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Get Yemen (and Women) Outta There: Force Majeure Claims under English law, and in ICC Case 19299/MCP ("Gujurat v The Republic of Yemen")

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Background

Earlier this July, a regional militant group calling itself 'the Avengers' was reported to have detonated some pipelines in Nigeria's Qua Iboe, the country's largest export stream. Shortly afterwards, ExxonMobil's subsidiary, Mobil Producing Nigeria (MPN), declared force majeure on its exports of crude oil in Qua Iboe.

The world, as we know, has become a much more politically unstable place over the last few decades. Projects such as those of ExxonMobil are encountering delays and disruptions due to all sorts of problems ranging from strikes to full-blown wars and incidents of terrorism.

Against this backdrop, to what extent has the force majeure clause evolved from being a bona fide justification for the impossibility of contractual performance to a back-door method of termination in times of economic difficulty or physical insecurity?

This post will consider how force majeure is applied by the English courts and ICC arbitral tribunals. It focuses on the ICC award rendered in July 2015, (1) Gujurat State Petroleum Corporation Ltd; (2) Alkor Petroo Limited; (3) Western Drilling Contractors Private Limited v (1) Republic of Yemen; (2) The Yemeni Ministry of Oil and Minerals ("Gujurat") (ICC Case 19299/MCP).

Force majeure under English law

The term 'force majeure' originates in French law. While it has no clear meaning under English law, the civil and common law concepts are said to be similar. In essence, the constituent elements of force majeure in each specific case depends on the contractual intention of the parties. It is on the occurrence of a specified event that a party can 'trigger' a force majeure clause.

Absent contractual wording to the contrary, the relevant trigger event should meet three main conditions under English law:

(i) It must be completely outside the parties' control.
(ii) It should render performance of the contract impossible by the party claiming it.
(iii) There should be a direct causal link between the event and the impossibility of performance.

Importantly, a party cannot claim force majeure on the basis of its own wrongful actions.

In *Lebeaupin v Richard Crispin and Co* ([1920] 2 K.B. 714), Macardie J. held that force majeure was a wide concept, and would cover war, any direct legislative or administrative interference, strikes or accidental breakdown of machinery, but not instances of bad weather.

A force majeure clause should be distinguished from a hardship clause. While the former renders performance of a contractual obligation impossible for an indefinite or specific period of time, the latter applies only where the contractual equilibrium has been dramatically altered by an event such as to make the contract particularly onerous or costly (or potentially ruinous) for a party.

Force majeure should also be distinguished from the similar English law concept of frustration, which is of more limited application. To rely on frustration, a party must prove that the performance of a contract has become radically different from that which the parties intended, such that the contract cannot be performed at all. Frustration would bring an end to the contract and extinguish any breaches that would otherwise arise.

Lebeaupin's central message is that a force majeure clause *"should be construed in each case with a close attention to the words which precede or follow it, and with a due regard to the nature and general terms of the contract"*. This was confirmed in *Great Elephant Corporation v Trafigura Beheer BV and other companies* ([2013] EWCA Civ 905, Court of Appeal (Civil Division)).

Force majeure in ICC tribunal practice: the Gujurat award

ICC tribunals have employed a robust approach when interpreting force majeure clauses. As they are of a contractual nature, the parties are free to provide for the specific events that shall be regarded as force majeure, regardless of the conditions that must be met under the applicable law. In relation to the content of the clause, last year's Gujurat award, which was made available to the public in the course of connected litigation proceedings in New York, is discussed below.

The Gujurat claimants sought to excuse their liability for non-performance under production sharing agreements (PSAs). They eventually terminated the PSAs, claiming that force majeure events in parts of Yemen (riots and insurrection) made the situation unstable for their staff to carry out the data seismic studies and other services required under the PSAs.

The applicable clause (Article 22) in the PSAs provided, *inter alia*, that force majeure *"shall be any order, regulation or direction of the [government of the Republic of Yemen]…whether promulgated in the form of law or otherwise, or any acts of GOD,*

***insurrection, riot**, war, strike (or other labor disturbances), fires, floods or any cause **not due to the fault or negligence of the Party invoking Force Majeure**, whether or not similar to the foregoing, **provided that any such cause is beyond the reasonable control** of the party invoking Force Majeure"* .

A fairly wide definition, many would say.

The clause also stated that if a force majeure event continued for six months or more, the party invoking the force majeure was entitled to terminate the PSAs.

The claimants said that the defined trigger events in the clause were clear, and needed to satisfy only two conditions to be admissible under the PSAs: (i) they must not be caused by the fault or negligence of a party; and (ii) they must be outside the reasonable control of the party claiming force majeure. The respondents, however, argued that two further conditions under Yemeni law, foreseeability and impossibility, should also be implied into the PSAs, and that these conditions had not been met.

The tribunal (composed of Philippe Pinsolle, Sir Bernard Rix and Laurent Levy, who presided*) found that two defined force majeure events within the scope of the clause (riot and insurrection) did occur during the relevant period and prevented the claimants' performance of the contract. Further, there was "*no scope or need for implying Yemeni law requirements into the provision", because "the language of the clause [made] clear that the Parties agreed to their own custom-made definition of Force Majeure for the PSAs*". Accordingly, 'additional requirements' of foreseeability and impossibility had not been expressly contemplated by the parties and did not apply.

There are several notable aspects to the tribunal's findings, which are set out below.

First, the terms "riot" and "insurrection" were defined according to their 'ordinary common' meanings. The respondents argued that "riots" meant "*protests which are illegal, not protests which fall within the legitimate right to protest or demonstrate enshrined in the Yemeni Constitution*" . The tribunal, however, accorded it the ordinary meaning, being "*a disturbance of peace and order by several people acting together*". The respondents then claimed that "insurrection", in the context of the PSA, had to fall within one of three types of acts prohibited by the Yemeni Penal Code . However, again, the tribunal preferred to apply what it deemed to be the ordinary English and Arabic definitions of the word, i.e., "*a violent revolt against authority or government*".

Second, it did not matter that the risk of the events arising existed at the time of entering into the PSAs. Rather, the significant increase in such a risk was enough to trigger the clause. This seems to be at odds with the position under English law, and possibly previous ICC decisions. It also begs the obvious question: when, and in whose eyes (the layman's or a sophisticated well-advised contractor's) will the increase be adjudged 'significant' enough to unlock the clause?

Third, pursuant to the PSAs, it was not necessary that the force majeure events be "continuous" throughout the relevant period (6 months), merely that the effects of the force majeure events continue over such period.

Finally, if force majeure applied, a party was entitled to terminate the contract "*irrespective of whether some other event [for example, unwillingness to perform] could have also caused non-performance*".

Gujurat may be compared with an earlier decision, *National Oil Corporation (Libya) v Sun Oil* ("Sun Oil)" (ICC Case 4462) , which went the other way, and which was cited by the respondents in support of their arguments. However, in Sun Oil, the clause was not clear enough to be interpreted according to its own terms. The tribunal felt the need to turn to Libyan law to interpret the provision. According to such law, force majeure is only established when the trigger event leads to impossibility of performance. The tribunal decided that it was not impossible for Sun Oil to perform, and the claim did not succeed.

Take-home thoughts from Gujurat

It would seem that if a party intends not to continue with an increasingly unfeasible project in a challenging jurisdiction, it could try to hang its hat on the force majeure clause. According to the rationale in *Gujurat*, this could amount to proving that: (i) the risk of a force majeure event happening, which is already known to the parties at the time of entry into the contract, significantly increased during the course of the contract at one point in time (the 'trigger event'); and (ii) the effects of such an event (though not necessarily the event itself) continued for the required force majeure period.

The sceptics amongst us might suggest that in a politically unstable country like Yemen, it would not be so difficult to frame such a case. Especially if the tribunal deciding the matter does not have practical experience of the jurisdiction in question, is unfamiliar with what is within the control of a certain corporate entity, or is unsure of what is technically achievable within the parameters of a particular project.

Pragmatic tribunals should also make allowance for the fact that experienced commercial parties weigh up the inevitably enhanced risks of sending their staff into developing jurisdictions known to be politically unstable, in the hope of reaping larger profits for their efforts, as opposed to doing business in safer countries. So, for instance, the occurrence of "*a disturbance of peace and order by several people acting together*", likely to be rare in a small town in Switzerland, may be much more of a regular occurrence in war-afflicted Yemen, Libya, or Iraq (to name a few). A tribunal should not be quick to jump to the conclusion that a force majeure claim is meritorious, merely on the basis of media reports, foreign travel advisories, and a couple of U.N. Security Council resolutions, which are often issued some distance away from the activities in point, by individuals with little hands-on involvement.

One should also be aware that insurance is designed and negotiated exactly for these types of political risks. A company would be well advised to consider recourse vis-à-vis their insurer, in the first instance, if a project becomes non-viable for such reasons.

Finally, it should be recalled that a force majeure event only suspends performance of the relevant obligation during the period that the force majeure (or its effects) are continuing; it does not terminate the contract (unless specific provision is made for

termination, as in the Gujarat PSAs). Accordingly, the tribunal (or national court) would normally also evaluate whether a party should have resumed its contractual obligations once the force majeure event has ended. In a Zurich-seated ad hoc arbitration culminating last year between National Iranian Oil Company ("NIOC") and Fimarco, on the one hand, and Transatlantic Oil on the other, the tribunal found that NIOC ought to have resumed delivering the remaining oil under the contract on 5 March 1979, as soon as the situation of force majeure created by the revolutionary unrest in Iran had disappeared. According to yesterday's GAR article, this was confirmed by a Swiss Federal Supreme Court decision, in which Transatlantic Oil's challenge to the award (which was in favour of NIOC) was rejected. It should be noted, however, that *Transatlantic* is quite anomalous as far as arbitrations are concerned, having taken a whole 26 years to conclude.

Conclusion

When all is said and done, the devil is in the detail. Under both English law and in international arbitral practice, a force majeure clause should be interpreted and applied in accordance with its terms.

In the absence of specific wording to the contrary, it would appear from *Gujurat* that ICC tribunal practice has, at least in the case of international contracts, edged towards allowing force majeure claims to succeed even where performance has not become impossible, as is usually required under English law, but perhaps too commercially impracticable, or hazardous.
Such may be the case regardless of whether or not the events leading up to non-performance were foreseeable.

Those operating in sensitive overseas jurisdictions should heed the lessons of drafting a precise force majeure clause. The thought that goes into drafting of such clauses should not stop at just setting out a specific list of 'boilerplate' trigger events. Such a list can be dangerous if care has not also gone into defining what the parties intended each term in such a list to mean, in the context of *that specific project*. It can sometimes make the difference between the success and failure of a claim.

*Tribunal secretary: Rahul Donde

Please note that the views expressed in this blog post are those of the author and are not necessarily those of Joseph Hage Aaronson LLP.

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