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CURRENT DEVELOPMENTS: CASE COMMENT

Force majeure in the Supreme Court: *MUR Shipping BV v RTI Ltd* [2024] UKSC 18

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Force majeure (FM) clauses are designed to free both parties to a contract from liability when an event beyond their control prevents one or both of them from performing the contract. Examples of such events include inclement weather, natural catastrophes, political upheaval, changes in applicable rules or regulations, or unavailability of essential supplies or services. It is common to include FM clauses in manufacturing, construction or transportation contracts, where there is a high risk of such events occurring due to the length of time required to perform the contract, or the complexity of the performance obligations. Often a lot of money is at stake and pre-allocating the risk of such events is crucial to avoid disputes further down the line. While disputes regarding the meaning and effect of FM clauses may not be unusual, such disputes rarely reach the Supreme Court. *MUR Shipping*[1] was one such rare case.[2]

In *MUR Shipping*, the question to be decided was whether a shipowner was entitled to rely on an FM clause as suspending its obligation to load seven cargoes of bauxite under a contract of affreightment (COA) (a contract whereby a shipowner agrees to perform a series of voyages to transport cargo for the charterer) between 6 April and 25 April 2018. The London Maritime Arbitrators' Association Arbitrators said it was not; Jacobs J in the High Court on an Arbitration Act 1996, section 69 appeal, said it was.[3] The majority in the Court of Appeal[4] reversed the High Court decision, and the Supreme Court in turn unanimously reversed the Court of Appeal majority decision.

1. The facts

The issue arose out of the imposition of sanctions by the US on the parent company of the charterer, which meant that the charterer faced difficulty paying freight in US$, as it was contractually required to do. Clause 36.3(c) of the COA listed 'any rules or regulations of governments or any interference or acts or directions of governments' and 'restrictions on monetary transfers' among the types of matters which could cause an FM 'event or state of affairs', but clause 36.3(d) indicated that an event or state of

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[1] *MUR Shipping BV v RTI Ltd* [2024] UKSC 18.

[2] Prior to *MUR Shipping*, it had been ten years since the Supreme Court (sitting as the Privy Council) decided *General Construction Ltd v Chue Wing & Co Ltd* [2013] UKPC 30, and that case involved *statutory* FM as provided in the Civil Code of Mauritius. The next most recent decision focused on FM (again by the Privy Council) was dated 1995 (*Hoecheong Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 WLR 404).

[3] *MUR Shipping BV v RTI Ltd* [2022] EWHC 467 (Comm).

[4] *MUR Shipping BV v RTI Ltd* [2022] EWCA Civ 1406.

affairs caused by any of these matters only constituted FM if it could not be 'overcome by reasonable endeavours by the Party affected'.[5]

On 6 April 2018 RTI's parent was placed on the Specially Designated Nationals List by the US Office of Foreign Assets Control, and on 10 April the shipowner gave notice of FM, noting that 'it would be in breach of sanctions for Owners to continue with the COA' and that 'the sanctions will prevent dollar payments which are required under the COA'.[6] When the charterer rejected the notice, the shipowner reverted, pointing to 'restrictions on monetary transfers' as being an FM event and claiming that 'if monetary transfers from Charterers to Owners are restricted Owners cannot be expected to load and discharge the cargo without receiving payment in accordance with the COA'.[7] The charterer proposed that it should make payment in Euros which could be converted into US$ as soon as they were received by the shipowner's bank, and agreed to bear any additional costs or exchange rate losses in converting the Euros into US$. The shipowner initially rejected this proposal and refused to make nominations under the COA, only resuming on 25 April.[8]

2. The Supreme Court decision

There was a single unanimous judgment from the Supreme Court, written by Lords Hamblen and Burrows, with whom Lords Hodge, Lloyd-Jones and Richards agreed. Their Lordships held, based on considerations of principle and on precedent, that the obligation to exercise reasonable endeavours to overcome an FM event does not require a contracting party to accept non-contractual performance (in this case payment in a non-contractual currency) from the other party.[9]

First, the Supreme Court held that: '… the relevant question is whether reasonable endeavours could have secured the continuation or resumption of contractual performance. It is reasonable steps towards that end with which the reasonable endeavours proviso is concerned.'[10] Thus, in order to be able to rely on the FM clause, MUR was only required to act reasonably to enable punctual payment in US$, and not in any other currency. Secondly, the court held that '[t]he principle of freedom of contract includes freedom not to contract; and freedom not to contract includes freedom not to accept the offer of a non-contractual performance of the contract'.[11] Thirdly, it held that the *Gilbert-Ash*[12] principle – that parties do not give up their rights in the absence of clear express words to that effect – applied irrespective of whether the rights in question derived from the common law or from contract.[13]

Their Lordships noted that RTI's case that the exercise of reasonable endeavours could in certain circumstances require accepting non-contractual performance 'requires inquiries into whether the acceptance of non-contractual performance would: (i) involve no detriment or other prejudice to the party seeking to invoke force majeure, and (ii) achieve the same result as performance of the contractual obligation in question.' With regard to the first limb of the proposed test, the Supreme Court noted that it would not always be clear what constitutes 'detriment'.[14] With regard to the second limb, the Supreme Court held that it was a rewording of 'Males LJ's suggested inquiry into "the purpose underlying" the relevant obligation and whether that purpose would be met by the alternative performance offered'.[15] This inquiry could be problematic because there may not be a single purpose and/or the purpose may not always be clear.[16] It may also be challenging to establish whether

[5][2022] EWCA Civ 1406, at [6].
[6][2022] EWHC 467 (Comm), at [26]. See also [2022] EWCA Civ 1406, at [8].
[7][2022] EWHC 467 (Comm), at [28].
[8][2022] EWCA Civ 1406, at [7]–[13].
[9][2024] UKSC 18, at [102].
[10]Ibid, at [39].
[11]Ibid, at [42].
[12]*Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689.
[13][2024] UKSC 18, at [45].
[14]Ibid, at [50]–[52].
[15]Ibid, at [53].
[16]Ibid, at [53].

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alternative performance corresponds exactly to the contractual purpose, and whether complete correspondence is required.[17] This raises difficulties in a context where immediate judgments need to be made by non-lawyers.[18] Therefore, the Supreme Court held that a finding that an offer of non-contractual performance could be refused in all cases was more conducive to certainty.[19]

The Supreme Court relied on the *Bulman*[20] and *Vancouver Strikes*[21] cases cited by counsel for MUR. *Bulman* was a case where a charterer was unable to perform its contractual obligation to discharge coal at Regent's Canal due to strike action, an event covered by the exceptions clause in the charterparty.[22] It was held that the charterer (whose obligation to discharge the cargo within laytime was affected by the strike action) was excused from performing thanks to the exceptions clause and was not liable for the losses caused by the delay.[23] Thus the charterer was not obliged to give up its contractual right to discharge at Regent's Canal, in order to be allowed to rely on the exceptions clause.[24] While the contract in *Bulman* did not contain a reasonable endeavours proviso, the Supreme Court in *MUR* held that such a proviso would have been implied, so the absence of an express proviso did not serve to distinguish the *Bulman* case from the case before it.[25] It therefore supported a finding in favour of the shipowner.[26]

The *Vancouver Strikes* case concerned a charterparty contract for a cargo of wheat under which the charterers had an option of loading up to one-third of barley and up to one-third of flour. Due to strikes by personnel operating the grain elevators at Vancouver, loading was delayed by nearly three months. The contract contained an exceptions clause which covered strikes, based on which the charterers argued that they were not liable for the losses to the shipowner caused by the delay.[27] It was held that the charterers were not prevented from relying on the exceptions clause merely because they had the option to load alternative cargoes that did not require the use of the grain elevators.[28] The Supreme Court in *MUR* held that, just as, in *Vancouver Strikes*, '[t]he intervention of a peril did not require the charterers to give up their contractual entitlement to load a full cargo of wheat', so, in *MUR*, the FM event should not require the shipowners to give up their right to payment in US$.[29]

After explaining why *B&S Contracts*[30] and *Payzu*[31] were inapplicable to the dispute before it, the Supreme Court also considered the arguments made for the charterer regarding the insights that could be drawn from the Suez cases on frustration.[32] It held that:

> While it is true that … both [frustration and force majeure] deal with a change of circumstances after the contract is made for which neither party is responsible, the doctrine of frustration is … applicable in a narrow range of changed circumstances and has the drastic consequence that the contract is automatically terminated. Force majeure clauses can cover a far wider set of circumstances with a range of different and flexible consequences, including temporary suspension of the contract for a period of time.[33]

[17]Ibid, at [54].
[18]Ibid, at [55].
[19]Ibid, at [59].
[20]*Bulman v Fenwick & Co* [1894] 1 QB 179.
[21]*Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries & Food* [1963] AC 691.
[22][2024] UKSC 18, at [61].
[23]Ibid, at [62].
[24]Ibid, at [63].
[25]Ibid, at [64].
[26]Ibid, at [65].
[27]Ibid, at [66].
[28]Ibid, at [67]–[72].
[29]Ibid, at [74].
[30]*B&S Contracts & Design Ltd v Victor Green Publications Ltd* [1984] ICR 419.
[31]*Payzu Ltd v Saunders* [1919] 2 KB 581.
[32]*Societe Franco Tunisienne D'Armement v Sidermar SpA, (the 'Massalia')* [1961] 2 QB 278; *Ocean Tramp Tankers Corpn v V/O Sovfracht, (the 'Eugenia')* [1964] 2 QB 226; *Palmco Shipping Inc v Continental Ore Corpn, (the 'Captain George K')* [1970] 2 Lloyd's Rep 21.
[33][2024] UKSC 18, at [92].

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3. Comment

The Supreme Court's decision has provided clarity on three points: first, fulfilling an obligation to exercise reasonable endeavours to overcome the effects of an FM event does not require a contracting party to accept non-contractual performance, in the absence of express words to that effect. Secondly, a reasonable endeavours proviso is to be implied in a standard FM clause even when not expressly included. Finally, the *Gilbert-Ash* principle applies in respect of rights deriving from contract not just to rights deriving from the common law.

The decision, however, did not deal directly with broader questions regarding the purpose of FM clauses and the circumstances in which parties are entitled to rely on them, which is a pity given how common these clauses are and how rarely the Supreme Court has the opportunity to consider them. This was certainly a case where circumstances outside the control of the parties led to a difficult situation. The arbitral tribunal made a factual finding that once RTI's parent became subject to sanctions, MUR was entitled to take the time to ensure that it would not itself fall foul of sanctions by continuing with performance of the COA.[34] However, the case was not decided in favour of MUR on this basis.

The FM event said to have triggered the clause was 'restrictions on monetary transfers'. This did have an impact on RTI's ability to effect punctual payment in US$ but it is difficult to see how it affected MUR's performance obligation to nominate vessels to load cargo. While it is true that the obligations may be said to be reciprocal, the terms of the contract[35] did not give MUR the right to suspend performance in response to delayed payments. The contract was not entered into on the GENCOA standard form, which expressly includes such a right,[36] but on GENCON which does not. Furthermore, rider clause 20 also made no provision on the consequences of late payment. Punctual payment is not a contractual condition, unless expressly so agreed: the default position is that it is an innominate term, the breach of which is only repudiatory if sufficiently serious, and does not otherwise entitle the shipowner to withhold performance. It was held in a time charterparty case that '[t]here is some authority … to the broad effect that, in the absence of a clear indication to the contrary, the court leans against the interpretation of a contractual term as a condition.'[37]

MUR was not therefore contractually entitled to suspend performance merely in response to the probability of delayed payment. Unless it could rely on the FM clause, MUR was obliged to carry on with performance, despite the charterer's breach, and accepting from the charterer the payment of an equivalent amount in Euros (with the result that it would have obtained the right amount in US$ at the right time) would likely have been the commercially reasonable way for it to mitigate its loss. The Supreme Court did not engage with the question whether MUR needed to show that the 'restrictions on monetary transfers' 'caused' *its* failure to perform in order to rely on the clause. There was some discussion of the matter before the High Court, but ultimately Jacobs J concluded that, in making its finding that all the requirements of the FM clause apart from the requirement in clause 36.3(d) had been met (a mixed finding of fact and law), the arbitral tribunal had not misdirected itself as to the law, as required by Arbitration Act 1996, section 69, and that the finding was 'within the range of permissible decisions',[38] and was not open to challenge. Therefore, the Supreme Court did not consider whether it mattered that the FM event relied upon (restrictions on monetary transfers) was liable to affect the *charterer*'s ability to perform the contract rather than that of the shipowner who was seeking to rely on it. The case does, however, impliedly suggest that it does *not* matter.

Neither of the authorities discussed and followed by the Supreme Court in reaching its decision points in a similar direction. In both *Bulman* and *Vancouver Strikes*, it was the party seeking to rely on the exceptions

[34][2022] EWHC 467 (Comm), at [37]. See also ibid, at [9].

[35]Reproduced in [2022] EWHC 467 (Comm), at [17].

[36]Baltic and International Maritime Council (BIMCO), GENCOA 2004, cl 14(b) and (c), GENCOA A 2022, cl 14(a) and GENCOA B 2022, cl 23(a), all available to download from https://www.bimco.org/contracts-and-clauses/bimco-contracts (last accessed 22 October 2024).

[37]*Grand China Logistics Group Co Ltd v Spar Shipping AS* [2016] EWCA Civ 982, at [99].

[38][2022] EWHC 467 (Comm), at [149].

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clause who was prevented from performing by an event out of its control, and not the other party. Further, although the Supreme Court held that it did not matter that the alternative performance offered by RTI was only technically non-contractual (in that MUR would still have obtained precisely what it bargained for), this is another point of distinction in factual terms from both *Bulman* and *Vancouver Strikes*. In both those cases, the party seeking to rely on the FM clause would have had to give up valuable contractual rights in order to continue with performance. In *Bulman*, giving up the right to discharge in Regent's Canal would have complicated the charterers' performance of their contract with the buyers of the cargo.[39] In *Vancouver Strikes*, loading alternative cargoes would have involved both paying more freight[40] and obtaining cargoes that were not readily available, which would in itself have caused delays.[41] By contrast, MUR would not have given up a similarly valuable right[42] and there is some indication that insistence on payment in US$ may have been a pretext for suspending performance for other reasons.

In the Court of Appeal, Males LJ noted that 'It is apparent from the award that the reason why [the charterer's proposal] was not accepted was that the contract had become disadvantageous to MUR, who did not want to perform it'.[43] While this may not have been the only reason why MUR sought to rely on the FM clause in a situation of uncertainty caused by sanctions, there is nevertheless the suggestion that MUR was able to take advantage of the situation, effectively using the FM clause to suspend performance of a bad bargain it had entered into freely. The terms of COAs are heavily negotiated, often with different shipowners competing for the business, particularly when freight rates are low. Published figures suggest that market rates were low in June 2016 when the COA was entered into, but had gone up by April 2018 when MUR ceased making nominations. For example, the Baltic Dry Index freight rates had more than doubled from US$662 on 1 June 2016 to US$1339 on 2 April 2018.[44] This meant that during the days on which it refused to nominate vessels, MUR could charter the same vessels at much higher rates, and RTI would have had to pay a lot more for substitute vessels. The outcome of the Supreme Court's decision could suggest that it is permissible to use FM clauses in this way, which is not in line with their purpose.

As noted, the Supreme Court did not accept the arguments made by counsel for the charterer regarding the applicability of precedents on frustration to the case before it. However, like frustration, FM is intended to excuse non-performance in a situation where the ability to perform the contract as intended is precluded by external events outside the parties' control. Consequently, it is submitted, FM should, like frustration, not be capable of being invoked too readily. The House of Lords has held that 'the doctrine [of frustration] is not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains',[45] and it is troubling that *MUR* suggests that the same does not apply to FM.

MUR is therefore disappointing in two ways. First, it does not shed any light on how and when the imposition of sanctions with respect to one contracting party would be regarded as causing non-performance by the *other* party, so that the latter can rely on FM. Secondly, the case may be viewed as providing authority for the contention that, where there is an FM event that delays payment in the contractual currency by party A, a standard FM clause can provide a basis for party B to refuse to perform, even though A does not itself give notice of FM, even though the event does not affect B's own ability to perform, and despite the fact that the contract does not otherwise provide for suspension or termination of performance by B in response to late payment.

[39][2024] UKSC 18, at [60].

[40]*Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] AC 691, at 695.

[41]Ibid, at 714–715.

[42]See [2022] EWCA Civ 1406, at [54], where Males LJ noted that there was no question of the shipowner being required to vary or abandon the right to be paid in US$.

[43][2022] EWCA Civ 1406, at [60]. See also [2022] EWHC 467 (Comm), at [25], citing an email sent by MUR's CEO.

[44]Obtained from https://tradingeconomics.com/commodity/baltic (last accessed 22 October 2024).

[45]*BTP Tioxide Ltd v Pioneer Shipping Ltd and Armada Marine SA (the 'Nema')* [1981] 2 Lloyd's Rep 239 (HL), at 253 per Lord Roskill.

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