The duty to minimise the impact of force majeure does (not) require the party affected to accept an offer of performance different from, but equivalent to, that contractually agreed

Commentary to *RTI Ltd. v. MUR Shipping BV* (2024) from the perspective of Spanish law

Important, even if to a limited extent, UK Supreme Court ruling on the scope of duties of good faith in the face of a force majeure event.

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1. The facts and legal doctrine

In international contracts it is common for force majeure clauses to be drafted in such a way that the same cannot be relied upon if the resulting state of affairs could be avoided by the exercise of reasonable endeavours by the party affected. The Supreme Court of the United Kingdom has just decided in *RTI Ltd v. MUR Shipping BV* (15 May 2024; *case ID: UKSC 2022/0172*) that such endeavours to overcome the adverse event must not go so far as to oblige the party invoking force majeure to accept an offer of non-contractual performance from the other contracting party in order to overcome the impediment. In the case at hand, the voyage charterparty entered into could not be performed according to its terms because sanctions imposed by the United States on the charterer's parent company prevented the charterer from making payments in US dollars as contractually agreed. The obligor offered to pay in euros, with full indemnity for currency exchange costs.

It is significant that the force majeure was not invoked by the obligor charterer, but by the shipowner, who made his ships available for the debtor's cargo, and not precisely by alleging that his own performance was impossible. This detail is not adequately highlighted by the judgement, which fails to note that it is the

obligee shipowner who wanted to set aside the contract due to force majeure, and not the obligor, who, far from alleging force majeure to excuse the non-performance, sought to reconstruct the contract so that his performance would continue to be possible. It is also noteworthy that the claimant in the resulting lawsuit was the obligee himself, who claimed damages from the shipowner for the latter's refusal to accept an offer of performance that was not in accordance with the contract. The approach to the matter was thus already very forced.

These last two details must be taken into consideration when invoking or recalling the RTI doctrine. According to the UK Supreme Court, the reasonable endeavours proviso does not oblige the obligee shipowner to accept an offer of performance that is not equal, although equivalent in substance, and reverses the Court of Appeal's judgment to the contrary.

And indeed the UK Supreme Court must be excused. In the terms in which the debate arises, the issue was not whether the obligor had made reasonable endeavours to avoid the event (it did, by offering payment in euros), but whether the obligee had or should have made reasonable endeavours to accept it, which is quite another matter. That is to say, if the shipowner had claimed compensation or damages for non-performance from the obligor, a determination would still be pending regarding *excused non-performance*, as to whether the obligor was excused from non-performance on the grounds of having offered a solution that would avoid frustration of the contract. If the shipowner had taken the initiative to sue for rescission of the contract on the grounds of *frustration*, it was not yet determined whether the contract would have been frustrated, there being an equally feasible alternative performance. If the charterer had sued for an amendment of the contract on the grounds of *hardship,* the final solution was not predetermined either.

2. Force majeure and other remedies

In other words, the RTI judgment must be understood only in its limited terms, without prejudging what would have happened if the dispute had arisen in contexts of *excused non-performance, frustration* or *hardship.* Or, even more closely, in the context of the obligee's duty to *mitigate his losses,* in the terms I discuss below. The Supreme Court thus clings to an extreme procedural and argumentative formalism, which is not strange for anyone familiar with this case law from the other side of the Channel. Once again, the Supreme Court flaunts *(noblesse oblige)* the feature that has made its case law so globally renowned: the demand for *certainty in contracts above all* and the assurance for all global operators that *freedom of contract* will be respected even if the world comes to an end. If the contract imposes the US dollar as the currency of payment, it will be paid in dollars and not in euros, regardless of any other consideration when the contract gives no reason to believe that for some reason the debtor might change the currency of performance. In particular, the Supreme Court refuses to consider whether or not the change of currency of payment was "detrimental" to the obligee and whether or not the proposed payment led to the "same result" as the contractually agreed payment.

The precedents to which the parties refer and which the court takes into consideration are not, in my opinion, decisive, because of the already explained forced way in which the dispute is presented and resolved. There is case law (*Bulman* and *Vancouver Strikes*, decisive for the Supreme Court) that allows the obligor *(charterer)* to conduct the vessel to the place designated for unloading, even though he knows that a

strike will in fact prevent it and even though the charterer could have gone - and this was provided for in the contract - to another unloading point not affected by the event. It should be noted that the fact that the obligor *could do this with impunity* (which would still be debatable) does not predetermine that the obligee could also have done so if the obligor, knowing of the strike, had offered to perform at another destination. Nor are the (not entirely coincident) *Suez cases* decisive. In these cases, the sole issue was (again with excessive formalism) whether or not the charterparty was frustrated and terminated by the fact that the voyage had to round the Cape of Good Hope, a much longer and more costly route than the crossing of the *Suez* Canal, which was closed due to the known hostilities. Substantially (*The Eugenia,* 1964, and *Captain George*, 1970), it was eventually decided that the shipowner and charterer were bound - for one reason or another - to endure twice as many nautical miles without asking for penalties or amendments or termination of the contract. In other words, although the RTI judgment does not emphasise this important point, the parties affected (shipowners or charterers, as the case may be) were exposed in the *Suez* case law to a greater burden than that which the charterer now wanted to impose on them when it offered to pay in euros. And all because the doctrine of frustration cannot serve as a valid precedent for cases involving force majeure!

3. Mitigation of loss

It is curious that the Supreme Court judgment does not rely on any specific statutory or regulatory provision on the contract of carriage of goods by sea. Evidently, the contract was the guiding criterion, but at this point of ambiguity it would have been useful to broaden the perspective with a review of the operative laws. In the Spanish case, the operator should bear in mind that there are some rules that are based on the principle of strict performance of the contract (e.g. Article 215 of the Maritime Navigation Act: agreed port), but there are more provisions that give the respective parties greater freedom of performance when it is a question of saving the value of the contract (e.g. Articles 220, agreed route; 222, deviation; 225, port safety).

In my view, the decisive issue to consider at this point, but which the claimant disregarded, is whether or not the shipowner was subject to *a duty to mitigate his losses by accepting payment in euros.* The formalism of the English judges' discursive process again obscures their view of the woods, obfuscated by the nearby trees.

The weighty precedent relied on by our charterer, albeit unsuccessfully, is *Payzu Ltd v. Saunders* [1919] *2 KB 581.* The defendants contracted to sell in instalments 400 pieces of silk, with delivery as specified by the claimants. The claimants failed to pay on time for the first delivery of silk that they had received although they had sent a cheque which never arrived and a further cheque that was delayed. When the claimants then gave the next order for delivery, the defendants refused to deliver unless the claimants paid cash for each order. The claimants refused to do this and brought a claim for damages for breach of contract alleging that the defendants had repudiated the contract by requiring the new terms. The Court of Appeal decided that the defendants were indeed in repudiatory breach of contract. However, after citing the leading case on the principles concerned with mitigation of loss [*British Westinghouse Electric and Manufacturing Co v Underground Electric Railways Co of London*, 1912, AC 673], the Supreme Court decided that the claimants should have mitigated their loss by accepting the offer of the defendants to deliver on payment of cash.

Once again, the Supreme Court refuses to venture down a path of systematic legal thinking and denies that mitigation cases can exchange doctrine with cases of force majeure. But it also adds in passing a more substantial consideration, which is that the doctrine of the duty to mitigate is always used as a defence against the obligee who claims compensation without having done anything to mitigate his loss, but not in a case such as the present one, where it is the claimant who offers the defendant different performance so that the defendant can mitigate his own loss, which, in fact, and for the moment, he is not claiming.

Note that the scenario of the dispute would have been different if it had been the shipowner claiming termination of contract on the grounds of frustration due to force majeure or if, instead or in addition, he had claimed damages as a consequence of a formal breach of contract.

4. Spanish law

Quid in Spanish law? The obligor affected by the impediment (who is the charterer, not the shipowner, who can continue to sail) would not have succeeded if he had jointly claimed *a*) that there was *prima facie* a force majeure event affecting his performance; *b*) but that the event was defused because the shipowner should have accepted an offer of amendment of the contract made by the charterer and *c*) that, consequently, the former had repudiated the contract and entitled the charterer to claim damages. *That is too much to ask for!*

The charterer could have directly claimed an amendment of the contract under the *rebus sic stantibus* clause. He could have sought a declaration of the right to perform in euros in accordance with good faith and the principle of preservation of the contract (Art. 1258 of the Spanish Civil Code). He could have consigned payment in euros. If the shipowner had sued, his action would probably have been dismissed for abuse of rights. And, if he had directly claimed damages for repudiation, it could have been admitted in the judgement that the debtor had repudiated, but without consequence, because the obligee should have minimised *all his losses* by accepting the offer made to him.