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Proving force majeure claims: a difficult enterprise

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Authors: Mark Goodrich, Alice McDonnell, Hirra Tung

Two recent English High Court decisions highlight the difficulty in successfully establishing a claim to force majeure. Even if there is no dispute that a force majeure "event" occurred, has it caused the failure to perform? And has the party tried hard enough to avoid the consequences?

Introduction

In English law, force majeure events are creatures of contract – they must be defined in the contract. This contrasts with the position in civil law jurisdictions which frequently include the concept of force majeure within their civil codes.

Sometimes it is beyond dispute that an event meets a contract's definition of force majeure (noting that some contracts use different terms). Although the requirements depend on the terms of the contract, the party must usually also prove that:

- the force majeure event caused that party's failure to perform its contractual obligations; and
- they have taken sufficient steps to minimise the issue caused by the force majeure event (they are often expressly required to take "reasonable steps" or use "reasonable endeavours").

Two recent English High Court decisions discussed below demonstrate some of the difficulties contracting parties may face in relying on force majeure to excuse liability for failing to perform a contractual obligation.

Causation

A party wishing to rely on a force majeure event to excuse itself from performance must first demonstrate that the force majeure event caused its failure to perform a contractual obligation. But the judicial treatment of causation can differ according to the circumstances. In two recent cases, Teare J has grappled with the question and come up with answers which some may find surprising.

The more straightforward case is *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640 (Comm) (03 July 2018) ("**Seadrill Ghana**"). In this case, Tullow Ghana contracted with Seadrill Ghana to hire an oil rig for the drilling and extraction of oil in two offshore petroleum concessions off the coast of Ghana. After various circumstances prevented use of the rig, Tullow Ghana claimed force majeure and terminated the contract.

The judge found that although the Government of Ghana's moratorium on drilling, which was the claimed force majeure event by Tullow Ghana, did prevent the rig from drilling in certain areas, the ***effective*** cause of the failure to perform was the Government's failure to approve Tullow Ghana's Greater Jubilee Plan (a drilling plan covering a wider area than that affected by the moratorium).

Therefore, the court held that Tullow Ghana was not entitled to rely upon the force majeure clause, and its purported termination of the contract on that basis was invalid. Tullow Ghana's position may not have been

assisted by referring internally to its discussions to consider options to terminate its contract, including by its force majeure claim, as "Project Voldemort" (the judge – evidently not a Harry Potter fan – was informed that he was "an evil and destructive character" in the bestselling novels). However, Teare J was at pains to emphasise that Tullow Ghana's aims were not determinative of whether it was entitled to rely on the force majeure clause.

In reaching its decision, the court also relied on the decision in *Intertradex v Lesieur* [1978] 2 Lloyd's Reports 509 which is said to be authority for the proposition that the force majeure event must be the "sole cause" of the failure to perform. However, this summary is not entirely accurate – in fact, the test which is set out therein is that the force majeure event must of itself have been sufficient to prevent performance (per Lord Denning at p. 515). In other words, it is not sufficient that a force majeure event combines with another event to render performance impossible if it was not sufficient to prevent performance on its own. In any event, the decision could have been made on the simpler ground that the Government's failure to approve Tullow Ghana's Greater Jubilee Plan had a far stronger causative effect.

"But for" test?

However, in *Classic Maritime Inc. v Limbungan Makmur Sdn Bhd & Anor* [2018] EWHC 2389 (Comm) (13 September 2018) ("**Classic Maritime**"), Teare J decided that a "but for" test was appropriate to determine whether the defendant, Limbungan Makmur ("**Limbungan**") could rely on the force majeure clause to avoid liability to Classic Maritime.

In this case, Classic Maritime, a ship owner, entered into a long-term affreightment contract with Limbungan, the charterer, for the carriage of iron ore pellets from Brazil to Malaysia. Following the burst of the Fundao dam in Brazil, Limbungan claimed the burst was a force majeure event that prevented it from supplying five cargo shipments of iron ore pellets from Brazil to Malaysia. A complicating factor in this claim was the fact that Limbungan was unlikely to have performed even in the absence of the dam burst. It had already missed two shipments due to a lack of demand in its factories in Asia. Teare J therefore held that the force majeure event had not caused Limbungan's failure to perform and hence Limbungan could not rely on it to avoid liability.

Relying on previous authorities, Teare J took the approach that questions of causation are to be resolved by reference to common sense.He disregarded the line of authority commencing with *Bremer Handelgesellschaft v Vanden Avenue* [1978] 2 Lloyd's Reports 109 which suggested that if a force majeure event was proved to have prevented performance, the party relying on it did not have to show that it would have performed in the absence of that event. Teare J came to the conclusion that these cases applied only to frustration and not to force majeure.

However, it was a pyrrhic victory for Classic Maritime because Teare J also concluded that the compensatory principle in damages meant that they could not recover substantial damages from Limbungan. The rationale was that even if Limbungan would have been able to perform, the force majeure event would have prevented it so that it would be wrong to award compensation to Classic Maritime.

What steps are required to be taken by a party after a force majeure event?

"Reasonable endeavours" or "reasonable steps"

Often, force majeure clauses require the party relying on the force majeure event to demonstrate that it took "reasonable endeavours" to avoid, or, at least reduce the adverse effects of the force majeure event. Several of the FIDIC 1999 and 2017 suites of contracts, for example, require each party to use "all reasonable endeavours" to mitigate the effects of force majeure (and these words may yet impart a higher standard – see *Rhodia International Holdings Limited & Another v Huntsman International LLC* [2007] EWHC 292 (Comm)). Teare J also considered this issue in both cases.

In Seadrill Ghana, pursuant to the contract terms, both parties were required to use their reasonable endeavours to "mitigate, avoid, circumvent or overcome the circumstances of the force majeure occurrence". In considering "reasonable endeavours", Teare J took the view that this wording required Tullow Ghana to consider Seadrill's commercial interests under the contract as well as its own. It was held that Tullow Ghana could have provided Seadrill with drilling works elsewhere (that did not require approval from the Government of Ghana) and although these works were not as commercially attractive to Tullow Ghana, the requirement to consider Seadrill's interests meant that a failure to provide them was a failure to use "reasonable endeavours".

In contrast with Seadrill Ghana, the contract in Classic Maritime did not contain express wording requiring any "reasonable endeavours" or otherwise to mitigate the effects of a force majeure event. In the absence of express words, the court found that the parties were nonetheless obliged to take "reasonable steps" to mitigate the effects of the force majeure event. In the event, it required Limbungan to demonstrate that it had taken reasonable steps to ship iron ore pellets from another location and supplier following the dam burst. Although Teare J considered that reasonable steps would have included seeking a long-term contract with an alternative supplier, on the facts he considered that no such long-term contract would have been available.

Comment

The focus in both judgments is on causation and, in particular, the rejection of the idea that "one size fits all" when it comes to considering whether a force majeure event has caused a failure to perform. Drawing upon principles of causation in other legal contexts, Teare J was concerned not to lay down a rigid test but rather find that causation depends on the circumstances in which it arises and should be decided on the basis of "common sense". This pragmatic approach allows judicial flexibility but potentially at the risk of increasing uncertainty.

These cases illustrate the practical difficulties in establishing relief for performance based on force majeure. In large, complex, multi-party projects, there are often likely to be competing causes for a failure to perform alleged by parties seeking compensation, or, on the other side, to absolve themselves of liability. For example, in large construction projects, it is not unusual that a force majeure event coincides with other delaying events such as failure to perform its contractual obligations or work scope changes. In such cases, courts or tribunals will carefully examine the reasons why parties fail to perform. The conduct of parties relying on a force majeure exclusion will also be scrutinised. There has been a lack of authority in relation to what is required as "reasonable endeavours" and Teare J's approach of requiring a party to consider the commercial interests of the other side may well be influential in this context. An intriguing question is what the courts would require if the contract provided for "best endeavours" or "all reasonable endeavours" to overcome the force majeure event (as is sometimes the case).

White & Case LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom

T +44 20 7532 1000