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Frustration Force Majeure and Covid-19

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Abstract

This article is a brief account of where an individual's contract would stand due to the present Covid-19 Pandemic. Can one invoke the Doctrine of Frustration? Or the Clause of Force Majeure? And if so, How and When? This article would go into the intricacies of the aforementioned issues.

Introduction

Contractual Force Majeure means what the contract says it means, no more, no less. The impact on obligations and liabilities will depend on what the contract says. By and large your entitlements and obligations will derive from these provisions rather than principles derived from the law of the contract. In other words force majeure depends on contractual risk allocation. Because the parties are, broadly speaking, free to define Force Majeure and the consequences as they choose parties do need to be careful about what they include and what they leave out. It would be foolish to regard force majeure clauses as boilerplate which cannot be changed: your approach should be carefully to negotiate the Force Majeure risks and understand your rights and obligations in relation to clause regime for each project you undertake. The consequences of major unexpected events will depend on how parties have allocated the risk of such events in their contract. Contracting parties must consider Force Majeure as an important part of appropriate risk allocation when negotiating contracts and to negotiate the consequences that you want to follow if it occurs. It makes sense to regard them as 'exceptional risks' clauses and to decide what happens if one of those risks eventuate. The events you need protection from, and/or financial relief need to be considered and negotiated in the express terms of your contract. If you leave it simply to the law of a particular jurisdiction alone you may not find that you have any or any adequate protection.

But one cannot ignore the context of the legal system entirely. Contracts are interpreted and applied according to the legal system whose law is the law of the contract. Particularly if the dispute resolution is the Court, it is difficult to resist the influence of how they approach Force Majeure in the general law. Different approaches may apply in other jurisdictions. It is enough to make the point is that although superficially there may appear to be a loose consensus about what force majeure normally includes and the relief that might be available it is unwise for contractors carrying out international work to leave things to the mercy of the application and interpretation of unfamiliar laws in different jurisdictions.

In England it has traditionally been the approach to construe contractual Force Majeure lists quite restrictively to the listed events or something very close to it (ejusdem generis) particularly where a general sweep up of 'other events beyond the reasonable control of the affected party' appears at the end of the list. So if you list natural disasters but not political ones you may face difficulty persuading a Court that the contract clause applied to an enforced electricity power blackout. Likewise if you include some political risks but not others, there is a risk that when something that is not listed may be treated as deliberately left out.

Contractual provisions in use vary quite significantly and frequently are not well drafted. Some older types of contract tend to mirror the general law and state that if force majeure applies the party affected is excused from liability and do not say much more.

Modern contractual force majeure regimes can be quite sophisticated and compare to contractual regimes for claiming extension of time and/or loss and expense on certain specified grounds: whereas contractors tend to be more aware of, and negotiate terms about the latter, seldom is much attention paid to the force majeure regime.

What typically constitutes contractual force majeure:

There are some typical features as to what constitutes a force majeure:

(1) An exceptional event which is beyond the control of the party affected by the event;

(2) Which the party could not reasonably have provided against when entering into the contract;

(3) The effects of which the party affected cannot reasonably avoid or overcome;

(4) But the affected party nevertheless has to take reasonable steps to mitigate the effect.

The formulation of (2), (which is FIDIC's approach) avoids using the concept of 'foreseeability'. This is sensible because much of what goes into a modern force majeure clause is foreseeable – indeed the lists of events that are created are borne of human experience. An Englishman may say that in Hertford, Hereford and Hampshire hurricanes hardly happen but US citizens battered by them every year know better and they are readily predictable. In the UK we might say the same thing about major floods which occur with increasing frequency. Warfare and instability is common particularly in unstable regions. Terrorism is no longer a rare isolated event but is a constant threat post 9/11: Al Qaeda, ISIS and lone-wolf suicide bombings mean that acts of terrorism or the threat of terrorism is an event that is foreseeable almost anywhere in the world. To say that these are not foreseeable as a construction risk on projects involving major infrastructure or tall buildings is to ignore reality. Given historic pandemics like the Black Death, the Great Plague and Spanish Flu in 1918/9 and previous outbreaks of Avian Flu and SARs, it is not really plausible to say that plague and pandemic is not foreseeable albeit rare. It may or may not feature in modern lists, but undoubtedly from 2020 will now do so. In my opinion, there is an

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inherent problem in demanding the absence of foreseeability in respect of events of unpredictable superior force.

In my view, it is far more important that such events cannot easily or proportionately be controlled or guarded against if they occur. Indeed it would be disproportionate and commercially uneconomic to expect a party to price a contract to include a contingency for attempting to control such events. While it may be possible to take certain steps to guard against the risks ultimately there comes a point where a contracting party is not best placed to bear those risks.