"Reasonable Endeavours" Obligations in Force Majeure Clauses

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This article considers, and welcomes, the decision of the Supreme Court in RTI Ltd v MUR Shipping BV *that an obligation to exercise reasonable endeavours in a force majeure clause does not impose a requirement to accept an offer of non-contractual performance.*

Introduction

Suppose that a contract contains a force majeure clause. The clause defines what amounts to a force majeure event for the purpose of the contract—and also provides that an event will not be a force majeure event if it could have been overcome by the affected party's exercising "reasonable endeavours". In this context, does overcoming an event by exercising reasonable endeavours mean that the affected party must accept an offer of non-contractual performance from the other party? According to the Supreme Court in *RTI Ltd v MUR Shipping BV*,[1] the answer to this question (in the absence of some other contractual provision to the contrary) is no. The decision of the Supreme Court (as with the decisions of the courts below) raises interesting and important points relating to the issue at hand with reference to some fundamental principles of contract law.

RTI v MUR: Background and Facts

The shipowner, MUR Shipping BV (MUR), and charterer, RTI Ltd (RTI), entered into a contract of affreightment. The contract was for the carriage of monthly quantities of bauxite from Guinea to Ukraine for a specified period between July 2016 and June 2018 and specified that freight payments were to be made in US dollars. On 6 April 2018, sanctions were imposed on RTI's parent company by the relevant US authority. These sanctions extended to RTI (a majority-owned subsidiary was subject to the same restrictions as its parent company). MUR's position was that it would be a breach of sanctions to continue performance under the contract —the effect of the sanctions being the prevention of payment in US dollars, and payment in US dollars was required under the contract. Accordingly, on 10 April 2018, MUR sought to rely on a force majeure clause in the contract by sending a force majeure notice pursuant to

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[1] *RTI v MUR Shipping* [2024] UKSC 18.

that clause. The force majeure clause was contained in cl.36. In summary, it defined a "force majeure event" as "an event or state of affairs" that:

- "prevents or delays the loading of the cargo at the loading port and/or the discharge of the cargo at the discharging port" (cl.36.3(b));
- "is caused by…restrictions on monetary transfers and exchanges" (cl.36.3(c)); and
- "cannot be overcome by reasonable endeavors from the Party affected" (cl.36.3(d)).

MUR's argument was that the sanctions amounted to a restriction on monetary transfers and exchanges (cl.36.3(c)), and this was a relevant force majeure event that prevented loading and discharging (cl.36(b)). This was because MUR could not be expected to load and discharge the cargo without receiving contractual payment. RTI disagreed—offering to pay in euros instead of US dollars and bear costs associated with converting euros to US dollars. MUR maintained that it was entitled to insist on payment in US dollars and, for a short period, suspended performance and refused to nominate vessels. Subsequently, on 25 April 2018, MUR resumed the nomination of vessels and accepted payment in euros.

RTI commenced arbitration, claiming damages for the cost of chartering replacement vessels during the period in which MUR had suspended performance. MUR sought to rely on cl.36, the force majeure clause. MUR's case on force majeure succeeded in all but one respect. That one respect was that, in accordance with cl.36.3(d), the force majeure event could have been "overcome" by MUR's "reasonable endeavours", namely MUR's accepting payment in euros rather than US dollars.

MUR, successfully, challenged this finding on appeal before Jacobs J.[2] MUR's position was that it was contractually entitled to payment in US dollars. Interpreting the reasonable endeavors obligation to require MUR to accept payment in euros rather than US dollars required MUR to accept an offer of non-contractual performance, and this went beyond what was required by the clause. This was reversed by a split decision of the Court of Appeal (Males and Newey LJJ; Arnold LJ dissenting),[3] but MUR succeeded before the Supreme Court.[4]

[2] *MUR Shipping v RTI* [2022] 2 All E.R. (Comm); [2022] EWHC 467 (Comm) (appeal under s.69 of the Arbitration Act 1996).
[3] *MUR Shipping v RTI* [2022] EWCA Civ 1406; [2023] 1 All E.R. (Comm) 501.
[4] *RTI v MUR Shipping* [2024] UKSC 18 (Lords Hamblen and Burrows with whom Lords Hodge, Lloyd-Jones and Richards agreed).

Force majeure clauses: some general points

Prior to addressing the reasoning in *RTI v MUR*, it is important to place the role of force majeure clauses—and, therefore, the significance of the issue in *RTI v MUR*—into some context. The starting point is the relationship between force majeure clauses and the doctrine of frustration. In the law of England and Wales ("English law"), frustration is a narrow doctrine that is of limited application.[5] The courts are reluctant to find that a supervening event or change in circumstances is significant enough to frustrate a contract and discharge parties from their future performance obligations. There are important reasons for this. First, it adheres to English law's general commitment to sanctity of contract and the principle that contracts should be performed in accordance with their terms. A liberal approach to frustration would undermine this: in discharging parties from their future performance obligations, frustration "kills"[6] the contract irrespective of the parties' wishes.[7] Second, a narrow approach minimises the possibility of parties turning to the doctrine of frustration merely because contractual performance has become more difficult than intended[8] or to escape the consequences of their bad bargain.[9]

It follows that the onus is placed on parties to anticipate and provide within their contract for what is to happen should events or changes in circumstances affect contractual performance. In this respect, careful contractual planning and the future-proofing of agreements are vital. This is especially so for long-term contracts which, of course, often carry unpredictability and considerable risk as regards the future landscape.[10] Accordingly, it is common for parties to include a force majeure clause in their contract—dealing with what should happen on the occurrence of events that are outside the parties' control.[11] One advantage of force majeure clauses is that they can cover a wider range of events or situations than are likely to engage the

[5] *Davis Contractors v Fareham Urban DC* [1956] A.C. 696 HL at 727.
[6] *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep. 1 CA at 8.
[7] *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] A.C. 497 PC.
[8] *Davis Contractors v Fareham Urban DC* [1956] A.C. 696 HL at 724; *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] A.C. 93 HL; *CTI Group Inc v Transclear SA (The Mary Nour)* [2007] EWHC 2070 (Comm), [2008] 1 All E.R. (Comm) 192 at [38].
[9] *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (No.2)* [1982] A.C. 724 HL at 752.
[10] This is, perhaps, all the more so in the light of the increase in collaborative and cross-border relationships: see generally, Sir George Leggatt, "Negotiation in Good Faith: Adapting to Changing Circumstances in Contracts and English Contract Law" (2019) 2 J.B.L 104.
[11] Similar clauses are also often found under other labels: for example, price adjustment clauses, extension of time clauses, and hardship clauses.

doctrine of frustration.[12] Another is that parties have flexibility as regards what is to happen in response to a relevant event. Thus, whereas the doctrine of frustration automatically brings the contract to an end, it is open to parties within a force majeure clause to provide for a different outcome—for example, that performance is partially excused or suspended.[13] More generally, in allocating or distributing responsibility for particular events and their consequences, force majeure clauses are an important part of parties' overall contractual allocation of risk.

Identifying the scope of any particular force majeure clause involves applying ordinary principles of contractual interpretation. "Force majeure" is not a term of art, so the practical effect of a force majeure clause depends on the wording of the individual clause and circumstances. Nevertheless, it is common for a force majeure clause to contain a provision to the effect that it applies only if the relevant event could not have been overcome or avoided by exercising "reasonable endeavours" or taking "reasonable steps" (or something similar). It was with such a "reasonable endeavours" provision that the Supreme Court was concerned in *RTI v MUR*.

The "reasonable endeavours" provision in *RTI v MUR*

The relevant provision in *RTI v MUR* was that an event would amount to a force majeure event if it "cannot be overcome by reasonable endeavors from the Party affected". In the Court of Appeal, the issue was viewed as one of the interpretation of "overcome" within the specific provision and not one of general principle.[14] According to Males LJ, "the real question" was "whether acceptance of RTI's proposal to pay freight in euros and to bear the cost of converting those euros into dollars would overcome the state of affairs caused by the imposition of sanctions".[15] The purpose of the payment obligation was "that MUR should receive the right quantity of US dollars in its bank account at the right time" and Males LJ could see "no reason why a solution which ensured the achievement of this purpose should not be regarded as overcoming the state of affairs resulting from the imposition of sanctions".[16] The proposal was "a very straightforward matter for MUR to accept…requiring no exertion on its part".[17] The

[12] For an illustration, see *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep. 1 CA where the relevant event did not lead to frustration of the contract but was covered by a force majeure clause.
[13] In contrast, there is no doctrine of temporary frustration: *Bank of New York Mellon (International) Ltd v Cine-UK Ltd* [2021] EWHC 1013 (QB) at [211].
[14] *MUR Shipping v RTI* [2022] EWCA Civ 1406; [2023] 1 All E.R. (Comm) 501 at [47] (Males LJ) (with which Arnold LJ agreed (at [69])) and at [78] (Newey LJ).
[15] *MUR Shipping v RTI* [2022] EWCA Civ 1406; [2023] 1 All E.R. (Comm) 501 at [55].
[16] *MUR Shipping v RTI* [2022] EWCA Civ 1406; [2023] 1 All E.R. (Comm) 501 at [56].
[17] *MUR Shipping v RTI* [2022] EWCA Civ 1406; [2023] 1 All E.R. (Comm) 501 at [55].

arbitrators had found that accepting payment in accordance with RTI's proposal presented "no detriment" and "no disadvantages" to MUR—so that, for Males LJ:

> Acceptance of RTI's proposal would have achieved precisely the same result as performance of the contractual obligation to pay in US dollars, namely the receipt in MUR's bank account of the right quantity of dollars at the right time. MUR's contractual right to payment in dollars remained, but MUR would have suffered no damage whatever as a result of RTI's breach consisting of payment in euros.[18]

Similarly, Newey LJ said that to "overcome" the force majeure event meant to "overcome" in a "more practical sense, such that all its adverse consequences would be avoided".[19] By accepting RTI's proposal, MUR would get the same result as if the contract was performed in accordance with its terms—without any detriment on MUR's part.

Arnold LJ agreed that the matter was one of the interpretation of the specific provision and emphasised the reasonableness of RTI's offer: "On the facts of this case MUR's position has no merit";[20] all that MUR had to do to solve the problem of payments in dollars probably being delayed was to accept that offer. Plainly it would have been reasonable for MUR to have done so";[21] and "RTI's offer would have solved that problem with no detriment to MUR".[22] Nevertheless, he dissented for the fundamental reason that he did not think that to "overcome" by reasonable endeavours could extend to requiring MUR to accept an offer of non-contractual performance. The contract entitled MUR to payment in US dollars, and it was entitled to reject payment in euros.

The Supreme Court did not agree that the matter was merely one of the interpretation of the specific provision. It was a matter of general principle.[23] This was because:

> It is well established that a force majeure clause will generally be interpreted (or a term will be implied to the same effect) as applicable only if the party invoking it can show

[18] *MUR Shipping v RTI* [2022] EWCA Civ 1406; [2023] 1 All E.R. (Comm) 501 at [57].
[19] *MUR Shipping v RTI* [2022] EWCA Civ 1406; [2023] 1 All E.R. (Comm) 501 at [78].
[20] *MUR Shipping v RTI* [2022] EWCA Civ 1406; [2023] 1 All E.R. (Comm) 501 at [66].
[21] *MUR Shipping v RTI* [2022] EWCA Civ 1406; [2023] 1 All E.R. (Comm) 501 at [69].
[22] *MUR Shipping v RTI* [2022] EWCA Civ 1406; [2023] 1 All E.R. (Comm) 501 at [74].
[23] *RTI v MUR Shipping* [2024] UKSC 18 at [25]-[27] (highlighting, at [27], statements in leading textbooks). Accordingly, "[t]he majority of the Court of Appeal was therefore wrong to approach the case as if it simply involved the interpretation of the particular reasonable endeavours proviso in this particular contract" (at [30]).

> that the event or state of affairs was beyond its reasonable control and could not be avoided by the taking of reasonable steps.[24]

The relevant general principle was one of causation. A force majeure clause will excuse performance if the failure to perform is "caused thereby".[25] The failure to perform will not have been caused by the force majeure event if the affected party could have prevented the failure of performance by exercising reasonable endeavours; in this situation, the failure to perform will have been caused by the affected party's inadequate response.[26] The court added:

> This means that the relevant question is whether reasonable endeavours could have secured the continuation or resumption of contractual performance. It is reasonable steps towards that end with which the reasonable endeavours proviso is concerned…It is not concerned with the steps that could or should have been taken to secure some different, non-contractual, performance. The object of the reasonable endeavours proviso is to maintain contractual performance, not to substitute a different performance.[27]

On this approach, MUR's exercising reasonable endeavours could not have overcome the impediment to performance (i.e. the payment delay due to sanctions) and maintained the contractual performance: "it would be absurd to say that MUR caused the non-performance of the contract by failing to accept an offer of non-contractual performance."[28]

MUR's "straightforward" approach also had the advantage of offering commercial certainty.[29] With force majeure clauses, parties often have to make immediate decisions: "Parties need to know with reasonable confidence whether or not a force majeure clause can be relied upon at the relevant time, not after some retrospective inquiry."[30] It was preferable, therefore, to avoid potentially-difficult questions (of the kind that would arise from the approach of the majority of the Court of Appeal) regarding detriment and whether the non-contractual performance

[24] *RTI v MUR Shipping* [2024] UKSC 18 at [26]. It followed that, "even if clause 36 had not contained 36.3(d), it would have been interpreted as containing a reasonable endeavours proviso to like effect", and no particular significance was to be attached to the meaning of "overcome" (at [29]).
[25] *RTI v MUR Shipping* [2024] UKSC 18 at [36].
[26] *RTI v MUR Shipping* [2024] UKSC 18 at [36].
[27] *RTI v MUR Shipping* [2024] UKSC 18 at [38].
[28] *RTI v MUR Shipping* [2024] UKSC 18 at [39].
[29] *RTI v MUR Shipping* [2024] UKSC 18 at [48].
[30] *RTI v MUR Shipping* [2024] UKSC 18 at [55].

would achieve the same result as the relevant contractual obligation.[31] Such difficulties were also apparent to Arnold LJ in the context of an example he had given:

> Suppose the contract required carriage to port A which was strike-bound and the party invoking cl 36 was presented with an offer by the other party to divert the vessel to port B which would not in fact be detrimental to the party invoking the clause (say because the goods being carried were required at place C equidistant between port A and port B)? Is the party invoking the clause required to accept that offer?[32]

As the Supreme Court pointed out, whether or not a party can rely on their contractual right in this context should not turn simply on what is reasonable.[33] This had been of concern to Jacobs J who had accepted MUR's position that "if the loss of a contractual right turns purely on what is reasonable in a case, then the contractual right becomes tenuous, and the contract is then necessarily beset by uncertainty which is generally to be avoided in commercial transactions".[34] In the Court of Appeal, Males LJ had explained that whether reasonable endeavours would "overcome" the restriction on payment was not simply a broad question of what was reasonable in the circumstances.[35] Nevertheless, it might be said that, on Males LJ's approach, the question, ultimately, still comes down to one of reasonableness: whether it is reasonable to reject the alternative performance. It will not be reasonable to do so (so that an offer of alternative, non-contractual, performance must be accepted) if the alternative performance would lead to the same result without detriment to the party receiving it. Yet, the reasonableness of the situation could be viewed another way: it is reasonable for a party to insist on its strict contractual rights and refuse an offer of non-contractual performance.[36] In the Supreme Court, this was presented as a matter of freedom of contract: "freedom of contract

[31] *RTI v MUR Shipping* [2024] UKSC 18 at [49]-[50].
[32] *MUR Shipping v RTI* [2022] EWCA Civ 1406; [2023] 1 All E.R. (Comm) 501 at [74]; see also *RTI v MUR Shipping* [2024] UKSC 18 at [51].
[33] *RTI v MUR Shipping* [2024] UKSC 18 at [58].
[34] *MUR Shipping v RTI* [2022] 2 All E.R. (Comm); [2022] EWHC 467 (Comm) at [131]. Commenting on this, Peel pointed out: "At no point did Males LJ's close attention to the question of interpretation really address Jacobs J's concern that, if the party affected by the *force majeure* event can be required not to insist on its strict contractual rights in an attempt to overcome it, some uncertainty has been introduced, which is best avoided in commercial transactions, especially where the issue is whether or not a *force majeure* clause can be invoked". See Edwin Peel, "Overcoming Force Majeure by Reasonable Endeavours" [2023] L.M.C.L.Q. 177, 181-82.
[35] *MUR Shipping v RTI* [2022] EWCA Civ 1406; [2023] 1 All E.R. (Comm) 501 at [51].
[36] See also Peel, "Overcoming Force Majeure by Reasonable Endeavours" [2023] L.M.C.L.Q. 177, 180.

includes freedom not to contract; and freedom not to contract includes freedom not to accept the offer of a non-contractual performance of the contract."[37]

The need to ensure that contractual rights did not have to give way to a non-contractual performance (even if to do so appeared to be reasonable or fair) was also consistent with authority. There was no direct authority regarding whether a reasonable endeavours obligation in a force majeure clause required a party to accept an offer of non-contractual performance. Nevertheless, there was *Bulman & Dickson v Fenwick & Co*.[38] In *Bulman*, addressing whether charterers, on becoming aware that a place of discharge was affected by strikes, should have directed a vessel to another place of discharge under the charterparty, Pollock B had said: "It is not a question between the plaintiffs and the defendants as to what is reasonable or unreasonable, it is a question of contract between the parties."[39] There was also *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food*[40] (known as the "*Vancouver Strikes*" case) where it was held that, when the charterers had ordered a vessel to Vancouver to receive a cargo of wheat and the loading of wheat was affected by strikes, the charterers were not required to nominate the loading of a different cargo under the charterparty.[41]

These cases, although not concerned directly with reasonable endeavours obligations, supported the general importance of parties' rights to perform their contractual obligations in accordance with the freedom given to them under their contract. But, the position is, perhaps, more difficult with reasonable endeavours obligations. Such an obligation, necessarily, involves an evaluative judgement and, to that extent, some (contracted for) uncertainty.[42] What the obligation entails—including the extent of any limits on a party's freedom to pursue its own interests—must, however, be framed by the particular contract and the other contractual obligations. It cannot "be allowed to ride rough-shod over the required contractual performance".[43] Otherwise, there is a danger of the obligation's being applied too broadly, with

[37] *RTI v MUR Shipping* [2024] UKSC 18 at [42].
[38] *Bulman & Dickson v Fenwick & Co* [1894] 1 Q.B. 179 CA.
[39] *Bulman & Dickson v Fenwick & Co* [1894] 1 Q.B. 179 CA at 183. *Bulman* was concerned with whether the charterers could rely on an "exceptions" clause in response to a claim for demurrage. Nevertheless, it offered "strong implicit support" for MUR's position: *RTI v MUR Shipping* [2024] UKSC 18 at [65].
[40] *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] A.C. 691 HL.
[41] For example, the charterers had "true and unfettered options" which they were "free to exercise…as they find convenient": *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] A.C. 691 HL at 724-25. This case "again implicitly, and strongly," supported MUR's position: *RTI v MUR Shipping* [2024] UKSC 18 at [74].
[42] *RTI v MUR Shipping* [2024] UKSC 18 at [57]-[58]; Sir George Leggatt, 'Negotiation in Good Faith: Adapting to Changing Circumstances in Contracts and English Contract Law' 2 (2019) J.B.L 104, 108.
[43] *RTI v MUR Shipping* [2024] UKSC 18 at [58].

the contract, effectively, being re-written.[44] Caution is, therefore, required in finding that a party has contractually agreed (whether as a matter of interpretation or more general principle) to be bound to accept an offer of an alternative, non-contractual, performance. In the absence of clear words to the contrary, parties should be free to rely on their strict contractual rights. A reasonable endeavours obligation ought to be applied in the light of those rights and not the other way around.[45]

This is in line with the view of Arnold LJ that, if the parties had "intended cl 36.3(d) to extend to a requirement to accept non-contractual performance, clear express words were required and there are none".[46] Arnold LJ had placed this within the "*Gilbert-Ash*" principle[47]—i.e. that clear words are required if a party is to have agreed to give up a fundamental right.[48] The *Gilbert-Ash* principle generally concerns giving up common law or statutory rights.[49] It might be doubted whether the principle adds anything in the context of giving up express contractual rights. This is because the suggestion that clear words are required if a party is to be held to have agreed to accept an offer of non-contractual performance ought to be so fundamental as to be unremarkable. Indeed, the Supreme Court did not think that it "greatly matters whether the applicable principle is that set out in *Gilbert-Ash* or an analogous principle applicable to valuable contractual rights"; what mattered was that MUR had a contractual right to be paid in US dollars and, therefore, a contractual right to refuse payment in any other currency.[50]

Conclusion

It is vital for parties to have a clear framework in which they can allocate risk between them when drafting their contracts and make decisions during the performance of their contracts. The outcome of *RTI v MUR* is desirable for these reasons. The onus (as it should be) is on parties to ensure that, if they want to contract for an obligation to accept an offer of a non-contractual (or reasonable) substitute performance, their contract is drafted clearly to that

[44] See the dissenting judgment of Lewison LJ (considering the scope of a reasonable endeavours obligation in a different context) in *Jet2.com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417; [2012] 2 All E.R. (Comm) 1053 esp. at [60].
[45] Although compare the approach of Males LJ: *MUR Shipping v RTI* [2022] 2 All E.R. (Comm); [2022] EWHC 467 (Comm) at [54].
[46] *MUR Shipping v RTI* [2022] EWCA Civ 1406; [2023] 1 All E.R. (Comm) 501 at [74].
[47] *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] A.C. 689 HL.
[48] *MUR Shipping v RTI* [2022] EWCA Civ 1406; [2023] 1 All E.R. (Comm) 501 at [71]. In contrast, Males LJ did not think that the principle was relevant (it "would beg the question") (at [54]).
[49] For analysis of this principle, see *Triple Point Technology Inc v PTT Public Co Ltd* [2021] UKSC 29; [2021] A.C. 1148 at [108]-[109].
[50] *RTI v MUR Shipping* [2024] UKSC 18 at [45].

effect.[51] Otherwise (again, as it should be), in the context of force majeure clauses, an obligation of reasonable endeavours will not be applied to require the acceptance of an offer of some performance that (however reasonable) is outside the strict parameters of the contract.

[51] *RTI v MUR Shipping* [2024] UKSC 18 at [59]; *MUR Shipping v RTI* [2022] EWCA Civ 1406, [2023] 1 All ER (Comm) 501 at [74] (Arnold LJ).