# <u>**Force Majeure Clauses, the meaning of ‘reasonable endeavours’ clauses, with a close look at the *RTI Ltd v MUR Shipping BV* [2024] UKSC 18 decision**</u>

With the best will in the world, sometimes contracts cannot be performed in the manner that was contracted. Things happen to the point where a party is unable to carry out its end of the bargain.

Over the years, the concept of the force majeure clause developed to cater for this sort of scenario. The clause is designed to free the parties of their contractual obligations on the occurrence of an extraordinary event or circumstances beyond the parties’ control. The parties’ obligations are suspended for the duration of the event or circumstances.

It is worthwhile noting that the force majeure clause is to be invoked in circumstances where things have gone badly wrong and beyond the parties’ control.

Throughout the development of the legal jurisprudence on force majeure arose the concept that force majeure clauses cannot be relied upon if the effects of the force majeure event could be avoided by the use of reasonable endeavours by the affected party.

The Supreme Court of the UK has provided a decision in <u>*RTI Ltd v MUR Shipping BV*</u> [2024] UKSC 18 on this very issue. Whilst the factual matrix related to a shipping dispute, the principles enunciated have far reaching application to contracts in general.

Parties globally frequently opt to use English law as the governing law of their disputes, most typically as the governing law of their contracts. The Abu Dhabi Global Markets’ legislation directly incorporates substantive English law, and the Dubai International Financial Centre Courts will look to case law from England & Wales in interpreting its legislation. Singapore and Hong Kong look to decisions from England & Wales when developing its case law. Therefore, whilst this is a decision from England & Wales, its far-reaching impact and application cannot be understated.

As outlined by the Supreme Court, the main issue is whether the exercise of reasonable endeavours may require the affected party, if it is to be entitled to rely on the clause, to accept an offer of non-contractual performance from the other contracting party in order to overcome the effects of the event or state of affairs.

<u>Salient Facts</u>

The parties had entered into a contract of affreightment in June 2016. The relevant clause required all freight payments to be made in US Dollars.

Clause 36 of the contract provided the force majeure clauses absolving liability for loss, damage, delay or failure in performance caused by a Force Majeure Event. The operation of the Force Majeure Event would suspend the obligation to perform.

A Force Majeure event was defined in the usual way containing the typical requirement, amongst others, that the event cannot be overcome by "*reasonable endeavours*" from the affected party.

In the context of this case, in April 2018 the US Department of the Treasury's Office of Foreign Assets Control ("OFAC") applied sanctions to RTI's parent company. This affected RTI, as a majority-owned subsidiary of a listed entity which was also subject to the same restrictions as the parent company; therefore, RTI was subject to the same sanctions.

A few days later, MUR Shipping submitted a force majeure notice invoking clause 36. The position contended was that payment could not be received by it in US Dollars as a result of the sanctions, thereby rendering performance incapable. MUR Shipping invoked the clause as the affected party.

RTI rejected the force majeure notice and offered to pay in Euros bearing any additional and associated costs suffered by MUR Shipping. In other words, RTI offered to ensure that the money would be received by MUR Shipping in a currency other than that expressly stipulated in the contract bearing any costs to ensure that MUR Shipping was not 'out-of-pocket'.

MUR Shipping insisted on receiving payment in US Dollars as per the contract, and therefore refused to nominate vessels.

Approximately 2 weeks later, OFAC permitted parties to carry out activities necessary to carry out contracts that were subject to sanctions. MUR Shipping accepted payments by RTI in Euros converted into US Dollars by the bank on receipt.

It was also common ground that payments in US Dollars were not prohibited but would highly likely have been delayed.

The contract contained an arbitration clause, and an arbitration claim was made by RTI for the chartering in of 7 vessels in the period in which MUR Shipping had suspended performance. The arbitral tribunal decided that reliance on the force majeure clause was inappropriate because RTI had used best endeavours to meet its obligations which MUR Shipping should have accepted as MUR Shipping would not have suffered any detriment and awarded damages to RTI.

On appeal to the High Court under section 69 of the Arbitration Act 1996, Jacobs J held in favour of MUR Shipping, namely that the contract only permitted payment in US Dollars and the reasonable endeavours proviso did not extend to augmenting the terms of the contract.

At the Court of Appeal, Males LJ rejected RTI's arguments, but found in its favour for different reasons, namely that the proposal to pay in Euros and bear the cost of conversion would overcome the state of affairs caused by the sanctions. This will be dubbed as the 'no prejudice' argument. The majority of the Court of Appeal took a practical approach to the issue in that the force majeure event could be "overcome" avoiding any prejudice to MUR Shipping.

The dissenting view of the Court of Appeal via Arnold LJ was that a non-contractual offer of performance cannot "overcome" the force majeure event. He took the view that a non-contractual offer does not compel the affected party to accept, even if there is not any prejudice to be suffered.

**<u>Supreme Court's Decision</u>**

Firstly, the 'reasonable endeavours' proviso was deemed to be a common feature of the force majeure clauses to the extent that if there is not an express term to that effect, then it will inevitably be implied into force majeure clauses.

The appeal raised a stark question: is there a requirement bestowed on the affected party to accept a non-contractual proposal as part of the reasonable endeavours to overcome the force majeure event or state of affairs?

The Supreme Court decided that such a requirement cannot be imposed in the absence of express wording, irrespective of whether no detriment or other prejudice is to be suffered by the accepting party.

*(1) Objective of reasonable endeavours provisos*

Causation lies at the heart of force majeure clauses. As a result, it is the force majeure event which must have caused the failure to perform the contractual obligation.

It concerns the failure to perform the contractually agreed performance, and causation is limited to the causal effect of the force majeure event upon the obligation as specified under contract.

The Supreme Court decided that the use of reasonable endeavours to “overcome” the force majeure event must be to secure the continued performance of the obligation, i.e. the reasonable steps to be taken are to secure the performance of that party’s obligation under the contract, as opposed to a non-contractual performance.

On the facts, the reasonable endeavours should have been to ensure timely payment in US Dollars, and not any other currency. An offer to pay in Euros is extra-contractual and beyond the scope of the ‘reasonable endeavours’ clause.

*(2) Freedom of contract*

The Supreme Court’s point here is simple: the parties freely contracted and agreed the terms of the contract.

As the express term specified payment in US Dollars, anything else was non-contractual rendering its acceptance discretionary only.

*(3) Clear words required to forego valuable contractual rights*

MUR Shipping's right under the contract, as established earlier, was to accept payment in US Dollars.

The issue which troubled the Supreme Court was whether there can be a legal obligation imposed by the common law to require MUR Shipping to have accepted the offer of payment in an alternative currency in circumstances where no prejudice would have been suffered.

This proposition was too bold because the contract did not specifically cater for the abandonment of that right. There needed to be clear and express wording to that effect. The Supreme Court drew support for its conclusion on other wording within clause 36.

*(4) Certainty in commercial contracts*

An overarching commercial factor for the Supreme Court was to ensure that English commercial law brings certainty to commercial contracts, particularly as so many parties opt to use English law as the governing law of the merits of their dispute.

The Supreme Court considered RTI's submissions to be unattached to the contract and therefore giving rise to legal and factual uncertainty. The lack of clarity would lead to an unnecessary inquiry into the scale of prejudice, what prejudice means to a particular party in one case as opposed to another, would the non-contractual offer even be enforceable, etc.

*(5) The authorities*

In short, the Supreme Court decided that the *Bulman* case and the *Vancouver Strikes* case in fact lent support to MUR Shipping's position.

Ultimately, the authorities favoured a strict contractual approach to the force majeure clause.

It was also decided that the authorities relied on by RTI were distinguishable.

Commentary

One interesting point of comparison to make between the Arbitration Act 1996 and the arbitration laws in countries such as the UAE is the mechanism to challenge an award under the previous section 69 of the Arbitration Act 1996 where a party may appeal the award on a point of law. Such provision does not exist within the DIFC Arbitration Law 2008, ADGM Arbitration Regulations 2015 or the UAE Federal Arbitration Law 2018. Following from the Law Commission of England & Wales' recommendation to keep section 69, although the parties could opt-out of its effect. Section 69 of the Arbitration Act 1996 has been left unamended by the Arbitration Act 2025.

There are likely to be diverse opinions on this decision. It is noted that there were multiple opinions evidenced in the lifetime of the dispute itself.

On the one hand English law has always preferred a strict contractual take on determining disputes; whereas others may take the view that absent prejudice, the only sensible conclusion is that the contract should be made to work, even through the medium of a non-contractual method to achieve the same outcome.

One can see an argument that the force majeure event concerned the consideration aspect of the contract only, as opposed to the operations aspect of the contractual obligations. The exchange in currency should make no difference to MUR Shipping if it is to ultimately receive the same value of its consideration albeit in a different currency.

Another view, however, is that certainty must prevail over any potential for ambiguity. The term of the contract clearly required a payment in US Dollars, being the typical currency used in shipping contracts, and the working of the force majeure clause was to ensure that reasonable endeavours were utilised to achieve the contractually agreed performance.

Another way to approach the same topic would be that if RTI were correct, then all force majeure contracts would contain an implied term that a reasonable non-contractual proposal must be accepted where no prejudice is to be suffered. That would be an undesirable situation as it would necessarily require the unenviable task of evaluating the reasonableness of the proposal, and a potential implied term that the non-affected party must consider all non-contractual proposals.

Leaving the matter as the Court of Appeal did arguably might have created uncertainty for parties. The Supreme Court’s decision has sought to bring clarity and simplicity to the situation: reasonable endeavours are to be used in order to overcome the force majeure event and meet the contractual obligation to its letter.

Irrespective of the difference of opinions, those who are negotiating contractual terms would do well to consider the wording of their force majeure clauses with a view to expressly requiring the non-affected party to reasonably consider alternative proposals in order to achieve the same or a similar goal.