

Force majeure:

How has the MUR Shipping v RTI [2022] litigation changed existing thinking on force majeure and reasonable endeavours?

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The headline:

A party may not be able to rely on a force majeure clause if they can get the substance of what they contracted for, even if strict contractual performance is impossible.

- What is the MUR case about and what does it decide?
- How important is it?
- What impact is it likely to have?

# Simplified Facts

- ❖ Long term COA- bauxite from Guinea to Ukraine
- ❖ Owners MUR; charterers RTI
- ❖ COA stipulates payment of freight in US\$ (5 days after B/L date)
- ❖ 2018, RTI become subject to US/ OFAC sanctions (Deripaska)
- ❖ The practical effect is that RTI cannot pay in dollars. No US bank will risk it
- ❖ No other aspect of performance is impacted by sanctions

So.... Do RTI say that they can rely on FM because they cannot pay?

No- RTI offered to pay in Euros, and common ground that MUR's bank would have immediately converted Euros to US\$



Owners- MUR Shipping- say **they** are entitled to suspend performance because of RTI being sanctioned

A Force Majeure Event is an event or state of affairs which meets all of the following criteria:

- a) It is outside the immediate control of the Party giving the Force Majeure Notice;
- b) It prevents or delays the loading of the cargo at the loading port and/or the discharge of the cargo at the discharging port;
- c) It is caused by one or more of acts of God, extreme weather conditions, war, lockout, strikes or other labour disturbances, explosions, fire, invasion, insurrection, blockade, embargo, riot, flood, earthquake, including all accidents to piers, shiploaders, and/or mills, factories, barges, or machinery, railway and canal stoppage by ice or frost, any rules or regulations of governments or any interference or acts or directions of governments, the restraint of princes, restrictions on monetary transfers and exchanges;
- d) It cannot be overcome by reasonable endeavors [sic] from the Party affected.

All elements of the FM case made out except for (d)- (the FM event cannot be overcome by reasonable endeavours from the Party affected).

Owners can overcome the FM event, by accepting payment in Euros.

Therefore, Owners not entitled to suspend performance.

(FM was one issue amongst many- the reasoning was not terribly clear.)

# The really surprising finding?

Sub-clause (b)- [The FM event] prevents or delays the loading of the cargo at the loading port and/or the discharge of the cargo at the discharging port.

RTI's practical inability to pay in US\$ did prevent or delay the loading of the cargo, because commercially, Owners could not be expected to load, if they reasonably believed they were not going to get paid.

Jacobs J- a causation argument- not a question of law- at best, mixed question of fact and law.

CA- no permission to appeal on that ground.

“ ...the exercise of reasonable endeavours did not require the Owners to sacrifice their contractual right to payment in US\$, and with it their right to rely upon the force majeure clause.”

“If there was a contractual right to payment in US\$, and a contractual obligation to pay in that currency, then this was a right and obligation which formed part of the parties’ bargain.”

“The exercise of reasonable endeavours required endeavours towards the performance of that bargain; not towards the performance directed towards achieving a different result which formed no part of the parties’ agreement.”

“...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.”

- Clearly “reasonable” for Owners to accept payment in Euros, which their bank would immediately convert to US\$ (RTI offered to pay all costs).
- The real issue was whether this would “overcome” the effect of the FM event.

## No disadvantages/ no detriment in accepting Euros converted to US\$

“Accordingly, unless the word “overcome” necessarily means that the contract must be performed in strict accordance with its terms, which in my judgment it does not, the arbitrators’ conclusion in paragraph 51 of the award that the force majeure could have been “overcome by reasonable endeavours from the Party affected” is a finding of fact, or at any rate of mixed fact and law, with which the court should not interfere.”

“Terms such as “state of affairs” and “overcome” are broad and non-technical terms and clause 36 should be applied in a common sense way which achieves the purpose underlying the parties’ obligations – in this case, concerned with payment obligations, that MUR should receive the right quantity of US dollars in its bank account at the right time. ...

It is an ordinary and acceptable use of language to say that a problem or state of affairs is overcome if its adverse consequences are completely avoided.”

“The position would be different if RTI’s proposal would have resulted in any detriment to MUR or in something different from what was required by the contract. In such a case, it could not be said that the force majeure had been overcome, but only (at most) that it had been partially overcome.”

[No problem in a payment case... but what about other obligations?]

“In my judgment an “event or state of affairs” is not “overcome” within the meaning of clause 36.3(d) by an offer of non-contractual performance, and in particular an offer of non-contractual performance by the counterparty to the Party affected.”

# How important?

Newey LJ:

“Mr Eaton KC eschewed “close textual analysis” of clause 36 of the contract of affreightment, but, as Males LJ points out, we are concerned in this appeal with the specific terms of that provision, **not general principle.**”

# How important?

Arnold LJ:

“On the facts of this case MUR’s position has no merit, but **the issue is one of general principle** and in my judgment MUR was entitled to insist upon its strict contractual right to receive payment in US dollars.”

## *Gravelor Shipping v GTLK Asia* (Foxton J) January 2023

“While the facts are different *MUR Shipping* does, however, demonstrate that clauses in contracts which are intended to address extraneous circumstances which render performance in the manner originally anticipated impossible, while keeping the relevant obligations alive as a matter of substance, or in “a ... practical sense”, may well involve one party accepting performance otherwise than “in strict accordance with its terms”.”

# What about a breach argument?

Could MUR have simply refused to accept payment in Euros?

Does the FM decision spill over into that sort of argument?

# AND..... THE BIG REVEAL.....



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