event could have been overcome by the Shipowners' reasonable endeavours, namely, acceptance of the Charterers' proposal to pay the freight in EUR and cover the conversion costs.

The Shipowners appealed the award before English courts. The High Court allowed the appeal. Later, the Court of Appeal overturned the lower court's judgement and reinstated the arbitral award. The Shipowners applied to the Supreme Court to reverse this judgement.

The Supreme Court's Judgement

The chief question before the Supreme Court was whether the exercise of reasonable endeavours to overcome the adverse effects of a force majeure event put an obligation on the party declaring force majeure to accept an offer of non-contractual performance from its counterparty. In short, the Supreme Court's answer was "no". In concluding so, the court relied on the following findings.

First, the objective of the reasonable endeavours provision, precluding parties from relying on force majeure event if they could have reasonably prevented it, is *"to maintain contractual performance, not to substitute a different performance"*. This provision does not concern any different, non-contractual performance – in this particular case, payment of freight in EUR instead of USD – even if it may result in the same ultimate outcome.

Second, the Supreme Court underscored the supreme importance of the freedom of contract, stressing that this principle *"includes freedom not to contract; and freedom not to contract includes freedom not to accept the offer of non-contractual performance*". In reaching such a conclusion, the court relied on the prior case law, in which English courts drew a distinction between the "business options" of parties to opt for certain ways of contractual performance if the underlying contract so allows and their contractual rights not to choose such ways even if it is commercially unreasonable and detrimental for their counterparties.

Third, the Supreme Court found that clear words are needed to forego valuable contractual rights. Applying this approach to the case at hand, the court concluded that the Shipowners would have been obliged to accept the offer of non-contractual performance only if the contract had contained express provisions to this effect.

Last but not least, the court emphasised the importance of certainty in commercial contracts, stating that the reasonable endeavours provision is limited by the charterparty's wording and that the parties should follow their contract instead of doing what may be reasonable. The court stated that *"it is not unmeritorious or unjust to insist on contractual performance, all the more so if being precluded from doing so would introduce uncertainty contrary to the expectations of business people"*.

Conclusion

This judgement, despite being well-reasoned, may be surprising for those involved in the grain trade since the court took a legalistic stance, favouring the textual interpretation of contractual provisions over commercial reasonableness. Considering this, the wording of contracts gains even more importance, as courts will consider only offers of contractual performance as those the party invoking the force majeure clause must accept. Offers on non-contractual performance, even those leading to the same ultimate outcome, may not be enough.

On the commercial side, the above-described judgement tends to support the party invoking force majeure, as it will give them more room to rely on force majeure even if an alternative but non-contractual performance is possible. We also expect force majeure clauses to be invoked more frequently since it would be harder to overcome them by offering alternative performance.