

Force Majeure under the spotlight

STUART JORDAN* highlights an interesting recent court decision on Force Majeure and contrasts English and Gulf law approaches.

A RECENT court decision on Force Majeure has again highlighted important differences between common law and Middle Eastern legal principles. For all parties operating in the Gulf region, these are important points to know. The case was focused on the effect of a contracting party's obligation to use "reasonable endeavours" to overcome a Force Majeure event, and the brief history is as follows:

In 2016, a shipowner (MUR Shipping BV) agreed a charter contract with a charter company (RTI Ltd) for the carrying of bauxite on a regular schedule for delivery to Ukraine, with payments to be made to MUR in US dollars. In 2018, RTI's parent company became subject of US sanctions, which, it was clear, would render making or receiving future payments in US dollars unlawful.

The contract contained a Force Majeure clause. Part of the definition of Force Majeure was that it was an event or circumstance that "cannot not be overcome by the reasonable endeavors of the Party affected." Relying on this, MUR declared the new US sanctions to be a Force Majeure event and sought to end the shipments.

In response to this, RTI offered to make payments instead in Euros and to cover MUR's costs in receiving and converting those payments into US dollars. However, MUR refused this proposal and reiterated its right to receive payment in US dollars. As a result of that refusal bringing the contract to an end, RTI was forced to make alternative shipping arrangements and RTI then demanded from MUR recovery of its additional costs in doing so. MUR refused the demand and the dispute went first to arbitration and then through the English Courts (with different results at each stage) eventually reaching the UK Supreme Court in May 2024.

The question underlying the dispute was

this: in refusing RTI's proposal, was MUR failing (or refusing) to exercise reasonable endeavours to overcome the relevant event or circumstance (the sanctions law) preventing performance?

On a practical level, it appears to have been generally accepted that RTI's proposal to pay in Euros and to cover

all conversion costs, would have left MUR in exactly the same commercial position as if the contract had been performed to the letter. But it is also clear that this proposal did not amount to performance of the contract in accordance with its terms.

To put this another way: *must reasonable endeavours* efforts to overcome a Force Majeure event be limited to efforts to find a way to perform the contract obligations, or can they also include efforts to bring the same outcome or the same benefit to a party, albeit not in accordance with the contract?

The Supreme Court found unanimously in favour of MUR, stating that MUR was not obliged (by any reasonable endeavours obligation) to accept RTI's proposals of non-contractual performance. MUR was entitled to insist on strict performance and if that was not possible due to the Force Majeure event or circumstance, MUR was entitled to suspend its performance of the contract.

Some of the principles underlying this decision are:

First, (addressing our above question directly) the idea of making efforts to overcome Force Majeure, must indicate an objective to perform the contract in accordance with its terms. Doing something else instead is not overcoming the event, it

is working around it.

And the principle of freedom to contract also means freedom to refuse to contract. RTI's offer was effectively a proposal of a different contract, which MUR could not, by this principle, be forced to accept.

The court noted also the need for certainty in contract operation. In this particular case, anyone would agree that the RTI proposal was "as good as" strict compliance but in other cases, that comparison will not

be so clear. In such cases, it would be detrimental if a party's refusal of "alternative performance" were subject to ad hoc and retrospective assessments as to whether or not the proposal would have delivered a benefit equivalent to contract performance.

Although this contract included a 'reasonable endeavours' obligation to try to overcome the Force Majeure event, the court noted that such obligations are generally implied anyway. If an event can be overcome by such efforts, then it

logically (as a matter of causation) cannot be something that is preventing a party from meeting its obligations.

Finally, let's contrast this approach with Gulf region legal principles. Taking just one example in the new Saudi Civil transactions Law: Article 97 covers events of a similar nature to Force Majeure. It provides that, if such events occur, making compliance oppressive for the affected party and threatening "grave loss", that party may seek renegotiation of the contract. And if the parties cannot reach an agreement, the affected party can apply to the court to impose an amendment which will reduce the burden to a reasonable one.

We have looked before at principles of Economic Hardship which is recognised in civil codes across the region and generally. The provisions are not exactly the same as each other, or the new Saudi Code, but they also allow for adjustments of contract terms to alleviate the prospect of grave loss. ■



Jordan ... a closer look at a 'reasonable endeavours' obligation.

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