Lexis®PSL LMA briefing – Q4 2022

In this briefing, the LexisPSL Banking and Finance team look at the recent case of *MUR Shipping BV v RTI Ltd* [2022] EWCA Civ 1406. The Court of Appeal considered whether a shipowner was entitled to invoke a force majeure clause contained in a contract. The Court held by a majority that payment could have been accepted in euros as an alternative to US dollars as a reasonable endeavour to overcome the force majeure event.

What is a force majeure clause?

In English law, the expression 'force majeure clause' is used to describe a contractual term which provides that, on the happening of a specified event or events beyond the parties' control, one (or both) of the parties:

- is entitled to cancel the contract (or it may be cancelled automatically)
- is excused from performance of the contract, in whole or in part
- is entitled to suspend performance or to claim an extension of time for performance

What was the background to the case?

In June 2016, a contract of affreightment (the contract) was entered into by MUR Shipping BV (MUR) as owners and RTI Ltd (RTI) as the charterer and provided for the carriage of bauxite from Guinea to Ukraine with payment being made in US dollars. The contract contained a force majeure clause providing that neither party would be liable to the other for loss, damage, delay or failure in performance caused by a 'Force Majeure Event'. A Force Majeure Event is 'an event or state of affairs' which meets all of the following criteria (at clause 36.3):

(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, amongst other things, '…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', and

(d) It cannot be overcome by reasonable endeavours from the party affected

On 6 April 2018, the US Department of the Treasury's Office of Foreign Assets Control (OFAC) added the majority owner of RTI (Rusal) to the Specially Designated Nationals and Blocked Persons List (the SDN List). RTI itself was not added to the SDN List.

On 10 April 2018, MUR sent a force majeure notice to RTI which stated that RTI should be treated as if they were named on the SDN List and that the sanctions would prevent payments in US dollars as required under the contract. MUR stated that it was not 'necessary' for it to load any further cargoes under the contract and that it would be a breach of sanctions were it to do so. The notice continued:

'Therefore, as a result of the sanctions placed on Charterers and guarantors, we are left with no option but to claim force majeure in accordance with clause 36 of the charterparty and this notice will have to remain effective for as long as the sanctions remain in place, or unless it is possible to obtain relief from sanctions which we will investigate.'

RTI subsequently sent an email on 14 April 2018 which rejected the force majeure notice and said that the sanctions would not interfere with cargo operations. It also offered to make payments in euros and to bear any additional costs or exchange rate losses in converting euros to US dollars.

MUR however was not willing to accept payment in euros and continued to refuse to nominate vessels under the contract until 25 April 2018 when it resumed nominations and accepted payments of euros which were converted into dollars by MUR's bank on receipt.

RTI brought a claim for breach of contract which was resisted by MUR on the basis of the force majeure clause. The dispute was submitted to arbitration.

What was the outcome of the arbitration?

The arbitrators considered a number of different issues around whether MUR was entitled to rely on the force majeure clause. The tribunal ultimately held that although MUR's case succeeded in all other respects, it failed because it could have been 'overcome by reasonable endeavours from the Party affected'.

Accepting payments in euros would have presented no disadvantages to MUR whose bank was based in the Netherlands and such payments were a 'completely realistic alternative' as RTI would bear any additional costs and a number of later payments were in fact made in euros and converted on receipt by MUR's bank (although the tribunal did accept that a payment in US dollars through a US bank would have been delayed in practice). MUR was therefore not entitled to rely on the force majeure clause and RTI was entitled to damages for MUR's refusal to nominate vessels to load the relevant cargoes.

MUR sought and obtained permission to appeal to the Commercial Court under section 69 of the Arbitration Act 1996, the specific question of law being 'whether 'reasonable endeavours' from the Party affected within clause 36.3(d) of the Contract of Affreightment can include accepting payment in € instead of US$ for which the contract provides'. An appeal under section 69 can only be on a question of law arising out of an award. There can be no challenge to the arbitrators' findings of fact.

What did the Commercial Court decide?

Mr Justice Jacobs allowed the appeal essentially because the contract required payment in US dollars and 'a party is not required, by the exercise of reasonable endeavours, to accept non-contractual performance in order to circumvent the effect of a force majeure or similar clause'. Reference was made to the decision in *Bulman v Fenwick & Co* [1894] 1 QB 179.

The Commercial Court granted permission to appeal to the Court of Appeal on the same question of law.

What was the decision of the Court of Appeal?

In a majority decision, the Court of Appeal found that the approach taken in the Commercial Court to the construction of the force majeure clause was too narrow. It therefore allowed the appeal and restored the award of the arbitrators.

It was emphasised at para [40] that the only issue before the Court concerned clause 36 and in particular clause 36.3(d), ie whether the force majeure event or state of affairs could have been overcome by reasonable endeavours from MUR as the party affected. It had arisen on the basis that RTI's contractual obligation was to pay freight in US dollars. The case was not concerned with reasonable endeavours clauses in general, or in fact force majeure clauses in general. Each clause must be considered on its own terms.

According to Lord Justice Males who gave the leading judgment, the real question in the case 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 on Rusal.

The judgment also set out, at para [56], that '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'. A solution that ensured that the purpose of the clause was achieved should be regarded as overcoming the state of affairs – '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'.

Further, at para [60], although the contract required payment in US dollars, 'the purpose of that payment obligation was to provide MUR as the shipowner with the right quantity of dollars in its account at the right time. RTI's proposal achieved that objective with no detriment to MUR and therefore overcame the state of affairs caused by the imposition of sanctions…'. The reason why MUR did not accept the proposal, it was suggested, was that the contract had become disadvantageous and it did not want to perform it.

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

In a dissenting judgment, Lord Justice Arnold took the view that MUR was entitled to insist upon its strict contractual right to receive payment in US dollars. He put forward that what was offered by RTI was non-contractual performance. An 'event or state of affairs' is not 'overcome' within the meaning of clause 36.3(d) by an offer of non-contractual performance by the counterparty. He relied on the presumption laid down in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol)* Ltd [1974] AC 689 and held that a party should not be taken to have given up their legal rights in the absence of clear words to that effect.

Lord Justice Arnold set out a scenario whereby the contract required carriage to port A which was strike-bound and the party invoking clause 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 (because the goods being carried were required at place C equidistant between port A and port B). He asked whether the party invoking the clause was required to accept the offer? In his view, the answer was no because the party invoking the clause would be entitled to insist on contractual performance by the other party. If the parties to the contract intended clause 36.3(d) to extend to a requirement to accept non-contractual performance, clear express words to that effect were required.

What are the practical implications of this case?

As in all force majeure cases, the decision here turned on the precise wording of the force majeure clause in question. Any force majeure clause must be drafted with extreme care and all the circumstances surrounding each specific scenario, along with the effects of invoking force majeure must be considered before any force majeure notice is actually issued. In particular, great care should be taken when drafting the scope and definition of a force majeure event. This is becoming ever more important in the context of sanctions as a result of the current situation in Ukraine.

One further issue to consider following the decision in this case is whether to specifically include wording that excludes non-contractual performance in a force majeure context. Attention should also be paid to any alternative proposals to non-contractual performance to establish whether they will actually achieve the results that the parties were seeking to achieve under the contract.

It remains to be seen whether permission to appeal the judgment to the Supreme Court will be granted, given that the decision was not unanimous.