JAPAN P&I CLUB
日本船主責任相互保険組合

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JAPAN P&I NEWS

To the Members

UK Supreme Court Judgment on 'Force Majeure Clause'

The UK Supreme Court, in a case concerning the application of a 'force majeure clause' containing the words 'reasonable endeavours', held that a party's obligation to use reasonable endeavours to overcome a force majeure event does not oblige it to accept an offer of non-contractual performance unless the contract contains specific wording to that effect.

The case is an interesting one in which a London arbitral tribunal's decision was overturned by the English courts in the first instance, the first instance decision was overturned by the Court of Appeal and a further Court of Appeal decision was overturned by the Supreme Court. Please find the article on this judgment written by our Senior Legal Adviser William Turner.

(Summary)
The owners MUR Shipping BV and the charterers RTI Ltd signed a COA for the carriage of bauxite. The COA stipulated that the freight was to be paid in USD. The COA contained a 'force majeure clause', which provided that an event or state of affairs did not qualify as force majeure unless it could not be overcome by 'reasonable endeavours'. During the performance of the COA, the charterers' parent company became subject to US sanctions and the charterers could no longer pay the freight in USD. The charterers offered to pay in EUR, but the owners refused to accept this and suspended the performance of the COA under a'force majeure clause'. The charterers disputed that the owners could not rely on the 'force majeure clause'because they had failed to make 'reasonable endeavours' to overcome the force majeure situation.

Yours faithfully,

The Japan Ship Owners' Mutual Protection & Indemnity Association

Attachment: RTI Ltd v MUR Shipping BV [2024] UKSC 18_Article by William Turner

UK Supreme Court Judgment - RTI Ltd v MUR Shipping BV [2024] UKSC 18

Earlier this year the Supreme Court handed down a decision, which has significant implications for the way in which the English courts will apply force majeure provisions containing reasonable endeavours wording.

The brief facts of the case are as follows.

In mid-2016, the parties entered into a contract of affreightment for the carriage of bauxite from Guinea to the Ukraine. They agreed that a total cargo of 280,000 metric tons of bauxite was to be carried by the Dutch ship owner MUR Shipping BV in consignments over a period of 24 months.

The COA provided that the Charterer RTI Ltd, a Jersey company would pay freight in US dollars.

The force majeure wording in the COA provided that an event or state of affairs did not qualify as force majeure unless it could not be "overcome by reasonable endeavours"

In early 2018, US authorities applied sanctions on the Charterers' parent company the effect of which was that Charterers were not able to make US dollar payments as required by the COA.

Owners proceeded to rely on the force majeure clause in the contract sending a notice stating that continuing the COA would be a breach of sanctions as payment in US dollars was no longer permitted.

The Charterers rejected Owners invocation of force majeure, and offered to pay freight in euros rather than US dollars and to bear the costs of conversion themselves. They rejected Owners arguments that a force majeure situation had arisen and used alternative tonnage to carry their cargoes.

The Charterers commenced arbitration and claimed the difference between the COA rates and the rates they needed to pay elsewhere for alternative tonnage.

The Tribunal found that in a situation where the force majeure clause provided for the exercise of reasonable endeavours to avoid an event or state of affairs preventing contractual performance, Owners were required to accept payment in euros.

The decision was appealed all the way to the Supreme Court who found unanimously that Owners were entitled to rely on the force majeure wording and not accept payment in Euros, even though this would be non-contractual performance under the terms of the contract.

Specifically, the Court found that the availability of a non-contractual solution to an obstacle to contractual performance would not prevent a party from declaring force majeure.

In their Judgment the court emphasised that it was fundamental principle of freedom to contract that a party not be required to accept an offer of a non-contractual performance.

If the parties wished to deviate from this position then clear wording to that effect would need to be included in the contract in order to forego such a valuable contractual right.

On balance, they found that this approach would best promote certainty and predictability, which are of particular importance in English contract law.

The case illustrates the importance of carefully drafting force majeure wording. If the parties intend to permit non-contractual performance to avoid the effect of force majeure events such as sanctions then they need to include specific wording expressly providing for this. This may include making provision for payment in other currencies under certain circumstances. If they do not do so then the courts are unlikely to force a party to accept non-contractual performance where reasonable endeavours wording is included in the force majeure provisions.

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