Campbell Johnston Clark

DAVID OWENS and KEELEY EDMONDSON | DECEMBER 2022

Sanctions, force majeure and "reasonable endeavours"

The Court of Appeal has handed down its decision in an important judgment in MUR Shipping BV v RTI Ltd relating to sanctions and payments which are in breach of sanctions. Can a party seeking to rely on a force majeure event reject an offer of alternative performance which departs from the contractually agreed method? Summary by ***David Owens****, Director, CJC* ***Keeley Edmondson****, Associate at CJC.*

The facts

In June 2016 MUR Shipping BV ("MUR") as owners entered into a Contract of Affreightment ("COA") with RTI Ltd ("RTI") as charterers for monthly consignments of bauxite, to be carried from Conakry, Guinea, to Dneprobugsky, Ukraine. The COA required the freight payments to be made in US dollars. In April 2018, RTI's parent company Rusal, was added to the SDN list by OFAC.

In light of this, on 10 April 2018 MUR served a notice on RTI invoking the force majeure provisions of the COA which stated that (1) MUR were unable to continue performance under the COA as this would be a breach of sanctions, and (2) RTI would be prevented from making payment in US dollars as required under the COA. MUR relied on these points to suspend its obligations to nominate vessels under the COA.

In response, RTI argued that (1) the sanctions did not prohibit MUR (as a Dutch entity) from performing the COA, (2) RTI could lawfully make payments in US dollars, and (3) in any event, RTI could make payment in euros instead of US dollars, and bear any currency exchange costs.This was important, because under the COA force majeure could not be claimed unless the event could not "*be overcome by reasonable endeavours from the party affected*".

MUR nevertheless continued to refuse to nominate vessels for a period of time. RTI brought a claim for losses based on the need to charter in vessels from the market.

Arbitration

The Tribunal held that as a matter of US law, there was no reason why the charter could not have continued, and payments made in US dollars. However, US dollar payments by RTI would pass through a US intermediary bank, where they would likely be stopped. This would result in a delay in the payment while an investigation was carried out by the bank as to whether the transaction complied with US sanctions requirements. The Tribunal therefore considered a force majeure event had taken place.

However, crucially the Tribunal also found MUR could have used reasonable endeavours to overcome the force majeure event. In particular, they could have accepted payment in euros as a "completely realistic alternative" and therefore they found in favour of RTI.

Commercial Court

MUR appealed on the basis that there was no authority in support of the argument that the requirement to exercise reasonable endeavours extends as far as the affected party varying the terms of the contract or agree to non-contractual performance. The Court agreed and found in MUR's favour as they did not consider that MUR should have to sacrifice its contractual right to payment in US dollars. RTI were granted permission to appeal to the Court of Appeal.

Court of Appeal decision

The majority of the Court allowed RTI's appeal and found that had MUR accepted RTI's proposal to pay in euros then the issue would have been resolved.

The reasons for their decision were as follows:

1. The question (in light of the wording of the force majeure clause) was whether or not the reasonable endeavours of MUR could have overcome the 'state of affairs' caused by the imposition of sanctions. If so, there was no force majeure.
2. The purpose of the COA provision providing for payment in US dollars was to ensure that the correct quantity of US dollars would be in MUR's bank at the correct time. Applying common sense, RTI's proposal to pay in euros would have ultimately resulted in MUR receiving the correct quantity of US dollars into its bank account at the correct time and there would be no detriment to MUR. As there would be no detriment to MUR from accepting RTI's proposal to pay in euros, this proposal would indeed have overcome the 'state of affairs' caused by the imposition of sanctions. As such, MUR were not entitled to rely on the force majeure clause.

Summary & Comment

This case will likely become increasingly important given the expanding scope of sanctions on Russia and their effect on the shipping market. Most charterparties contain provisions requiring payment in US dollars. The risk of breaching sanctions if dealing with sanctioned companies (or companies owned by sanctioned entities) means parties can be justifiably concerned about the effect of making payment in dollars. This case (unless overturned on a further appeal) shows that given the right combination of charterparty clauses and circumstances, a party can become entitled under such circumstances to make payment in a different currency.

However, it is also an important judgement for parties to be aware of when drafting force majeure clauses. The Court were clear that when considering parties' obligations in a force majeure clause, the express wording is the key indicator of its scope rather than general legal principles. However, an inclusion of "reasonable endeavours" could under the right circumstances lead to a force majeure event being overcome by non-contractual performance. This principle may not necessarily be limited to payment in another currency.

For queries and further information please contact:

David Owens
Director
David@CJCLaw.com

Keeley Edmondson
Associate
Keeley@CJCLaw.com

Campbell Johnston Clark Limited (CJC) is an international law firm specialising in shipping and international trade. With almost 60 staff worldwide, CJC has offices in London, Newcastle, Singapore and Miami. The firm has a strong presence in the London and overseas shipping markets with clients and fellow practitioners alike.

CJC advises on all aspects of shipping and international trade law, from ship finance to dry shipping and comprehensive casualty handling, and everything in between. Our clients are based around the globe and include leading operators, ship owners, Fortune 500 and FTSE listed companies, start-up ventures, investment banks, private equity houses, P&I clubs, hull & machinery, and liability insurers.