

CLIENT ALERT

Force Majeure Events do not Justify Non-Contractual Performance

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The United Kingdom Supreme Court has published a judgment which clarifies whether a force majeure clause that requires the affected party to exercise reasonable endeavours to overcome the event mandates acceptance of performance not in accordance with the contract. The Supreme Court concluded that it does not.

In [*RTI Ltd v MUR Shipping BV \[2024\] UKSC 17*](#), the Supreme Court allowed the shipowner's appeal against the Court of Appeal's decision. The Supreme Court held that the shipowner did not fail to exercise "reasonable endeavours" to overcome a force majeure event by refusing to receive payment in EUR when the charterer's parent became subject to US sanctions and could not effect payment in USD under the contract.

The appellant shipowner and respondent charterer entered into a voyage charterparty for the carriage of bauxite in bulk from Conakry in Guinea to Dneprobugsky in Ukraine. The freight payments were to be made in USD under the charterparty. After the parties entered into the contract, the US Department of the Treasury's Office of Foreign Assets Control applied sanctions to the respondent's parent company, rendering the respondent subject to the same sanctions as it was majority-owned by a listed entity.

The appellant sent a force majeure notice invoking the force majeure clause under the charterparty noting that payment in USD was prevented by the sanctions. The respondent rejected the force majeure notice and offered to pay in EUR instead and to bear any additional costs or exchange rate losses. The appellant maintained its right to payment in USD and suspended performance.

The issue for the Supreme Court was whether a reasonable endeavours provision in a force majeure clause requires the appellant to accept an offer of performance not in accordance with the contract (i.e. payment in EUR rather than USD).

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The majority of the Court of Appeal considered that it was dealing with a narrow issue of contractual interpretation. On the other hand, the Supreme Court observed that force majeure clauses requiring the party affected to exercise reasonable endeavours (“reasonable endeavours provision”) are commonplace and the issue raised is one of general application which should be addressed as a matter of principle.

In short, the Supreme Court held that a reasonable endeavours provision does not require the party seeking to rely on the force majeure clause to accept non-contractual performance absent express wording. The Supreme Court’s reasoning is grounded in principle and implicit support from authorities.

As a matter of principle, the Supreme Court found that the object of allowing a party to rely on a force majeure clause to excuse performance of the contract boils down to the question of causation. The party seeking to rely on the force majeure clause is excused from performance because the event or state of affairs caused the failure to perform. Freedom of contract and commercial certainty also lend support to the Supreme Court’s reasoning as to why a reasonable endeavours provision does not require acceptance of non-contractual performance.

A party should not be required to give up valuable contractual right and accept an offer of non-contractual performance unless clear words are used. This is based on the *Gilbert-Ash* presumption against the abandonment of valuable common law rights or analogous principle applicable to valuable contractual rights.

The Supreme Court found that *Bulman & Dickson v Fenwick & Co* [1894] 1 QB 178 and *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] AC 691 provided strong implicit support for the shipowner’s case that a party should be allowed to insist on contractual performance unless expressly stated otherwise.

The Supreme Court’s decision has re-emphasised contractual certainty under English law and places great weight on written contracts reflecting the parties’ rights and obligations.

Parties are well-advised to exercise caution in the drafting of reasonable endeavours provision and expressly specify where alternative modes of performance, such as payment in a different currency, are intended to be permitted. Depending on the context and the interest of the parties involved, it may also be advisable to expressly provide other alternative ways to perform the contract if a force majeure event exists. For example, if the force majeure clause in charterparty in *RTI Ltd v Mur Shipping BV* expressly allowed for payment in an alternative currency other than USD, the Supreme Court would no doubt have reached a different decision.

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