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BRIEFING

DON'T UNDERESTIMATE FORCE MAJEURE

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- FORCE MAJEURE CLAUSES ENABLE PARTIES TO AGREE WHAT SHOULD HAPPEN IN THE EVENT OF DEFINED EVENTS OUTSIDE THEIR CONTROL, SUCH AS NATURAL DISASTERS
- HOWEVER THE FORCE MAJEURE EVENT MUST BE CAUSATIVE OF NON-PERFORMANCE OR DELAY TO BE EFFECTIVE

"FORCE MAJEURE CLAUSES ENABLE THE PARTIES TO AGREE IN THEIR CONTRACT WHAT SHOULD HAPPEN ON THE OCCURRENCE OF DEFINED EVENTS ... PROVIDING GREATER CONTROL OVER THE CONTRACTUAL ALLOCATION OF RISK."

Earlier this year a tailings dam in Brumadinho, Minas Gerais, Brazil, collapsed, resulting in the tragic deaths of more than 230 people. The dam was operated by the Vale group. By early February 2019, a Brazilian court had ordered the Vale group to suspend a total of eight dams. This led the Vale group to announce that it was declaring force majeure "on a number of related iron ore and pellets sales contracts". It is therefore timely to provide a reminder on what force majeure is, how it works, and why relying on force majeure clauses can be complicated.

What is force majeure and how does it differ from frustration?

The normal position in contract law is that most obligations are absolute, and a party who fails to perform its obligations is in breach and liable in provable damages for that failure. However, sometimes parties to a contract are faced with events which are outside their control, such as a natural disaster. If the event was unexpected and it makes performance of the contract impossible or radically different from what was anticipated, the concept of "frustration" might apply. If a contract is frustrated, it is discharged automatically and neither party has to fulfil the obligations which remain outstanding at the time of discharge. The consequences of frustration (for example, whether any money paid under the contract should be refunded) are provided for in the Law Reform (Frustrated Contracts) Act 1943 and by the common law.

In contrast to frustration, force majeure clauses enable the parties to agree in their contract what should happen on the occurrence of defined events (such as a natural disaster, epidemic, terrorist attack or industrial action), providing greater control over the contractual allocation of risk.

The term "force majeure" has no settled meaning, and to the extent that it is used in a contract it should be defined. This is typically done by setting out the events which will constitute force majeure and what is to happen if one of these events occurs, for example suspension of particular contractual obligations on the occurrence of a particular event for as long as that event takes place, or excusing performance of obligations (either in whole or in part). By using a force majeure clause, parties can excuse liability for defined events outside a party's control, and prevent such events resulting in discharge of the contract.

"A PARTY SEEKING TO RELY ON A FORCE MAJEURE CLAUSE MUST PROVE THAT SUCH AN EVENT HAS IN FACT OCCURRED AND THAT THE EVENT HAS AFFECTED PERFORMANCE OF THE CONTRACT IN A RELEVANT RESPECT."

Recent examples of litigation concerning force majeure clauses

Whether reliance on a force majeure clause is possible in any given case will be highly fact dependent. A party seeking to rely on a force majeure clause must prove that such an event has in fact occurred and that the event has affected performance of the contract in a relevant respect (for example by preventing performance, or delaying performance, depending on the wording of the force majeure clause itself). The party arguing that a force majeure event has occurred will also have to prove that non-performance was due to circumstances beyond its control, and that reasonable steps could not have been taken to avoid or mitigate the event or its consequences.

Arguments over force majeure clauses can arise in diverse factual scenarios as demonstrated by a brief review of recent cases.

In *GPP Big Field LLP v Solar EPC Solutions SL*,[1] a contractor argued that it could not lay cable along a planned route because of protests by local residents said to amount to a force majeure event. The relevant clause defined force majeure as "disturbance, commotion or civil disorder" or "acts of sabotage". The judge found that the delay in laying cable was *not* caused by a force majeure event, and in addition the contractor had not given sufficient notice of the alleged force majeure event as required by the contract. This case highlights the importance of proving causation and of complying with any notice requirements in the contract.

In *Sucden Middle-East v Yagci Denizcilik Ve Ticaret Ltd Sirketi, "The MV Muammer Yagci"*,[2] the court determined that seizure of cargo by local customs authorities at a discharge port causing delay to discharge amounted to "government interference" for the purposes of the force majeure clause in the Sugar Charter Party 1999.

In *Classic Maritime Inc v Limbungan Makmur Sdn Bhd*,[3] the court had to determine whether the bursting of a dam in Brazil could be relied on as a force majeure event excusing a charterer from liability for failing to ship cargoes. The contract had provided that the charterers would not be responsible for any failure to deliver cargo resulting from accidents at the mine, provided that such events had directly affected the charterer's performance under the contract. The court held that the charterer was required to show that, but for the dam bursting, the cargo would have been supplied. The charterer could not do so and therefore it was unable to rely on the force majeure clause. Again, this highlights the importance of causation when attempting to rely on a force majeure clause.

[1] [2018] EWHC 2866 (Comm)
[2] [2018] EWHC 3873 (Comm)
[3] [2018] EWHC 2389 (Comm), appeal outstanding.

In *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd*,[4] the issue was whether the Ghanaian government's refusal to approve a new oil field was an event justifying an oil drilling company's use of a force majeure clause to terminate its hire contract. The court held that a moratorium imposed by the Ghanaian government on drilling had been a force majeure event, but the refusal to approve a new oil field for other reasons, was not. The defendant's intention to continue drilling had been frustrated by the lack of approval, not by the moratorium. The defendant could not show that it was prevented from acting by a force majeure event and therefore could not rely on the clause to justify termination. As above, causation was determinative.

In *Triple Point Technology, Inc v PTT Public Company Ltd*,[5] one argument put forward by the claimant was that the relationship between the parties had been affected by a force majeure event, being civil unrest in Thailand. This issue was not relevant on appeal, but the way that the High Court judge dealt with the argument nonetheless provides an instructive example of use of force majeure clauses. There was insufficient evidence for the judge to be able to determine that the civil unrest caused the claimant to be unable to perform any of its obligations, further demonstrating the importance of causation.

"WHILE FORCE MAJEURE CLAUSES CAN BE USEFUL TO PARTIES WHO WANT SOME CONTROL OVER THEIR OBLIGATIONS WHEN FACED WITH EVENTS OUTSIDE THEIR CONTROL, THE UNPREDICTABLE NATURE OF SUCH EVENTS MEANS THAT THE ABILITY TO RELY ON A CLAUSE IN ANY GIVEN SITUATION WILL OFTEN BE DIFFICULT TO PREDICT."

Finally, in *Great Elephant Corp v Trafigura Beheer BV "The Crudesky"*,[6] the Court of Appeal considered the interpretation of a force majeure clause. The High Court had held that a delay resulting in demurrage had been caused by an unforeseeable force majeure event. The relevant clause had stated that neither party would be held liable for delay in performance of contractual obligations if that delay was caused by "the occurrence of an unforeseeable act or event which is beyond the reasonable control of either party ("Force Majeure")". The Court of Appeal emphasised that a force majeure clause must be interpreted in accordance with its own terms, and that any ambiguity was to be resolved against the party seeking to rely on the clause. The standard of being "beyond [a corporate person's] control" was a high one, "since corporations usually do have a significant measure of control over their own business." The Court of Appeal did not agree with the High Court that the force majeure clause could be relied on.

Conclusion

The above review of recent cases concerning force majeure clauses has shown that it is very important for a party attempting to rely on a force majeure clause to prove that the force majeure event was causative of non-performance or delay. In four of the six cases surveyed, the relevant party was unable to do so. In a situation like that of the collapse of the tailings dam in Brumadinho, the collapse would have to come within one of the defined force majeure events in the relevant contract, and the hurdle of causation would have to be overcome. While force majeure clauses can be useful to parties who want some control over their obligations when faced with events outside their control, the unpredictable nature of such events means that the ability to rely on a clause in any given situation will often be difficult to predict.

[4] [2018] EWHC 1640 (Comm)
[5] [2017] EWHC 2178 (TCC), Watson Farley & Williams acted as solicitors for the defendant.
[6] [2013] 2 CLC 185 (CA)

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this briefing, please speak with one of the authors below or your regular contact at Watson Farley & Williams.

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