The dangers of invoking force majeure when your force majeure clause contains a 'reasonable endeavours' provision – *MUR Shipping v RTI Ltd* [2022] EWCA 1406

Imagine you have an English law contract for the delivery of goods to Port A. The contract has a force majeure clause with a 'reasonable endeavours' requirement, meaning you can only invoke force majeure if the force majeure event cannot be overcome by reasonable endeavours on your behalf.

Now imagine a force majeure event, a strike, prevents delivery to Port A. The other party proposes that they deliver to Port B. This makes no practical difference to you – it is just as easy for you to take delivery at Port B as at Port A – but it is not what the contract says. It also so happens that your position has changed, and it would be advantageous for you to get out of the contract.

Can you refuse delivery at Port B and invoke force majeure? The Court of Appeal's answer in *MUR v RTI* is 'no'.

On its face this seems like a fair decision. Delivering to Port B is a practical solution to the strike at Port A and you still get the goods on time at no extra cost. Indeed, to allow you to invoke force majeure in those circumstances would be intuitively unreasonable.

But the decision is also a blow to legal certainty. The parties' rights under the contract provided a clear boundary to the operation of the reasonable endeavours provision: surely a force majeure event cannot be 'overcome' if the contract is not performed according to its strict terms? Following *MUR v RTI*, however, this statement no longer holds. Instead, as explained below, it seems that whether or not a force majeure event has been 'overcome' will depend on whether the party invoking force majeure has suffered any practical detriment. What practical detriment means, however, will depend on the facts of each case.

The facts

In June 2016, RTI, as charterer, entered into a contract of affreightment with MUR, as owner, and agreed to pay MUR in US dollars. The parties performed the contract without issue until April 2018,

when the United States imposed sanctions on the oligarch Oleg Deripaksa, who through various companies directly or indirectly controlled RTI.

Correspondence between the parties showed that there was a common understanding that as a result of the sanctions RTI would or at least might encounter difficulties in making payment in dollars, which in turn would be a force majeure event under the contract. RTI therefore proposed to pay in euros and bear the costs of converting those euros into US dollars. MUR, however, refused this offer and instead invoked force majeure.

RTI's response was that MUR could not invoke force majeure because MUR did not meet the requirements of the reasonable endeavours provision in the force majeure clause: the sanctions could easily be 'overcome' by MUR simply accepting payment in euros and converting those euros to US dollars at RTI's expense.

MUR denied that the reasonable endeavours provision required it to accept anything less its contractual right to direct payment in US dollars. MUR relied on the '*Gilbert-Ash*' principle, which is the presumption that parties do not give up their legal rights in the absence of clear and express words to that effect. MUR argued that had the parties intended that the 'reasonable endeavours' provision require that parties give up a contractual right – such as payment in US dollars – it would have said so.

The dispute went to arbitration, which was decided in RTI's favour. MUR successfully appealed to the Commercial Court under section 69 of the Arbitration Act 1996 (which covers appeals on a point of law). RTI then appealed to the Court of Appeal.

The Court of Appeal's decision

There was no question that it would have been 'reasonable' for MUR to accept payment in euros. The question for the Court of Appeal was instead whether, within the meaning of the reasonable endeavours provision, 'overcoming' the force majeure event necessarily required strict contractual performance to take place. In other words, if the contract is not performed in full, can it be said that a force majeure event has been 'overcome' for the purposes of the reasonable endeavours provision?

Males LJ, with whom Newey LJ agreed, delivered the lead judgment for the majority. He found that the reasonable endeavours provision

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 was clear to Males LJ 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 note, however, 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*."

Importantly, Males LJ considered that the *Gilbert-Ash* principle was irrelevant: there was "*no question*" of MUR being required to abandon or vary its right to payment in US dollars. The only issue was whether MUR could invoke force majeure, which in his opinion was a separate issue.

In his dissenting opinion, Arnold LJ disagreed that the *Gilbert-Ash* principle could be so easily set aside. Indeed, he considered it was an important part of the context in which the reasonable endeavours provision was to be interpreted, which pointed to a stricter interpretation:

"*If the parties to the contract… intended [the reasonable endeavours provision] to extend to a requirement to accept non-contractual performance, clear express words were required and there are none*".

For Arnold LJ, absent these clear express words, it could not be said that non-contractual performance 'overcomes' a force majeure event, and MUR was therefore within its rights to invoke force majeure.

Comment

Although it is difficult to fault the Court of Appeal for trying to get to the 'right' result in the circumstances (even Arnold LJ, in his dissenting judgment, described MUR's position as without merit), this decision is nevertheless a backwards step for legal certainty.

As noted above, the *Gilbert-Ash* principle provided a clear and principled boundary to the operation of a reasonable endeavours provision: unless the contract says otherwise, a force majeure event is not 'overcome' by something less than full performance of the contract.

In declaring the *Gilbert-Ash* principle irrelevant to the interpretation of the reasonable endeavours provision, the Court of Appeal makes this operation less clear cut. A force majeure event may be overcome by something less than full performance of the contract, but how much less is not spelled out, and now requires an analysis on a case-by-case basis.

To use the example of Port A and Port B given at the start, whether you can invoke force majeure will depend on whether delivery to Port B would: (i) practically speaking, result in something different than what was required by the contract (i.e. the goods in your hands at the right time); or (ii), cause you a practical detriment over and above you not getting precisely what you contracted for (which was delivery to Port A). In most cases, the detriment (or lack of) will be evident, as will whether the final result is different from that which was required by the contract. But things will not always be so clear, as the facts of *MUR v RTI* show.

The result is that the Court of Appeal has opened up a new and undefined grey area around the operation of reasonable endeavours provisions. The need for additional analysis around the invocation of force majeure is especially unfortunate given such decisions must often be taken at speed and within tight contractually imposed timeframes.

Conclusion

In the long term, it can be hoped that the Supreme Court will bring some clarity to this issue (although it is unclear at this stage whether MUR is planning to appeal to the Supreme Court).

In the short term, however, clients may be wise to check their English law contracts for reasonable endeavours provisions in the force majeure clauses. If they find any, a note can be made that such clauses should only be invoked after a careful analysis of the type discussed above. This is especially true if the other party is offering something less than, but close to, full performance of the contract.