

Crisis, What Crisis?

Force Majeure in Commercial Contracts

**Justice Tom Montagu-Smith QC
AIFC Court**

Force Majeure in English law

- Define a set of events
 - Often by list, qualified by more general requirement
 - Out of party's control
 - Usually: cannot be reasonably foreseen
- Specify the required effect on the contract
 - Prevents a party from performing
 - Sometimes: "hindered" "impeded" "interfered with"
 - Delayed - May not necessarily mean prevented
- Modify the parties' obligations
 - Excuse performance
 - Substitute obligation
 - Suspend obligation
 - Termination

2 Entertain Video v Sony DADC Europe [2020] EWHC 972 (TCC)

14.1 Neither party shall be liable for its failure or delay in performing any of its obligations hereunder if such failure or delay is caused by circumstances beyond the reasonable control of the party affected including but not limited to industrial action (at either party), fire, flood, wars, armed conflict, terrorist act, riot, civil commotion, malicious damage, explosion, unavailability of fuel, pandemic or governmental or other regulatory action.

14.2 The obligations of the party affected (but not the Term) will be suspended to the extent and during the time its ability to fulfil such obligations is affected by such force majeure.

14.3 The affected party shall use all reasonable efforts to remedy the effects on its operations and resume normal operations as soon as is practicable.

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Force majeure clauses

- Operate as terms of the contract
- (Probably) not exemption clauses.

Exemption Clauses?

“Force majeure clauses are of different kinds. In the case of an exception clause it is generally true to say that it only operates on the happening of an event which would otherwise result in a breach, but there is nothing to prevent the parties providing for an extension of the time for performance or for a substituted mode of performance on the occurrence of a force majeure event whether or not such event would have prevented performance.”

Lord Tucker in

Fairclough, Dodd & Jones Ltd. v J. H. Vantol Ltd. [1957] 1 WLR 136, 143.

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- But: narrowly interpreted

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Force majeure clauses

- Operate as terms of the contract
- (Probably) not exemption clauses.
- But: Narrowly interpreted
- And: Subject to statutory control
 - Unfair Contract Terms Act 1977
 - Cf. Implied Terms in Contracts and Unfair Terms Regulations, AIFC Regulations No. 6 of 2017

Unfair Terms Regulations

Article 41

41. Liability arising under contract

- (1) This section applies between contracting parties if one of them (A) deals on the written standard terms of business of the other (B).
- (2) As against A, B cannot by reference to any contract term:
 - (a) if B is in breach of contract—exclude or restrict any liability for the breach; or
 - (b) claim to be entitled:
 - (i) to render a contractual performance substantially different from the contractual performance that was reasonably expected of B; or
 - (ii) in relation to the whole or any part of B's contractual obligation, to render no performance at all;

except so far as (in any of the cases mentioned in paragraphs (a) and (b)) the contract term satisfies the requirement of reasonableness.

AIFC Constitutional Statute

Article 13(6)

“In adjudicating disputes, the AIFC Court is bound by the Acting Law of the AIFC and may also take into account final judgements of the AIFC Court in related matters and final judgements of the courts of other common law jurisdictions.”

Frustration in English law

- Event occurs after the contract is concluded
 - Makes performance impossible; or
 - Changes the obligation into something fundamentally different
- Outside the party's control
- Something for which they cannot be blamed
- Discharges the contract automatically

Frustration

- Applied narrowly
- Destruction of subject matter
 - *Taylor v Caldwell* (1863) 3 B. & S. 826
- Supervening illegality
- Frustrating the wider purpose of the contract
 - *Krell v Henry* [1903] 2 K.B. 740
 - Cf. *Herne Bay Steamboat Co v Hutton* [1903] 2 K.B. 683
- Objective test
 - Includes: parties' allocation of risk
 - *Force majeure* clauses may save the contract
- Law Reform (Frustrated Contracts) Act 1943

Article 82

Force Majeure

- (1) Except with respect to a mere obligation to pay, non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond the party's control and that the party could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

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Article 82

(2) If the impediment is only temporary, the excuse has effect for the period that is reasonable having regard to the effect of the impediment on performance of the contract.

...

(4) Nothing in this section prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

Source of AIFC law

- Unidroit Principles for International Commercial Contracts
 - Art 7.1.7
 - Unidroit commentary
- One significant difference:
 - Non-performance of payment obligations in not excused.

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Article 83

Performance of monetary obligation

If a party who is obliged to pay money does not do so, the other party may require payment notwithstanding section 82.

UN CISG

- UN Convention on Contracts for the International Sale of Goods, Article 79
 - But – Article 79(2) is different
- UNCITRAL Digest of Case Law on the CISG
 - 2016
- No provision for “hardship”
 - Unidroit Principles, Article 6.2

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