

Force Majeure and COVID-19

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The nature of a force majeure clause

- Term ‘force majeure’ is of French origin
- Concept recognised by many civil law systems (such as French Civil Code) as a defence to a claim for breach of contract
- Concept not recognised by the common law, which recognises frustration instead (narrow doctrine, difficult to bring oneself within)
- Force majeure is thus a creature of contract in this jurisdiction
- Not a term of art in English law: *Tandrin v Aero* [2010] 2 Lloyd’s Rep 668, [43]

➤ *Chitty* (33rd Ed, 15-152):

" ... a contractual term by which one (or both) of the parties is entitled to cancel the contract or is excused from performance of the contract, in whole or in part, or is entitled to suspend performance or to claim an extension of time for performance, upon the happening of a specified event or events beyond his control."

- Historically, held not to be an exemption clause: *Fairclough, Dodd & Jones Ltd v J.H. Vantol Ltd* [1957] 1 W.L.R. 136, 143
- That said, Chitty deals with force majeure clauses in the chapter concerned with exemption clauses; and says (15-152) that it is:

“ ... difficult to draw any clear line of demarcation between the two types of clause, since the effect of each may be to relieve a contracting party of an obligation or liability to which he would otherwise be subject. ”
- Ultimately, courts unlikely to adopt unduly narrow / restrictive approach to the interpretation of force majeure clauses:

“...what matters is not the label but the content of the tin”

Classic Maritime Inc. v Limbungan Makmur [2019] 4 All E.R. 1145, [62], [92]

Burden of proof: 5 main requirements

- It is for a party relying upon a force majeure clause to prove the facts bringing the case within the clause: *Tandrin v Aero* [2010] 2 Lloyd's Rep 668, [48]
- Generally speaking, that means satisfying 5 requirements:
 - 1) Occurrence of specified event
 - 2) Effect on performance, i.e. causation
 - 3) Due to circumstances beyond his/her control
 - 4) No reasonable steps that he/she could have taken to avoid or mitigate the event or its consequences
 - 5) All necessary notices given
- If all 5 are satisfied, then look to the contract for guidance as to the relief available (e.g. EOT, right of suspension, right of termination, etc.)

(1) Occurrence of specified event

- What sorts of events have historically been held to constitute force majeure events?
 - storm, tempest or flood
 - fire
 - perils and dangers or accidents of the sea
 - war
 - riot or civil commotion
 - strikes
- What sorts of events have been held not to constitute force majeure events?

“... bad weather [and] football matches”:

Matsoukis v Priestman [1915] 1 KB 681, 687

Force majeure clause expressly refers to “pandemic”, “epidemic”, “disease” or even “plague”



- Such terms not commonly in use in standard form construction and engineering contracts.
- That may well change in due course
- More commonly used in other contexts. See e.g.:
 - *Classic Maritime Inc v Limbungan Makmur* [2019] Bus. L.R. 2854, [11] (contract of affreightment)
 - *The Flying Music Company Limited v Theater Entertainment SA* [2017] EWHC 3192 (QB) [43] (contract for the putting on of performances of ‘Thriller Live’ in various locations around Greece)

Specified event listed as “Act of God”



- Term has been described as follows:

“[a] metaphorical phrase (like "fate") with a religious origin used to describe those events which involved no human agency and which it was not realistically possible for a human to guard against: an accident which the defendant can show is due to natural causes, directly and exclusively, without human intervention and could not have been prevented by any amount of foresight, pains and care, reasonably to be expected of him”:

Transco Plc v Stockport Metropolitan Borough Council [2003] 3 W.L.R. 1467, [59] (HL)

- Such wording would probably respond to / be engaged by COVID-19 generally*

- Clause 2.29.15 provides that force majeure is a Relevant Event
- Clause 8.11.1.1 provides that force majeure is a matter which may permit termination of the contract
- Term ‘force majeure’ is not defined in JCT SBC/Q. On balance, COVID-19 generally probably would engage those clauses*. See e.g.
 - *Lebeaupin v Richard Crispin & Co* [1920] 2 K.B. 714, 719: suggests that epidemics fall within the confines of force majeure where that term is not expressly defined by contract; and
 - *Tandrin v Aero* [2010] 2 Lloyd’s Rep 668: held that a clause headed “force majeure” would be engaged where the seller of aircraft was unable to deliver “*due to a pandemic causing a dearth of delivery pilots*” [46(b)]

- 1999 Edition, Clause 19.1, defined force majeure as:
 - “... an exceptional event or circumstance:*
 - (a) which is beyond a Party’s control;*
 - (b) which such Party could not reasonably have provided against before entering into the Contract;*
 - (c) which, having arisen, such Party could not reasonably have avoided or overcome, and*
 - (d) which is not substantially attributable to the other Party.”*
- Then offered non-exhaustive list of events which might constitute force majeure, which included:
 - “... natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity”*

➤ Clause 19.1 (prevention):

“If an event occurs which ... neither Party could prevent and ... an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it, the Project Manager gives an instruction to the Contractor stating how he is to deal with the event.”

- Probable that the COVID-19 pandemic generally would fall within that clause*. Moreover, clause 60.1(19) states that such an event is generally a compensation event
- However, NB: such an event is only a compensation event under clause 60.1(19) where it is *“not one of the other compensation events stated in this contract”*:
 - The COVID-19 pandemic could, conceivably, constitute an *Employer’s* risk and therefore a compensation event under clause 60.1(14) instead
 - Equally, if the Project Manager gives an instruction in response to the event, which serves to change the works information, it may be that there is a further or alternative compensation event arising under clause 60.1(1)

(2) Effect on performance, i.e. causation

Force majeure clause requires proof that performance has been “prevented”



- Represents highest hurdle.
- Performance must be legally or physically impossible, not just more difficult or unprofitable: *Blythe & Co v Richards* (1916) 114 LT 753
- Relatively recent example:
 - *Triple Point v PTT* [2017] EWHC 2178 (TCC) before Jefford J. Contract required proof of inability to perform as a result of force majeure event. Held, [221]:

“...it is simply not possible for me to say that the civil unrest caused PTT to be unable to perform any of its obligations with a consequent suspension of the obligation to perform during any period of unrest and certainly not the entire period from November 2013 to May 2014”. (Emphasis added)

Force majeure clause requires proof that performance has been “hindered” or “delayed”



- “Hindered” is broader than “prevented”:
 - Includes situations where performance would require dislocation of business and breaking of other contracts: *Reardon Smith Line v Ministry of Agriculture* [1962] 1 QB 42
 - Does not generally include situations where performance has merely become more expensive due to rise in prices: *Tennants v Wilson* [1917] AC 495
- “Delayed”: meaning depends on context and words used in the contract

Must the force majeure event be the sole cause of the impacted performance?



- Ultimately: a question of construction of the words used in the contract:
 - Sir Guenter Treitel, *Frustration and Force Majeure*, 3rd. Ed, 12-032;
 - *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2019] 1 All E.R. (Comm) 34, [79]
- However, in the majority of instances, the force majeure event must be the sole cause of the impacted performance in order for relief to be obtained:
 - *Intertradex v Lesieur* [1978] 2 Lloyd's Rep. 509
 - *Seadrill*, [75] - [80]

The ripple effect: introduction



- “Ripple effect” first referred to in an article by Simon Rainey QC and Andrew Leung
- On a proper analysis, has performance of the contract been affected by the pandemic generally; or by subsequent government legislation / guidance / third party actions etc.?
- Non-exhaustive list of potential causation contenders
 - > Pandemic generally
 - > Primary legislation
 - > Regulations
 - > Government / industry guidance / best practice
 - > Bona fide misinterpretation / abundance of caution
 - > 3rd party conduct / foreign law

The ripple effect: primary legislation



- In England, section 52 and Schedule 22 of the Coronavirus Act 2020 (Royal Assent 25 March 2020) together empower the SOS to:

“... issue a direction imposing prohibitions, requirements or restrictions in relation to the entry into, departure from, or location of persons in, premises in England”

(whether specified premises or premises of a specified description).

- Construction sites have not been ordered to close pursuant to those statutory provisions, but there remains the possibility of such closure, requirements or restrictions being imposed in the event of a 2nd or subsequent wave

- The regulations which have closed businesses and restricted movement and gatherings are The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020
- Made under the Public Health (Control of Disease) Act 1984
- Came into force on 26 March 2020
- Amended by the Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations 2020 as of 22 April 2020

The ripple effect: guidance / best practice



- Government has produced: Guidance for employers and businesses on coronavirus (COVID-19) (updated 7 April 2020), which includes the following recommendations:
 - *Avoid crowding and minimise opportunities for the virus to spread by maintaining a distance of at least 2 metres (3 steps) between individuals wherever possible*
 - *Make sure there are places to wash hands for 20 seconds with soap and water, and encourage everyone to do so regularly*
 - *Ensure employees who are in an extremely vulnerable group and should be shielded are supported to stay at home*
 - *Wherever possible, keep teams of workers together (cohorting), and keep teams as small as possible*
 - *Consider shift working or the staggering of processes which would enable staff to continue to operate both effectively and where possible at a safe distance*

The ripple effect: guidance / best practice (continued)



- Government has also produced: Social distancing in the workplace during coronavirus (COVID-19): sector guidance (updated 4 May 2020), which includes the following recommendations in respect of the construction industry:
 - *Where it is not possible to follow the social distancing guidelines in full in relation to a particular activity, you should consider whether that activity needs to continue for the site to continue to operate, and, if so, take all the mitigating actions possible to reduce the risk of transmission.*
 - *If you decide the work should go ahead, you should advise staff to wash their hands frequently using soap and water for 20 seconds, and especially after blowing their nose, sneezing or coughing, on arrival at work, before and after eating, after using public transport, and when they arrive home. Where facilities to wash hands are not available, hand sanitiser should be used.*
 - *You should still advise staff to keep 2 metres apart as much as possible.*
 - *You should plan work to minimise contact between workers and avoid skin-to-skin and face-to-face contact. Where face-to-face contact is essential, this should be kept to 15 minutes or less wherever possible.*

The ripple effect: guidance / best practice (continued)



- *As much as possible, keep groups of workers working together in teams that are as small as possible (cohorting). For example, you keep vehicle crews working together, rather than mixing crew members on different shifts.*
- *Staff should also wash their hands each time before getting into enclosed machinery (such as diggers) with others, and wash their hands every time they get out. To help with this, you should consider adding additional pop-up handwashing stations or facilities, providing soap, water and/or hand sanitiser.*
- *Employees should keep the windows of enclosed machinery or enclosed spaces open for ventilation and be careful to avoid touching their face at all times. The inside of cabs should be regularly cleaned, particularly between use by different operators.*
- *You should try to use stairs in preference to lifts or hoists. Where lifts or hoists must be used, you should lower their capacity to reduce congestion and contact at all times, and regularly clean touchpoints, such as doors and buttons.*

The ripple effect: guidance / best practice (continued)



- Secretary of State has written to the construction industry informing them of Site Operating Procedures produced by the Construction Leadership Council in accordance with the guidance from Public Health England. See: Construction Sector - Site Operating Procedures Protecting Your Workforce During Coronavirus (Covid-19) (now in v. 3 dated 14 April 2020)
- Those Site Operating Procedures are, in effect, a much more detailed version of the Government guidance referred to above
- NB: not necessarily consistent with the Government guidance. By way of example only:
 - Government's sector guide states:

“Where it is not possible to follow the social distancing guidelines in full in relation to a particular activity, you should consider whether that activity needs to continue for the site to continue to operate, and, if so, take all the mitigating actions possible to reduce the risk of transmission.”
 - SOP document states:

“The health and safety requirements of any construction activity must not be compromised at this time. If an activity cannot be undertaken safely, it should not take place.”

The ripple effect: guidance / best practice (continued)



- On Sunday, Government announced and published:

“OUR PLAN TO REBUILD: The UK Government’s COVID-19 recovery strategy”

- Applies in England from Wednesday 13 May 2020.
- Series of ‘Steps’ to escape lockdown
- Provides (at p. 22) for new “COVID-19 Secure” guidelines:

“Many measures require the development of new safety guidelines that set out how each type of physical space can be adapted to operate safely. The Government has been consulting relevant sectors, industry bodies, local authorities, trades unions, the Health and Safety Executive and Public Health England on their development and will release them this week.”

The ripple effect: guidance / best practice (continued)



- On Monday, Government published:
 - Staying alert and safe: social distancing
 - Reiterates that construction sites should be open
 - Coronavirus outbreak FAQs: what you can and can't do
 - Breaks down aspects of Sunday evening's 50-page plan
 - Makes clear (s. 3.1) that the construction industry will be subject to the "COVID-19 Secure" guidelines referred to in Sunday's plan
 - Staying safe outside your home:
 - Same message as Appendix A to Sunday's plan
- On Tuesday, Government published construction industry COVID-19 Secure guidance:
 - Similar in content to Construction Leadership Council document and Sunday's plan

The ripple effect: take-away points



- Analyse whether there is an arguable case to the effect that the COVID-19 pandemic generally falls within the force majeure clause
- If the cause of non-performance was something very direct (i.e. a dearth of workers due to illness) analyse what, more specifically, it is that has prevented, hindered or delayed performance (compliance with legislation, regulations, guidance, etc.) and ask whether there is an arguable case to the effect that *that* event falls within the force majeure clause
- Analyse whether there are any other contractual provisions, beyond the force majeure clause, which might afford relief in respect of the event in question. By way of example in the context of NEC3:
 - Optional Clause X2.1 re: changes in the law;
 - Clause 18.1: change in law rendering carrying out of Works Information illegal
- Maintain records. Consider how one might prove (by reference to contemporaneous documents wherever possible) the fact that site operations changed to suit legislation, regulations and /or guidance

**(4) Reasonable steps to avoid or
mitigate the event or its consequences**

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- Possible examples:
 - Continue working in accordance with Government legislation, regulations and guidance wherever possible (rather than shutting down site)
 - Procure parts / labour from elsewhere in the event of insolvent suppliers / subcontractors or broken supply chains
 - Stagger work / move to shift working in order to mitigate delay

Other potential issues arising in relation to COVID-19

- Imminent challenge to legality of lockdown:
 - Letter of Claim has been sent to Matt Hancock, threatening judicial review proceedings on 3 grounds:
 - (1) *Ultra vires* because regulations implemented under the Public Health Act 1984, rather than the Civil Contingencies Act 2004 or the emergency Coronavirus Act 2020
 - (2) Disproportionate
 - (3) Breaches the European Convention on Human Rights as regards rights to liberty, family life, education and property

Government guidance on contractual dealings



- On 7 May: Government issued:

Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency

- In summary:

“the Government is strongly encouraging all individuals, businesses (including funders) and public authorities to act responsibly and fairly in the national interest in performing and enforcing their contracts, to support the response to Covid-19 and to protect jobs and the economy ... parties to active contractual arrangements which are materially impacted by Covid-19 should consider their behaviour as part of the national response to the public health emergency we are currently facing”.

- However:

- self-avowedly non-statutory; and

“... not intended to override specific contracts whose primary purpose is to make express and clear provision for, and allocate risks in respect of, the effects of global or national public health emergencies or pandemics”

**And now for some questions
with Adrian Williamson QC
and Sean Wilken QC**

Please contact the Practice Management Teams for further information

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