



## Relying on “force majeure” clause in the face of international sanctions

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Shipowners Club Senior Claims Consultant Paul Smit has written on a case (tMUR Shipping BV v RTI Ltd [2022] EWHC 467 (Comm)) that highlighted the reliance on a force majeure clause.

The dispute arose out of a Contract of Affreightment (COA) concluded in 2016 between the shipowners and their charterers for the carriage of bauxite between Guinea and Ukraine. Payment of freight due under the COA was to be made by the charterers in US Dollars. However, in 2018, as a result of US OFAC sanctions imposed on the parent company of the charterers, the shipowners invoked the contract's Force Majeure clause, which defined such an event as follows:

*“36.3 A Force Majeure Event is an event or state of affairs which meets all the following criteria:*

- a) It is outside the immediate control of the Party giving the Force Majeure Notice.*
- b) It prevents or delays the loading of the cargo at the loading port and/or the discharge of the cargo at the discharging port.*
- c) It is caused by one or more of ... any rules or regulations of governments or any interference or acts or directions of governments... restrictions on monetary transfers and exchanges.*
- d) It cannot be overcome by reasonable endeavours from the Party affected.”*

The shipowners' position was that, as a result of the sanctions imposed, amongst other things, US Dollar freight payments as an express term of the COA would be delayed or prevented, with continued performance under the COA in this regard ultimately constituting a breach of US sanctions. Coupled with the Force Majeure provisions of the contract they concluded that this relieved them of their obligations under the COA.

The charterers commenced a claim before an arbitration tribunal in the first instance for their costs in securing alternative freight, disputed the triggering of the Force Majeure clause. They maintained that, in offering the shipowners the option to receive payment of freight in EUR, a realistic and reasonable alternative had been presented in order to overcome the Force Majeure event.

In this respect, the tribunal supported the charterers. It found that, whilst the severe effects of US sanctions did indeed discourage trading with sanctioned entities, the shipowners had not used reasonable endeavours to overcome the relevant event. Acceptance of the charterers' offer of payment in a non-contractual currency would, the tribunal found, have constituted reasonable endeavours and avoided the Force Majeure event.

### **Commercial Court decision**

Subsequently the shipowners appealed the award to the Commercial Court on the basis that the COA specified payment in US Dollars and no other currency, and thus the contractual agreement – and their reasonable endeavours to avoid a Force Majeure event – did not extend to accepting payment in another currency.

The Commercial Court, in overturning the award and finding in favour of the shipowners' appeal, said that contractual obligations are paramount in determining the question of reasonableness – in this case, the obligation to pay in a particular currency was a key aspect of the contract. The shipowners were not obliged to agree a variation in this contractual term, nor accept non-contractual performance by the charterers (in other words, payment in EUR), even in light of the "reasonable endeavours" requirement of the Force Majeure clause.

The concept of reasonable endeavours, in short, had to be looked at within the confines of what the parties had contractually agreed between them. Parties affected by a Force Majeure event were not expected to accept non-contractual performance, even if declining this precludes the continuation of the contract.

Smit concluded that "whilst the decision is currently under further appeal, the crisis in Ukraine has once again brought supply chain and sanctions issues to the fore, and in this regard the judgment offers timely insight into the interpretation – and indeed extent – of "reasonable endeavours" when held up to the light of a Force Majeure clause."

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