

Force Majeure clauses: FIDIC, ENAA and drafting bespoke clauses¹

The term "Force Majeure" originates from the French Code Napoleon (now the Code Civil) which states "There is no place for any damages when, as a result of Force Majeure the debtor has been prevented from... doing that to which he was obliged." However, "Force Majeure" has not been recognised as having a precise meaning in English law. Without a clear definition and provisions that effectively set out the parties' rights and remedies, contracting parties will be at the mercy of the rigid English doctrine of frustration of contracts and the inflexibility of the Law Reform (Frustrated Contracts) Act 1943.

Properly drafted force majeure clauses should provide a sophisticated mechanism for dealing with the consequences of events and prescribe a range of remedies available to the parties as a result. However the drafting of force majeure clauses is by no means consistent throughout standard and bespoke forms.

FIDIC

In Clause 19 of the FIDIC 1999 Red², Yellow³ and Silver⁴ Books, the term "Force Majeure" is principally identified as being an "exceptional" event or circumstance, beyond the Party's control, and something that it could not have reasonably provided against before entering into the Contract. Further, the event cannot be one that the Party could have reasonably avoided or overcome, nor is it allowed to be "substantially" attributable to the other Party.

Thereafter follows a non-exhaustive list of categories of events that could fall within the definition Force Majeure, with again the qualification that the event has to be "exceptional" and the other conditions referred to above have to be satisfied. As will be seen below, as the available relief depends on the type of event, it is worth noting each of the categories here: category (i) includes war and other hostilities; category (ii) includes rebellion, terrorism and civil war; category (iii) includes riots and strikes, but only strikes by persons other than the Contractor's personnel and Subcontractors; category (iv) includes explosive materials and radioactive contamination, so long as not attributable to the Contractor's use of such materials; and category (v) includes natural catastrophes such as earthquakes, hurricanes, typhoons and volcanic activity.

Relief is only available where the Contractor is "prevented" from performing any of its obligations by reason of an event that satisfies all of the above conditions for Force Majeure. To invoke the relief, the prevention must be physical or legal prevention and not simply economic unprofitability (i.e. a party will not be able to claim that it was "prevented" from performing the contract just because the cost of performance increases above what was originally anticipated)⁵. In *Fairclough Dodd & Jones Ltd v J.H. Vantol Ltd*⁶, the court held that the word "prevented" meant that relief was only available where shipment remained impossible up to the end of the contract period.

The Contractor will be entitled to an extension of time for delays arising from being "prevented" from performing the Contract in respect of all categories of Force Majeure events. However, it will only be able to recover cost (never profit) in relation to some types of Force Majeure: for all category (i) events, and for category (ii), (iii) and (iv) events if they occur in the country where the site is located; the Contractor will not be entitled to recover costs arising in relation to natural catastrophes (category (v)). The

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¹ Adapted from 'Force Majeure Clauses' by Emma Kratochvilova and Michael Mendelblat, Herbert Smith, (2012) 28 Const. L. J Issue 1.

² FIDIC Conditions of Contract for Construction, 1999.

³ FIDIC Conditions of Contract of Plant and Design Build, for electrical and mechanical plant and for building and engineering works, designed by the contractor, 1999.

⁴ FIDIC Conditions of Contract for EPC/Turnkey Projects, 1999.

⁵ *Tennants (Lancashire) Ltd v G.S. Wilson & Co Ltd* [1917] A.C. 495

⁶ *Fairclough Dodd & Jones Ltd v J.H. Vantol Ltd* [1956] 3 All E.R. 921

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Clause is silent as to what financial remedy the Contractor would be entitled to in the event of an exceptional event which satisfies the criteria in the first paragraph of Clause 19.1, but does not fall within any of the listed categories.

As well as being able to recover its costs, the Contractor will also be entitled under the Employer's Risks provisions in Clause 17 to an extension of time and cost (again, not profit) in relation to any remedial work required by the Employer due to loss or damage caused to the Works, Goods or Contractor's Documents arising as a result of a Force Majeure event; although in relation to category (iii) only if the event occurred within the country in which the site is located.

Either party may give notice terminating the Contract in the event of prolonged Force Majeure (more than 84 days for one event, or more than 140 days in total) that "substantially" prevents the execution of all of the Works. The Contractor is then entitled to recover certain costs (as listed in Clause 19.6) while any part of the advance payment that has not been repaid by the Contractor becomes immediately payable to the Employer (Clause 14.2).

Notwithstanding the relief available for Force Majeure, by Clause 19.7 the parties are also entitled to be discharged from further performance of the Contract if an event occurs outside their control (including but not restricted to Force Majeure) which either makes it "impossible or unlawful" for them to fulfil their contractual obligations, or which entitles them to be released from performance under the governing law of the Contract; i.e. under common law frustration if English law applies. In respect of the former, given that under English law "prevention" suggests impossibility and also covers unlawful prevention, there would seem to be an argument that both Clauses might apply to the same event. However, it would appear that the words "impossible or unlawful" in Clause 19.7 suggest a higher threshold for release from performance than the "prevention" requirement for Force Majeure relief.

ENAA

ENAA⁷ takes a slightly different approach to FIDIC in that, at General Condition ("GC") 37, Force Majeure is primarily defined as an event beyond the reasonable control of the affected party, which is unavoidable. Thereafter follows a non-exhaustive list of categories of events that would be considered to be Force Majeure. The list is similar to that at Clause 19 of the FIDIC forms, but with an additional category covering labour, materials and utilities shortages that are themselves caused by Force Majeure events.

Unlike FIDIC where relief is only available if performance has been "prevented", ENAA's Force Majeure relief applies if a party has been "prevented, hindered or delayed" by reason of Force Majeure. To "hinder" means to render performance more difficult, but not impossible⁸. As a result, the ENAA wording provides relief not only for total non-performance but also varied performance.

Another notable difference between FIDIC and ENAA is that, while compliance with the ENAA notice provisions is also mandatory, the time for giving notice runs from the occurrence of the event, rather than from awareness of the event under FIDIC. Further, under ENAA the Force Majeure relief is expressed as not applying to the Owner's payment obligations, whereas under FIDIC Force Majeure relief will not apply to either party's payment obligations.

The party affected by a Force Majeure under ENAA will be relieved from performance and entitled to an extension of time for any consequential delay. With regard to recovery of cost, the starting point in ENAA is that neither party will be liable in damages or for additional cost by reason of the delay or non-performance. However, there are exceptions.

First, by GC 32.2, if the Works are lost or damaged by reason of "occurrences that an

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⁷ The Engineering Advancement Association of Japan Model Form International Contracts for Power Plant Construction 1996 and for Process Plant Construction 1992 and 2010 (the General Conditions discussed in this article are materially the same under both forms of Contract).

⁸ *Tennants (Lancashire) Ltd v G.S. Wilson & Co Ltd* [1917] A.C. 495

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experienced contractor could not reasonably foresee or if reasonably foreseeable could not reasonably make provision for or insure against " (which, it would seem, could include Force Majeure as defined in GC 37) or by reason of nuclear reaction or radiation contamination or pressure waves caused by aircraft or other aerial objects, and in all cases if such events relate to the country where the site is located, then the Owner is obliged to pay the Contractor for all Works executed even if they have been lost, damaged or destroyed. Further, if the Owner instructs the Contractor to conduct repairs the Contractor will be entitled to claim the cost of doing so.

The second exception relates to War Risks, which are defined as any event specified in paragraphs (a) and (b) of the non-exhaustive list of Force Majeure events in GC 37.1, and any explosion or impact of any mine, bomb, missile etc, occurring in or near the country where the site is located. If the Works, Materials or Construction Equipment, or any other property of the Contractor to be used for the purposes of the Works, is damaged or destroyed by reason of a War Risk then the Contractor is entitled to relief similar to that provided in GC 32.2. Further, the Owner is obliged to pay the Contractor any increase in the cost of executing the Works that is in any way caused by or connected to the War Risk.

Termination rights arise in the event that performance is "substantially" prevented, hindered or delayed by Force Majeure event(s) for an aggregate of 120 days or more. This is without prejudice to the parties' right to terminate in the event of prolonged War Risks which cause the execution of the Works to become "impossible or is substantially prevented" for more than 60 days. Again, given English law authority on the interpretation of the term "prevent", it is likely that there will be difficulties in differentiating between the terms "impossible" and "substantially prevented", but overall the intention appears to be to create a higher threshold for terminating for War Risks than for other Force Majeure events. In the event of termination the Contractor is entitled to recover certain defined costs.

Drafting bespoke Force Majeure clauses

When considering the elements that should make up the force majeure clause in a construction contract, the first point to note is that the use of the term "force majeure" without any qualification is generally to be avoided. Indeed, it has been held that a clause referring to "the usual force majeure events" may be void for uncertainty⁹. By contrast, it is possible to adopt a general definition of the effects of the force majeure event. Then a non-exclusive list of qualifying events may be included which should be tailored to the particular needs of the contract and should where necessary match other contractual provisions in connected contracts. It may also be necessary to specify events which will not constitute force majeure to avoid any doubt.

Provision should be made as to the manner in which notice of the event is to be given and the criteria (e.g. awareness or occurrence of the event) which should trigger the need for notice. The clause should state the consequence of non-compliance with the notice provision and in particular whether it has mandatory or directory effect. It should define the effect which triggers the clause, for example whether hindrance as well as prevention will suffice. The clause should proceed to define the consequences of a force majeure event and who is to be responsible for assessing these in the first place, for example, project manager or architect/engineer. The consequences should then be defined and guidelines given as to how they are to be assessed, for example, whether any extension of time should be reasonable in all the circumstances. The consequences to be specified should include the effect of delaying events leading to an extension of time, any provision to be made for costs to be recovered as a result of the delay, as well as impact on performance and the possibility of termination.

Where termination as a result of a force majeure event is to be provided for, the clause should state the criteria (e.g. length of days of delay) by which it should be found to be necessary. The clause should provide for notice of termination to be given and whether or not this can be done by either or both parties. The consequences of termination should then be spelt out either by reference to existing provision (for

⁹ British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressing Ltd (1953) 1 WLR 280

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example, as for termination for convenience) or provision specific to the force majeure clause itself. Provision for the consequences of termination should include issues such as payment for work done and for costs due to termination; it should also be clarified whether the latter should include profit.

Finally, the parties should decide whether or not to exclude the common law rights of frustration or whether to make express provision that they are to be retained as is in the case of, for example, FIDIC.

Conclusion

The term "force majeure" is widely recognised by lawyers and contracting parties but is in fact rarely fully understood. This is largely because there is no legal definition of the term under English law and the standard form contracts all deal with the concept in different ways. Indeed, for a provision that is so commonly included in construction contracts, it is surprising how differently it is treated in the standard forms; not only in relation to the meaning of the term but also the relief afforded to the parties.

The impact of standard form provisions must therefore be fully understood before they are agreed to without revision. Likewise, when drafting bespoke clauses the parties should take care to address the fundamental drafting points discussed in this article. In all cases, the parties must satisfy themselves that the definition of force majeure will address the specifics of the project at hand and that the relief granted will be satisfactory in the circumstances. A failure properly to account for such matters in the contract could result in an affected party being solely reliant on the limited relief that might be available under the common law doctrine of frustration.

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