ALERT MEMORANDUM

Sanctions, Certainty and Pragmatism – the Contemporary Context for Analysing Force Majeure clauses.

5 June 2024

Following a long and somewhat sleepy existence on the margins of contractual interpretation case law, force majeure clauses ("**FMCs**") found themselves subject to a rude awakening with the global onset of COVID in 2020, and consequent interruptions to all manner of contracts relating to global supply chains, major sporting events, and many other facets of business. The judicial analysis of how and when FMCs are engaged in international commerce has continued post-COVID, with the introduction of wide-ranging Sanctions against Russia.

On 15 May 2024, the UK Supreme Court delivered a significant judgment in the case *RTI Ltd v MUR Shipping BV*,[1] addressing the modern approach to be taken to FMCs under English law, as well as taking the opportunity to examine the relationship between concepts of autonomy and certainty of contract on the one hand, and what might have been seen as commercial pragmatism on the other. Certainty won.

This memorandum analyses the Supreme Court's judgment and its key implications, including:

- that certain considerations regarding FMCs are of general (or near-general) application;
- how the Supreme Court approached the apparent tension raised on the facts between certainty and commercial pragmatism;
- implications from a sanctions perspective; and
- most importantly, implications for the drafting of FMCs going forward.

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[1] *RTI Ltd v MUR Shipping BV* [2024] UKSC 18 (the "***UKSC Judgment***").

I. Factual background

In 2016, MUR (the shipowner, a Dutch company) and RTI (the charterer, a Jersey company and subsidiary of United Company Rusal plc) entered into a contract of affreightment. Amongst other things, the contract specified freight payments to be made in US dollars.

The contract included a FMC. This clause provided that a given event or state of affairs, in order to constitute a "Force Majeure Event", had to be such that "*[i]t cannot be overcome by reasonable endeavors from the Party affected*".[2] On 6 April 2018, RTI's parent, and thus by extension RTI as well, became subject to US sanctions. This impacted on RTI's ability to make payments in US dollars (it later was common ground between the parties that the sanctions did not prohibit payment of US dollars but would likely have delayed such payments).

On 10 April 2018, MUR sent a force majeure notice, noting that payment in US dollars (as required under the contract) was prevented by US sanctions. RTI rejected the force majeure notice and offered to pay in euros instead of US dollars and to bear any additional costs or exchange rate losses suffered by MUR in converting euros to US dollars. MUR maintained its right to payment in US dollars and insisted that it was entitled to suspend performance under the FMC.

On 25 April 2018, MUR resumed nominations of vessels under the contract of affreightment and henceforth did accept payments from RTI of euros which were converted into US dollars by MUR's bank on receipt.

In accordance with an arbitration clause contained in the contract, RTI commenced arbitration claiming damages for the cost of chartering-in seven replacement vessels in the period during which MUR suspended performance.

II. Proceedings below the Supreme Court

Arbitral award:[3] the arbitrators found that RTI was entitled to damages for breach of contract by MUR on the basis that MUR had failed to nominate vessels. On the force majeure issue, the arbitrators found that MUR was not entitled to invoke the FMC. This was because MUR could have overcome the relevant event/state of affairs by reasonable endeavours insofar as it could have accepted RTI's offer to pay in euros which would have resulted in no detriment to MUR.

High Court:[4] Jacobs J allowed an appeal against the arbitral award. This was on the basis that the right to payment in US dollars formed part of the parties' bargain, and the reasonable endeavours proviso in the FMC precluded a party from invoking force majeure only where reasonable endeavours allow it to receive *contracted for* performance; it does not require a party to accept a performance that did not form part of the parties' agreement.

Court of Appeal:[5] By a 2:1 majority, the Court of Appeal allowed an appeal against Jacobs J's judgment. Males LJ considered the real question to be whether acceptance of the 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. He considered the contractual language of "state of affairs" and "overcome" to be non-technical terms, and that the FMC should be applied in a common sense way that achieves the purpose underlying the parties' obligations. On that basis, to the extent that MUR would end up with the right quantity of US dollars in its bank account at the right time, he considered that the relevant event/state of affairs would be overcome. Accordingly, and on the basis of the arbitrators' findings that MUR would have suffered no detriment as a result of RTI paying in euros, he found that MUR was not entitled to invoke force majeure.

[2] UKSC Judgment, [4].

[3] *UKSC Judgment,* [10] - [12].

[4] *UKSC Judgment,* [13] – [16]; *MUR Shipping BV v RTI Ltd* [2022] EWHC 467 (Comm) (the "***EWHC Judgment***").

[5] *UKSC Judgment,* [17] – [22]; *MUR Shipping BV v RTI Ltd* [2022] EWCA Civ 1406.

Arnold LJ dissented, considering that the relevant event/state of affairs cannot be overcome by an offer of non-contractual performance.

III. Parties' arguments

MUR's position was that the question whether (in the absence of express language to that effect) reasonable endeavours provisos in FMCs should extend to offers of non-contractual performance is a point of principle with general application, and that, in the interest of certainty, reasonable endeavour provisos should not so extend.

RTI's position was that reasonable endeavours may encompass offers of non-contractual performance (and that failing to accept such offers may, therefore, prevent a party from relying on a FMC) where such offer (i) involves no detriment or other prejudice to the party seeking to invoke force majeure, and (ii) achieves the same result as performance of the contractual obligation in question.

IV. Decision

The Supreme Court found for MUR, unanimously allowing the appeal.[6]

First, the court held that there were "good reasons of principle" supporting MUR's position:

1. **Causation as the rationale underlying force majeure clauses:**[7] in the Supreme Court's view, "*the relevant question*" in in considering a reasonable endeavours proviso "*is whether reasonable endeavours could have secured the continuation or resumption of contractual performance*" (presumably, this is a reference to contractual performance by the party seeking to invoke force majeure, i.e., in this case, MUR). It follows that such provisos are "*not concerned with the steps that could or should have been taken to secure some different, non-contractual, performance*", such as had been offered by RTI .[8]
2. **Freedom of contract**:[9] the Supreme Court also emphasised the principle of freedom of contract, which includes the freedom not to contract and, as such, the freedom not to accept an offer of a non-contractual performance.
3. **Valuable contractual rights:**[10] the Supreme Court also considered that MUR was, under the contract, entitled to refuse any tender of payment which was not in US dollars, and that MUR should not, in the absence of clear contractual provisions to that effect, be required to forego that right.
4. **Certainty**:[11] lastly, the Supreme Court highlighted the importance of certainty and predictability in the context of commercial law. The court considered that RTI's proposed approach would introduce "considerable legal and factual uncertainty", including because it would require consideration of whether the non-contractual performance in question: (i) result in any detriment of prejudice to the party seeking to invoke force majeure, which would raise questions such as what amounts to detriment and how it is to be assessed, and (ii) it would achieve the same purpose as performance of the underlying contractual obligation, which would raise questions as to what the purpose is and how it could be met. Such uncertainty may be particularly problematic in the context of a FMC which requires immediate judgments to be made.

Secondly, the court considered that, while no previous case has directly answered the question raised by the appeal, the cases of *Bulman & Dickson v Fenwick & Co* [1894] 1 QB 179 and *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] AC 691 provided strong implicit support for MUR's case.

V. Analysis

a) General approach to force majeure clauses

A highly significant aspect coming out of the court's judgment is the extent to which it considered the

[6] *UKSC Judgment,* [103].

[7] *UKSC Judgment,* [36] – [40].

[8] *UKSC Judgment,* [38].

[9] *UKSC Judgment,* [41] – [42].

[10] *UKSC Judgment,* [43] – [46].

[11] *UKSC Judgment,* [47] – [59].

question raised by the appeal to be of general application.[12]

The majority of the Court of Appeal had previously taken the view that the issue raised by this case is a narrow one of interpretation of the specific language of the contract in question.

The Supreme Court disagreed with this view. It considered that FMCs commonly are subject to reasonable endeavours provisos, either expressly (as in this case) or impliedly. It follows that the Supreme Court's conclusion – that reasonable endeavours provisos do not require the party affected to accept an offer of non-contractual performance – is equally of general application.

b) Certainty vs pragmatism

Throughout the proceedings and commentary thereon, the respective positions by MUR (favoured by Jacobs J and the Supreme Court) and RTI (favoured by the arbitrators and the majority in the Court of Appeal) have been characterised as a conflict between the fundamental principles of certainty and commercial pragmatism (although, notably, the Supreme Court did not consider such dichotomy to exist,[13] notwithstanding that, to emphasise the importance of certainty, it referred[14] to Lord Bingham's (dissenting) judgment in *The Golden Victory*,[15] a case which turned very much on a balancing of certainty and commercial fairness).

In highlighting the importance of certainty, the court rejected RTI's analogy to the rules on mitigation, specifically to the case of *Payzu Ltd v Saunders* [1919] 2 KB 581, where it was held that the claimants should have mitigated their losses by accepting an offer from the defendants (which was on slightly different terms than the original contract that had been breached).[16] It did so on the basis that it considered mitigation, forming part of the law of damages/remedies, to have little if anything to do with the question whether a contract has been breached.[17]

That being said, the extent to which subsequent courts may be willing, or able, to reopen this question remains to be seen, given the unanimity with which the Supreme Court took its view.

c) Sanctions

As regards the sanctions aspects of the case, it appears that US sanctions impacted the freight payments made by RTI primarily because, being payments in US dollars, they would almost inevitably pass through a US intermediary bank, which would, due to RTI's sanctions status, have stopped and investigated the transfer to ensure compliance, thereby causing delay.[18] Also, the contract specified a New York based bank as correspondent bank.

A number of points are worth observing in this respect.

First, the specific issues regarding the currency of freight payments and the scope of reasonable endeavours in the context of FMCs only arose because, other than the difficulties regarding payments in US dollars, MUR was not prevented from dealing with RTI. This would have been different if, at the relevant time, RTI had been subject to, for example, EU sanctions which would have prevented MUR from receiving payments from RTI altogether.

Secondly, the question of impossibility of making payments through US banks has been considered in previous cases. One of these is the 1987 *Libyan Arab Foreign Bank* case.[19] In this case, the claimants had demanded payment of a USD 131 million balance held in an account at the London branch of a US bank, which the bank refused on the basis that this would amount to an illegal act in the US. It was held that, while payment via the Clearing House Interbank Payments System (C.H.I.P.S.) would be illegal, payment in cash would -

[12] *UKSC Judgment,* [25] - [34].

[13] *UKSC Judgment,* [58].

[14] *UKSC Judgment,* [47].

[15] *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 UKHL 12, [2007] 2 AC 353.

[16] *UKSC Judgment,* [83] – [86].

[17] *UKSC Judgment,* [85].

[18] [9]. See also *EWHC Judgment,* [31] to [40].

[19] *Libyan Arab Foreign Bank v Bankers Trust* [1989] 1 QB 728.

as a matter of English law, the law of the place of performance of the obligation - be lawful. Accordingly, it was held that the claimant was entitled to receive cash payment in US dollars, or, if payment in dollars was impossible, in sterling.

This case was distinguished in the recent Court-of-Appeal decision in *Celestial Aviation.*[20] The court considered that a bank's ability to pay in sterling is primarily a rule of construction, and that parties may agree to exclude both the creditor's right to demand payment in cash and the option to pay in sterling.[21] On the facts, the court held (overturning the first-instance decision on this point) that the relevant letters of credit expressly required strict conformity with applicable terms and conditions,[22] and, given the references in the documents to "transfer" and "US dollars", that there was a strong argument that payment in cash and/or another currency than US dollars was not permitted under the letters of credit.[23]

Considered against the background *RTI v MUR*, these cases raise some intricate questions.

First, considering that, in *Libyan Arab Foreign Bank*, payment in sterling would have been a permissible alternative, could MUR have been legally obliged to accept payment in euros (the local currency of the Netherlands, the place where RTI's payment obligation was to be discharged)? This question was considered before Jacobs J, who held, however, that this would be a question of Dutch law, and that, in the absence of Dutch law evidence during the arbitration/findings on Dutch law in the arbitration award, he could not conclude that MUR was required to accept euros. Parties involved in litigation or arbitration raising similar questions may therefore wish (i) to expressly address the question whether, on proper construction of the relevant contract, the possibility of payment in another currency than agreed has been excluded (as was held to be the case in *Celestial Aviation*), and (ii) to contemplate whether evidence on foreign law is required as regards the permissibility of payment in the local currency of the place of performance.

Another question is whether RTI might have been able to satisfy its obligation to pay in US dollars in another way, for example – even if unlikely, or at least burdensome – by paying in cash. The RTI-MUR contract did specify payment details, including a New-York based correspondent bank. This raises the question – which, per *Celestial Aviation,* is a question of construction - whether payment in cash, or otherwise than via the specified correspondent bank, would have been permissible under the contract, or whether it would have amounted to "non-contractual performance" which would not fall within the scope of reasonable endeavours for purposes of the FMC.

Arguably, this suggests that, despite the Supreme Court's hard stance, the precise limits of "non-contractual performance" may yet have to be determined.

d) Take-aways

In terms of practical implications of the Supreme Court's judgment, perhaps the most important take-away concerns contractual drafting, specifically two distinct points:

1. Parties may wish to consider if their contractual obligations should be framed in terms that allow for some flexibility in performing them. For example, the Supreme Court emphasised that, on the facts, "*the position would have been different if RTI had been able to perform the contract by paying in either US dollars or euros*".[24]

   To draw on the more specific insights gained in the course of this litigation, parties may consider specifying (a) that a payment obligation will be deemed satisfied if payment, made in any currency, is upon receipt converted by the payee's bank into (the agreed amount of) the desired/agreed currency (e.g., US dollars, as in this case); or perhaps (b) that

[20] *Celestial Aviation Services Limited v Unicredit Bank AG (London Branch)* [2024] EWCA 628.

[21] *Celestial Aviation*, [110].

[22] *Celestial Aviation*, [111] – [113].

[23] *Celestial Aviation*, [114].

[24] *UKSC Judgment,* [59].

payment may, in addition to a certain specified currency (e.g., US dollars), be made in any other currency, provided that any costs related to such payment being converted into the specified currency are reimbursed.

2. As the Supreme Court made clear, parties are free to draft FMCs such that reasonable endeavours do encompass acceptance of offers of non-contractual performance (i.e., that a party may be unable to invoke force majeure where it has failed to accept such offer of non-contractual performance).[25]

   However, leaving aside the possibility of payment performance being allowed in another identified currency, which could be a limited and defined exception, any contract draftsperson will quickly understand the Supreme Court's concern to provide for certainty and predictability, when they come to the task of trying to establish a certain, predictable and binding contractual framework for what might be considered to be non-contractual performance. As such, if this second approach is taken, parties should carefully consider the questions raised by the Supreme Court, such as how to determine the circumstances in which a party may be required to accept non-contractual performance. Similarly, if this is done by reference to concepts such as detriment or underlying purpose of the contractual provision (as did the test proposed by RTI), parties may wish to address in advance the uncertainty that the Supreme Court considered to be inherent in this approach.

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[25] *UKSC Judgment,* [44] – [46], [59].