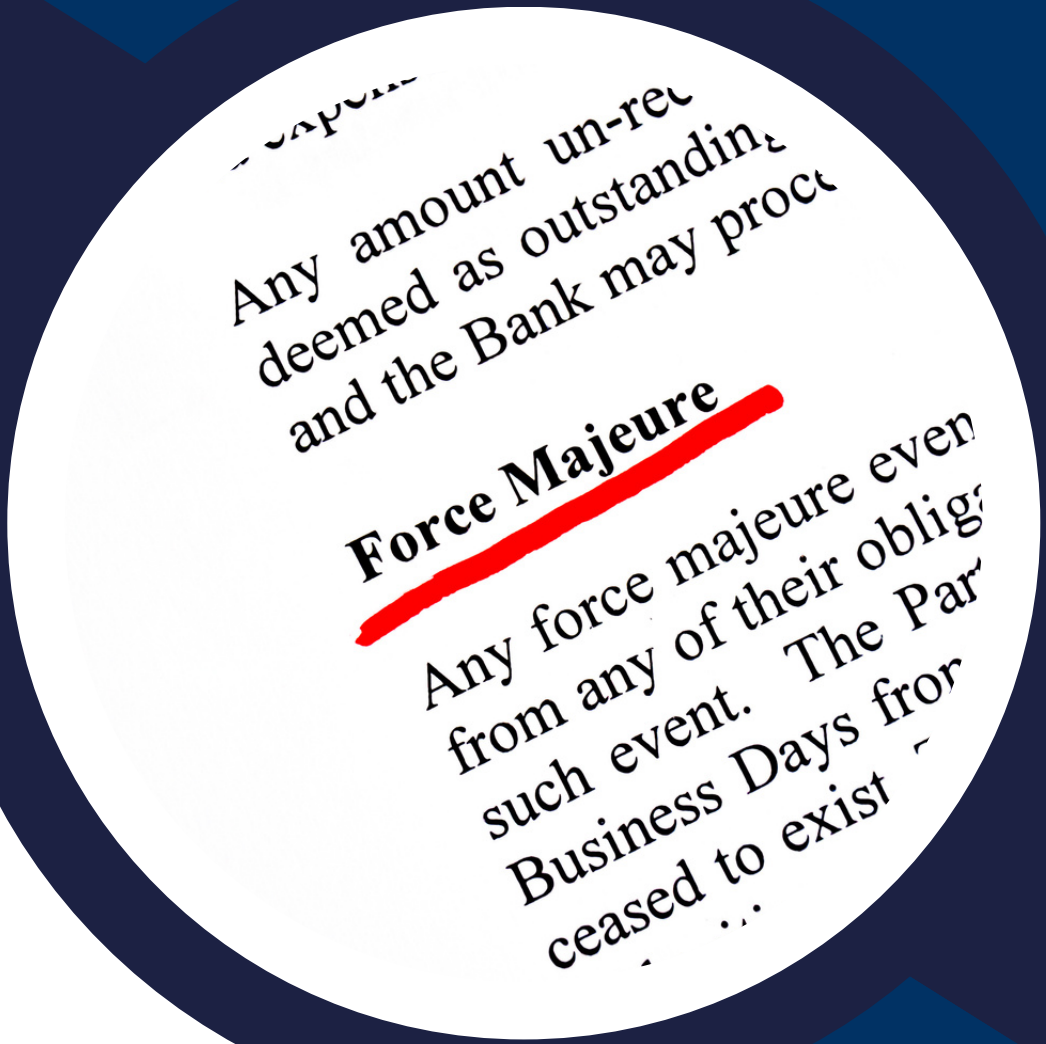
CHANNING LAW
INTERNATIONAL

FORCE MAJEURE AND *"REASONABLE ENDEAVOURS"*:

The Implications of *MUR Shipping v RTI Ltd* [2022] EWCA 1406



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Introduction

The Court of Appeal in its judgment in the case of *MUR Shipping BV v RTI Ltd*, considered when a force majeure clause can relieve a party from performance of its contractual obligations in circumstances where that party has an obligation to use *"reasonable endeavours"* to overcome a potential force majeure event. The Court of Appeal has by way of majority, overturned the decision of the High Court, which had held that in exercising *"reasonable endeavours"* to overcome the impact of sanctions, a party is not required to accept anything other than what has been agreed in the contract.

Summary of the Facts

In 2016 MUR Shipping (the "**Owners**") entered into a freight contract with the RTI (the "**Charterers**"). In accordance with the contract, the Owners would transfer goods to Ukraine on behalf of the Charterers and the Charterers would pay for this service in US Dollars. The contract contained a force majeure clause that included that a force majeure event was an *"[…event or state of affairs which] cannot be overcome by reasonable endeavours from the party affected."*

The Charterers' parent company was added to the US sanctions list in 2018. The Charterers were subsequently notified by the Owners that this was a force majeure event. The Owners stated that the US sanctions would (i) unacceptably delay its receipt of the Charterers' US Dollar payment (delay being caused by US banks scrutinising the transaction to confirm whether the transaction breached US sanctions); and (ii) prevent it from being able to load and discharge the Charterers' goods onto the freight vehicle.

The Charterers did not accept that the US sanctions constituted a force majeure event that allowed the Owners to refuse to perform the contract and argued that there was no force majeure event because *inter alia* the Charterers offered to pay in the alternative currency of Euros and include an indemnity against any costs of conversion so that the Owners did not suffer any detriment.

The Tribunal's Decision

The arbitral tribunal was asked to determine various issues, including whether a "*Force Majeure Event*" had in fact occurred.

The tribunal considered the definition of a force majeure event that *"[i]t cannot be overcome by reasonable endeavours from the Party affected."* The tribunal found that the Owners' case on force majeure failed at the last hurdle because it could have been overcome by *"reasonable endeavours"*. It is noted that accepting payment in Euros would have presented no disadvantage to the Owners and was a viable alternative with no adverse effect on the Owners.

The High Court Decision

The High Court allowed the Owner's appeal on the narrow question of whether a party is 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."*

The High Court rejected the Charterers' argument and overturned the tribunal's award in favour of the Owners. Citing *Bulman v Fenwick & Co* [1894] 1 QB 179, the High Court held that the affected party (in this case the Owners) is not *"required, by the exercise of reasonable endeavours, to accept non-contractual performance in order to circumvent the effect of a force majeure clause …"* (emphasis added)—this was a firmly established general principle of law.

The Court of Appeal Decision

The only question on appeal that the Court of Appeal was required to consider was—*"whether the force majeure event or state of affairs could have been overcome by reasonable endeavours [i.e., acceptance of Euro payment] from MUR as the party affected."* (emphasis added). In other words, was *"… acceptance of RTI's proposal to pay freight in euros and to bear the cost of converting those euros into dollars [enough to] overcome the state of affairs caused by the imposition of sanctions on the Charterers' parent company"?*

The Court of Appeal examined the precise wording of the force majeure clause and considered whether (on the terms of the clause) the *"endeavours"* (payment in Euros) would have been successful in overcoming the *"event"* or *"state of affairs"*. Males LJ concluded that *"[t]erms 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. I 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. 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 question for the Court of Appeal was whether (within the meaning of the reasonable endeavours provision) *"overcoming"* the force majeure event required strict contractual performance to take place.

Males LJ (with whom Newey LJ agreed) delivered the lead judgment for the majority and found that the reasonable endeavours provision should be applied in a *"common sense way which achieves the purpose underlying the parties' obligations.."* (namely in this case that MUR should receive the right quantity of US Dollars in its bank account at the right time).

It was held that the offer by RTI to pay in Euros ensured this purpose and therefore *"overcame"* the sanctions for the purposes of the reasonable endeavours provision.

Males LJ did however note that *"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."*

Concluding Remarks

This case makes it clear that the interpretation of a force majeure clause will be determined by the specific wording of the clause. The Court of Appeal's decision reinforces the importance of analysing a force majeure clause on the specific contractual wording.

The decision is significant in finding that in some circumstances a party may have to accept payment in a currency other than that specified in the contract, if to do so would overcome a force majeure event. The Court of Appeal distinguished the line of authorities relied on by the High Court that a party does not have to accept non-contractual performance, as adjudicated in the decision in *Bulman v Fenwick & Co* [1894] 1 QB 179. Per the Court of Appeal decision, a force majeure event may be overcome by something less than full performance of the contract, but how much less is not established.

In conclusion therefore, under current English law the exercise of reasonable endeavours to overcome a force majeure event **can** involve performance that is inconsistent with the express provisions of a contract, if the outcome of the performance is essentially the same as envisaged under the contract.