

Asia Pacific Projects Update

FORCE MAJEURE CLAUSES

KEY CONTACT

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INTRODUCTION

Force majeure clauses are almost always included in project agreements. However, they are rarely given much thought until one or more parties seek to rely on them. However, in the current global environment it is appropriate to examine their application.

WHAT IS FORCE MAJEURE?

Force majeure is a civil law concept that has no real meaning under the common law. However, *force majeure* clauses are used in contracts because the only similar common law concept - the doctrine of frustration - has limited application, because for it to apply the performance of a contract must be radically different from what was intended by the parties. In addition, even if the doctrine does apply, the consequences are unlikely to be those contemplated by the parties. An example of how difficult it is to show frustration is that many of the leading cases relate to the abdication of King Edward VII before his coronation and the impact that had on contracts entered into in anticipation of the coronation ceremony.

In circumstances where a project company wants to minimise any opportunity for extension of time claims, it could consider not including a *force majeure* clause and instead rely on the doctrine of frustration. However, before making a determination to rely on frustration, a

project company must consider how frustration is applied in the relevant jurisdiction and, in particular, whether the common law application has been altered by legislation.

Given *force majeure* clauses are creatures of contract, their interpretation will be governed by the normal rules of contractual construction. *Force majeure* provisions will be construed strictly and in the event of any ambiguity the *contra proferentem* rule will apply. *Contra proferentem* literally means "against the party putting forward". In this context, it means that the clause will be interpreted against the interests of the party that drafted it. The parties may contract out of this rule.

The rule of *ejusdem generis*, which literally means "of the same class", may also be relevant. In other words, when general wording follows a specific list of events, the general wording will be interpreted in light of the specific list of events. In this context it means that when a broad "catch-all" phrase, such as "anything beyond the reasonable control of the parties", follows a list of more specific *force majeure* events, the catch-all phrase will be limited to events analogous to the listed events.

Importantly, parties cannot invoke a *force majeure* clause if they are relying on their own acts or omissions.

GENERAL FORCE MAJEURE PROVISIONS

Traditionally, *force majeure* clauses, in referring to circumstances beyond the control of the parties, were intended to deal with unforeseen acts of God or of governments and regulatory authorities. More recently, *force majeure* clauses have been drafted to cover a wider range of circumstances that might impact on the commercial interests of the parties to the contract. It is now quite common for *force majeure* clauses to deal not

only with impossibility of performance, but also with questions of commercial impracticability.

By itself, the term *force majeure* has been construed to cover acts of God¹; war and strikes², even where the strike is anticipated; embargoes, refusals to grant licences³; and abnormal weather conditions⁴.

The underlying test in relation to most *force majeure* provisions is whether a particular event was within the contemplation of the parties when they made the contract. The event must also have been outside the control of the contracting party. Despite the current trend to expressly provide for specific *force majeure* events, case law actually grants an extensive meaning to the term *force majeure* when it occurs in commercial contracts.

There are generally three essential elements to *force majeure*:

- It can occur with or without human intervention.
- It cannot have reasonably been foreseen by the parties.
- It was completely beyond the parties' control and they could not have prevented its consequences.

For instance, Bailhache J. in *Matsoukis v Priestman*⁵ held that *force majeure* covered dislocation of business owing to a universal coal strike and access to machinery, but not bad weather, football matches or a funeral. In *Lebeaupin v Crispin*⁶ *force majeure* was held to mean all circumstances beyond the will of man, and which it is not in his power to control. Therefore, war, floods, epidemics and strikes are all cases of *force majeure*.

There is an important caveat to the above and that is parties cannot invoke a *force majeure* clause if they are relying on their own acts or omissions. Additionally, the *force majeure* event must be a legal or physical restraint and not merely an economic one⁷.

CIRCUMSTANCES BEYOND THE CONTROL OF THE PERSON CONCERNED

The phrase "circumstances beyond the control of the person concerned" has not been subject to detailed examination by the courts. The courts simply assume that the phrase is given its common and everyday meaning. The phrase has been judicially held to refer to occurrences where neither the person concerned, nor any person acting on their behalf to do the act or take the step, could prevent⁸. Recent practice has significantly expanded the scope of such clauses to cover a wider range of circumstances that might impact on the commercial interests of the parties to the contract.

Reynolds JA in *Caltex Oil v Howard Smith Industries Pty Ltd*⁹ stated that the phrase "other circumstances beyond the control of the parties" would include an industrial strike. Therefore, specific reference to "strikes" may be

unnecessary in *force majeure* provisions where the above phrase appears, although it is still advisable to include it.

The Australian unreported case of *Asia Pacific Resources Pty Ltd v Forestry Tasmania (No. 2)*¹⁰ noted that as a general rule a party cannot invoke a *force majeure* clause due to "circumstances beyond the control of the parties" which, to the knowledge of the party seeking to rely upon the clause, were in existence at the time the contract was made. This case must be contrasted against *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food*¹¹ which held that there was no settled rule of construction that prevents a party to a *force majeure* clause from relying on events in existence at the time the contract was entered into as events beyond that party's control.

Kerr J in *Trade and Transport Inc v Lion Kaiun Kaisha Ltd, The Angelia*¹² referred to *Reardon Smith* and then stated that ordinarily a party would be debarred from relying upon a pre-existing cause as an excepted peril if:

- (i) The pre-existing cause was inevitably doomed to operate on the contract
- (ii) The existence of facts that show that the excepted cause is bound to operate is known to the parties at the time of contract, or at least to the party who seeks to rely on the exception.

His Honour then added as an alternative to (ii);

- (iii) If the existence of such facts should reasonably have been known to the party seeking to rely upon them and would have been expected by the other party to the contract to be so known.

Given the above, it seems that causes beyond the control of the parties that were known at the date of contracting may excuse performance only where they were of a temporary nature and are not doomed to operate on the contract.

Several recent Australian cases have considered, however, that performance that becomes uneconomical will not be a circumstance beyond the control of a party to a contract. Spiegelman CJ in *Gardiner v Agricultural and Rural Finance Pty Ltd*¹³ citing *Hyundai Merchant Marine Co Ltd v Dartbrook Coal (Sales) Pty Ltd*¹⁴ stated that commercial impracticability may not be sufficient.

THE WAY FORWARD

If a project company decides it wants to include a *force majeure* provision in its project agreements, the best way to limit the application of that clause is by defining a closed list of events that constitute *force majeure* for that contract. In other words, it should not include the catch all "any event beyond the reasonable control of the parties including....". Given *force majeure* is a creation of

contract, the courts are unlikely to expand on the definition given by the parties.

Obviously, this restricted approach is most appropriate when the counterparty has time-critical obligations, eg: in an Engineering, Procurement and Construction contract. However, where it is the project company that has time-critical obligations, eg in an offtake agreement, the project company should adopt a more encompassing definition, including the traditional catch-all phrase.

FOOTNOTES

- 1 *Matsoukis v Priestman & Co* [1915] 1 KB 681 at 685-7
- 2 *Lebeaupin v Richard Crispin* [1920] 2 KB 714 at 719
- 3 *Coloniale Import-Export v Loumidis Sons* [1978] 2 Lloyd's Rep 560
- 4 *Toepfer v Cremer* [1975] 2 Lloyd's Rep 118
- 5 [1915] 1 KB 681 at 687
- 6 [1920] 2 KB 714 at 719
- 7 *Yrazu v Astral Shipping Company* (1904) 20 TLR 153 at 155;
Lebeaupin v Crispin [1920] 2 KB 714 at 721
- 8 Re Application by Mayfair International Pty Ltd (1994) 28 IPR 643
- 9 [1973] 2 NSWLR 89 at 96
- 10 (1998) Aust Contract R 90-095; (Supreme Court of Tasmania, 5-7 & 10 November 1997; 5 May 1998)
- 11 [1962] 1 QB 42
- 12 [1973] 2 All ER 144
- 13 (2008) Aust Contract R 90-274; [2007] NSWCA 235
- 14 (2006) 236 ALR 115

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