Force Majeure Clauses and COVID-19

1. The advent of the COVID-19 pandemic has caused a surge in interest in invoking force majeure clauses – to suspend a party's need to perform its contractual obligations, and perhaps to cancel the contract altogether.

2. Such force majeure clauses will typically specify: (i) a number of events beyond the parties' control ("force majeure events"); (ii) the effect on a party's performance of the contract that such events must have if the force majeure clause is to apply; and (iii) the consequences for the parties' contractual responsibility when the clause applies: per Males LJ in Classic Maritime Holdings Inc v Limbugan Makmur SDN BHD, Lion Diversified Holdings BHD [2019] 4 All E.R. 1145 at [31].

3. In this note, we outline three areas concerning the operation of force majeure clauses that may give rise to commercial disputes during the pandemic.[1]

4. This note does not address the common law doctrine of frustration, which might be triggered by the outbreak of COVID-19 and consequent government measures (although certain points of comparison are noted). Frustration does not depend on the terms of the parties' contract in the same way as force majeure; the doctrine will apply notwithstanding that there is no "frustration" clause in the contract. Although the relationship between frustration and force majeure clauses is "*difficult to summarise*"[2], typically a force majeure clause will suspend the affected party's obligation for the duration of the force majeure event, while keeping the contract alive (at least for a specified period of time), whereas in the case of frustration, the parties' contractual obligations are not merely suspended, but rather are brought to an end.

[1] This note is intended as a general and high-level summary only. It is not exhaustive of the potential issues that may arise in relation to force majeure clauses. Any party considering invoking a force majeure provision should seek legal advice. The position may also be different in a consumer context.

[2] Lewison, The Interpretation of Contracts (6th ed) at [13.11].

Has the COVID-19 pandemic given rise to a force majeure event?

5. A party seeking to rely on a force majeure clause bears the burden of proving that its failure to perform has been caused by a force majeure event. In so doing, it is likely to have to consider at least the following matters.

6. First, the court will consider whether COVID-19 is (or gives rise to) a force majeure event. Force majeure is not a legal term of art in English law[3] but an expression borrowed from French law.[4] Unlike the common law doctrine of frustration, it is a creature of contract: a party can only invoke force majeure if its contract includes provisions enabling it to do so, and the terms of the parties' contract are therefore all important. As one commentator notes "*the events constituting force majeure, the impact of force majeure and the conditions in which it may be invoked stem entirely from the terms of the contract*".[5]

7. Force majeure is often a label or a heading for a clause, which specifies particular events or circumstances that allow for such a clause to be invoked: see Sucden Middle East v Yagci Denizcilik Ve Ticaret Limited Sirketi, "The Mv Muammer Yagci" [2018] EWHC 3873 (Comm) at [21]. Such lists may contain express reference to pandemics, epidemics or diseases (or even, in more antiquated language, "plague"), or to governmental actions that interfere in a party's ability to perform. Lists may also contain more general catch-all drafting such as "or any other causes beyond our control".

8. The question of whether a party is entitled to invoke a force majeure clause is ultimately one of contractual construction. In this respect, the actual language chosen by the parties is all important. The starting point is the words agreed by the parties, rather than a broader enquiry into the parties' general intention: per Saville LJ in Coastal (Bermuda) Petroleum Ltd b VTT Vulcan Petroleum SA ("The Marine Star") [1996] 2 Lloyds' Rep. 383.[6] The parties' contracts may specify that certain events which would not otherwise discharge the

[3] In British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd [1953] 1 WLR 280, 283, McNair J said that the phrase "force majeure" was not too vague to have contractual effect but that a contract said to be "subject to force majeure conditions" was void for uncertainty.
[4] McCardie J considers the use of the expression "force majeure" in France, and continental Europe more generally, in Lebeaupin v Richard Crispin and Company [1920] 2 K.B. 714, 719.
[5] Goode, Commercial Law (5th ed) at [3.167].
[6] See also Lebeaupin v Richard Crispin and Company [1920] 2 K.B. 714, 719-720.

contracts be considered to be force majeure events, or exclude certain events which would otherwise discharge the contracts.[7]

9. Accordingly, when considering whether a particular event is covered by the clause, it is necessary to carefully consider precisely what is giving rise to a difficulty in performance. Is it the fact of the pandemic in itself? Is it lockdown provisions that have been imposed by the government? Is it a voluntary course of action undertaken by another actor that was in accordance with government recommendations, but was not legally required? Having analysed the factual position, one can then consider whether it is covered by the wording of the force majeure clause.

10. Second, the drafting of a force majeure clause is also likely to require a causal connection between the force majeure event and the failure to perform. In some cases, the contract may, on its true construction, require that the force majeure event is the *sole* cause of a party's failure to perform an obligation. For example, in Seadrill Ghana Operations Limited v Tullow Ghana Limited [2019] 1 All E.R. (Comm) 34 at [77]-[80], Teare J considered the contractual wording "*if and to the extent that fulfilment has been delayed or temporarily prevented by an occurrence as hereunder defined as Force Majeure*". It was held that this language did not cover a situation where a party's failure to perform was caused by two matters – one a force majeure event, and the other not. Note that where a party has some control over measures that would prevent the putative force majeure event from occurring (for example, installing a sprinkler system to prevent outbreaks of fire), and fails to do so, it may be unable to establish the event was beyond its reasonable control: 2 Entertain Video Ltd & Ors v Sony DADC Europe Ltd [2020] EWHC 972 (TCC) at [205]-[208].

11. Third, a party seeking to rely on a force majeure clause will likely have to take reasonable steps to avoid or mitigate the relevant force majeure event and/or its consequences (or to prove that there were no such steps that it could have taken). In some instances, a requirement to take reasonable steps may be expressly stated in the force majeure provision itself: see, for example, Seadrill Ghana Operations Limited v Tullow Ghana Limited at [28], [82]-[98]. However, it seems that this requirement may be present more generally even where such express language is not used by the parties: see Parker LJ in Channel

[7] See Treitel, Frustration and Force Majeure (3rd ed) at [12-001].

Island Ferries Limited v Sealink UK Limited [1988] 1 Lloyd's Rep. 323, 327; Chitty on Contracts (33rd ed) at [15-155].

12. Finally, contracts are likely to contain formality requirements for the party seeking to rely on the force majeure clause, such as the giving of written notice within particular timescales. As to this:

    a. If a party fails to give notice in accordance with the contract, it is a further question of construction whether the notice requirement is a condition precedent that must be satisfied to rely on the force majeure clause. If such formality requirements are *not* a condition precedent, then the party's failure to satisfy the notice requirements will not necessarily preclude its reliance on the force majeure clause – even if that failure itself constitutes a breach of contract, which may be actionable in damages.

    b. If a party gives notice of an intention to suspend its performance on the grounds of force majeure, there is also a risk that this will itself constitute an anticipatory (and repudiatory) breach of contract by that party – if that party was not, on proper analysis, entitled to rely on the force majeure clause.

What if only some but not all of a supplier's contracts are affected?

13. One likely consequence of the COVID-19 pandemic is a reduction in the capacity of suppliers (as their workforce is reduced by illness or by the imposition of social-distancing measures). Subject to the precise wording of the contract, this may constitute an event of force majeure that would in principle be capable of relieving the affected party of its contractual obligations.

14. For many suppliers, a reduction in capacity is likely to leave them in a position of being able to perform some, but not all, of their contracts. The question that then faces the supplier is: how does one allocate one's capacity to each contract? Does one pro-rate the lower capacity to each contract, only supplying (for example) 90% of the contractually-stipulated amount to each customer? Or does one simply invoke force majeure in relation to one's least profitable contracts, supply nothing under those contracts, and supply 100% of the contractually-stipulated amount to one's remaining contracts?

15. If a supplier can only perform some, but not all, of its contracts, it may fall into difficulty.[8] In Hong Guan v Jumabhoy [1960] 2 A.C. 684, a clove importer agreed to sell 50 tons of cloves to the claimant. The importer shipped in enough cloves to satisfy the order, but not to also satisfy its commitment to other buyers. The importer allocated its cloves to its other buyers and delivered none to the claimant. The Privy Council considered the effect of a clause stating the sale was "*subject to shipment and force majeure*", and held that the importer was liable to the claimant for breach of contract. The claimant was deprived of cloves by virtue of the importer's choice; had the importer wished to make delivery conditional upon it being able to satisfy its other customers, express wording should have been used.[9]

16. In the absence of wording providing that the supplying party can pro-rate or choose which contracts to satisfy, a court may conclude that a supplier is not entitled to rely on a force majeure clause in deciding which contract to perform, and has simply breached its contractual obligations to supply the goods or services in question. This is more likely if the contract requires that the force majeure event has "prevented" performance rather than "hindered":

    a. Clauses that refer to a party's actions being "prevented" usually entail performance being rendered physically or legally impossible, rather than merely uneconomic. If a supplier can deliver on some of its contracts, it is not impossible to deliver to the *particular* purchaser, even if it is impossible to deliver to *all* purchasers.

    b. By contrast, clauses that refer to performance being "hindered" or "delayed" are likely to be understood more broadly as these terms do not necessarily suggest that performance has to be impossible. In Tennants (Lancashire) Ltd v CS Wilson & Co [1917] A.C. 495, a supply of chemicals became prohibitively expensive due to the outbreak of World War One. A supplier was only able to perform a contract with a buyer if it broke all its other contracts. Whilst this did not "prevent" delivery in the

[8] A party in such a position would likely also fall into difficulty if the contract is frustrated: see Chitty on Contracts (33rd ed) at [23-062] et seq.

[9] This case is not on all fours with the issue under consideration as "force majeure" was not claimed by the seller, and their Lordships' decision turned largely on a construction on the meaning of the words "subject to shipment". That said, the case is still instructive. Lord Morris explained that the words "subject to shipment" had to be construed in light of the fact that the contract was also "subject to force majeure". It was held to be "in consonance" with the force majeure language that the seller had to have an *inability* to procure the shipment, rather than a *choice* as to whether or not to ship the goods to the particular buyer.

sense of rendering it physically impossible, it did "hinder" it such that the force majeure clause was effective to suspend performance: pp.518-520.

Will deposits and advance payments be repaid?

17. Typically, the initial effect of a force majeure clause will be to put the affected party's obligations into suspense, whilst keeping the contract on foot. In some cases,[10] the parties' contract may provide that, if the obligations are put into suspense for a sufficiently long period of time, the contract may terminate automatically (or at one party's election).

18. In cases where a deposit or an advance payment has been made by one party, and the contract is then terminated as a result of force majeure, the question arises: what happens to the money already paid? Is the payer entitled to a refund, or is the payee entitled to keep it?

19. The answer to this question may be provided by express wording of the parties' contract that deals with the issue in terms: it may expressly provide that the payment is non-refundable, or, alternatively, that it is to be refunded upon termination for force majeure. However, in many cases, the contract may be silent on the point. What then?

20. So far as we are aware, there is no decided case that addresses this point,[11] but a possible approach to the issue is as follows:

    a. First, the court will look to the language of the contract to see whether, on its proper construction, it provides for the repayment (or retention) of the upfront payment. If a clause provides for the repayment or retention of the payment upon the "default" or "breach" of the paying party, such wording may not cover a situation where the performing party suspends its obligations due to a contractually stipulated force majeure event. Further, where the agreement provides that the sum is a deposit, it is less likely to be refundable, whereas if it provides that the sum is an advance payment

[10] For example, in the Engineering Advancement Association of Japan Model Form International Contracts for Power Plant Construction 1996 and for Process Plant Construction 1992. See Kratochvilova & Mendelblat, Force majeure clauses, Const. L.J. 2012, 28(1), 12-21.

[11] The recent case of Totsa Total Oil Trading SA v New Stream Trading AG, but the judgment is as yet not publicly available. Case summaries suggest that the court's reasoning turned on the particular wording of the parties' contract.

of the purchase price, it is more likely that the paying party will be entitled to a refund.[12]

b. Second, if there is no express term governing the position, the court will consider whether there is any basis for implying a term that will govern repayment if the parties' contracts permit a force majeure clause to be relied upon to terminate the contract after a set period of time. This is a fact-sensitive question that will depend on (i) the nature of the parties' relationship; (ii) previous dealings between the parties (if any); (iii) the wording of the contract; and (iv) the nature of the upfront payment. Any party seeking to imply such a term will likely have to show that, without the term, the contract would lack commercial or practical coherence: per Lord Neuberger in Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited [2016] A.C. 742 at [21].

c. Third, if the court concludes that the contract makes no provision regarding the upfront payment, the court will consider whether the payment was made in respect of a basis that has entirely failed, such that the payee has been unjustly enriched at the expense of the paying party, entitling the latter to restitution of the upfront payment. It is worth noting that, where the contract has been partly performed, it is unlikely that the court will conclude that the conditions for making a claim in unjust enrichment are satisfied.[13]

21. In the context of frustration, the position is different, due to the intervention of section 1(2) of the Law Reform (Frustrated Contracts) Act 1943, which provides that sums paid in pursuance of the contract before the time it is discharged by frustration are prima facie

[12] The distinction between an advance payment and a deposit is often a fine one in practice. In conceptual terms, the distinction is as follows. A deposit is paid as guarantee for performance as well as being a payment on account, and will generally be forfeited upon non-performance by the paying party. It must be reasonable in amount. An advance payment is a payment on account only, and may be refundable in the event of non-performance by the paying party.

[13] The position may be more nuanced if the contract is divisible into a series of purchases. For example, if a contract provides for: (i) payment of £X for the delivery of X goods at time T1; and then (ii) £Y for the delivery of Y goods at a later time T2; the fact that both parties' obligations were performed at time T1 would not necessarily prevent the recovery in restitution of £Y by the purchaser if Y goods were never delivered at T2. The basis of the payment at T2 has arguably totally failed – even if that is not true of all the payments under the contract.

recoverable, notwithstanding that the contract may have been partly performed. However, the effect of the Act may be excluded by agreement of the parties: section 2(3).[14]

Concluding remarks

22. With government restrictions on free movement and commerce likely to continue for some time, we anticipate attempts by commercial parties to invoke force majeure clauses.

23. The central point to bear in mind is that force majeure is a creature of contract, and the wording agreed by the parties is key. This note has considered that in three respects:

    a. Any party seeking to rely on a force majeure clause in relation to the COVID-19 pandemic should carefully consider whether the particular wording of the clause covers the circumstances giving rise to the difficulty. This should include consideration of: (i) the degree of causation required between the force majeure event and the party's difficulties in performance; and (ii) whether the operation of the provision depends on any conditions precedent such as the giving of notice.

    b. If a party finds that it can only perform some of its contracts, a court will consider whether the force majeure clause requires that performance of *this particular* contract is impossible, or whether it is sufficient that the party finds itself in difficulty in performing *all* of its extant contracts with all of its customers.

    c. Where a party has previously made payments under a contract that has been suspended or terminated due to the invocation of a force majeure provision, the contract may provide for repayments of those sums – either by way of an express or an implied term. If it does not, a party may be able to retrieve the payment in restitution if it can prove that there has been a failure of basis.

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[14] E Peel, Treitel: The Law of Contract (15th ed), at [19-117].