PRACTICAL PROBLEMS FACING COMMERCIAL PARTIES SEEKING TO INVOKE FORCE MAJEURE IN LIGHT OF THE COVID-19 PANDEMIC

Claire Blanchard Q.C. and Stuart Cribb

1. In addition to its widespread and tragic human cost, the current worldwide COVID-19 crisis will inevitably have a substantial impact on the ability of many commercial parties to meet their existing contractual commitments. They may find themselves physically unable to perform as a direct consequence of the pandemic. Alternatively, they may be legally precluded from doing so by restrictions imposed by governments in the attempt to combat the disease. Or it may simply be the case that they can no longer afford to perform, because their customer base has disappeared as a result of social distancing measures.

2. One natural response for commercial parties in these circumstances is to seek to invoke 'force majeure' as a basis to excuse or escape liability for non-performance. This Note examines that concept (in brief), and discusses a number of the practical problems that may confront commercial parties seeking to rely on force majeure clauses in response to the COVID-19 pandemic.

A. The meaning of force majeure

3. Unlike in many other jurisdictions, the expression force majeure is not a term of art in English law: Chitty on Contracts §15-162. There is no common law 'doctrine of force majeure'. There is a doctrine of frustration, which allows a contract to be discharged when an unforeseen event occurs that renders performance of the contract impossible. Its requirements and effects are discussed in Section C of a note by our colleagues, David Scorey Q.C. and Wei Jian Chan, which can be found here: https://essexcourt.com/covid-19-legal-issues/.

4. Force majeure clauses are different. Per Chitty on Contracts §15-152, the expression force majeure is "*normally used to describe a contractual term by which one (or both) of the parties is entitled to cancel the contract or is excused from performance of the contract, in whole or in part, or is entitled to suspend performance or to claim an extension of time for performance, upon the happening of a specified event or events beyond his control*".

5. Thus, in any given case, whether or not one of the parties is entitled to invoke force majeure depends on the terms of the contract between them. If the contract contains no force majeure clause, that is the end of any 'force majeure' argument (although the doctrine of frustration may still apply). Further, where there is a force majeure clause, its true meaning is a function of the

words the parties have chosen to use. In short, force majeure can mean whatever the parties in their contract say it means.

B. The interpretation of force majeure clauses

6. In principle, force majeure clauses are to be construed following the principles applicable to contracts generally.

7. There is, therefore, no assumption that a force majeure clause is necessarily intended to be on all fours with the common law doctrine of frustration: *Thames Valley Power v Total Gas* [2006] 1 Lloyd's Rep. 441 per Christopher Clarke J. at [50]. Since the use of such clauses primarily developed as a response to the stringent requirements of the common law doctrine of frustration, the contrary might be argued.

8. However, there is some debate as to whether force majeure clauses ought properly to be regarded as exemption clauses, and thus strictly construed against the party relying on it. Chitty on Contracts §15-152 states that "*Force majeure clauses have been said not to be exemption clauses*". By contrast, Longmore L.J. in *Great Elephant Corporation v Trafigura, The Crudesky* [2014] 1 Lloyd's Rep. 1 was of the view at [25] that a force majeure clause "*is an exceptions clause and any ambiguity must be resolved against the party seeking to rely on it*". In *Classic Maritime Inc v Limbungan Makmur Sdn Bhd* [2019] EWCA Civ 1102 Rose L.J. did not find the use of such labels helpful (at [92]), which was ultimately what Males L.J. concluded as well (at [62]).

9. In any event, whether or not it is correct to describe the clause under consideration as an exemption clause, the search, as ever in the exercise of construction, is always to find the true meaning of the words the parties have chosen to use.

C. The force majeure event

10. The first step for a party seeking to invoke force majeure is to identify the relevant force majeure event upon which it relies. There are a number of important points to bear in mind here.

11. First, generally, whether or not a particular event is covered by a force majeure clause is a function of the words used in the contract. Some clauses define force majeure by reference to a list of specific events which are said to constitute force majeure. Other clauses use general wording, such as "*any cause or event beyond a party's reasonable control*". Many adopt a hybrid approach, giving a list of specific events and then following it with general 'catch all' wording. That can give rise to questions as to whether the general wording should be construed ejusdem generis with the specific events enumerated: see, for example, *Tandrin Aviation Holdings v Aero Toy Store* [2010] 2 Lloyd's Rep. 668 per Hamblen J. at [44]. Equally

significantly, certain events that would otherwise fall within the scope of the general wording may be specifically excluded, or otherwise subject to more onerous requirements.

12. Secondly, many of the cases contain general statements that a force majeure event must be supervening, in the sense that it was not foreseeable or predicted when the contract was entered into, although there is no absolute rule to that effect: see e.g. *The Radauti* [1988] 2 Lloyd's Rep 416 per Lloyd L.J. at p.420. The question really resolves itself into one of causation: was the foreseen or predicted event truly the cause of the inability to perform? Insofar as the COVID-19 crisis is concerned, that is unlikely to be a problem in cases arising out of contracts entered into long before the pandemic emerged. However, the position may be more difficult for contracts entered into in early 2020 and beyond, by which time it might be argued that the parties either were or should have been aware of the threat of COVID-19 and that it was not a supervening event.

13. Thirdly, in the particular context of the COVID-19 pandemic, it will be important to give careful thought to what is said to be the relevant force majeure event. Is it the pandemic itself? Or is it the legal restrictions imposed by governments in response to the pandemic? This could be significant if the enumerated events in a particular force majeure clause cover one scenario but not the other, or if governmental action is expressly excluded from the clause's scope. It will also be important where service of a notice specifying the force majeure event is a condition precedent to a party's right to rely upon the clause (discussed below). If the correct event if not identified in the notice, the right to rely upon the force majeure clause may be lost.

14. Fourthly, it is also important to consider the effect of the force majeure event on the performance of obligations a party seeks to suspend or cancel.

15. Generally, in the absence of clear words to the contrary, English Courts have taken the view that the fact that contractual performance is rendered more expensive is not force majeure: *Tandrin Aviation Holdings v Aero Toy Store* [2010] 2 Lloyd's Rep. 668 per Hamblen J. at [40]-[42] and [49]. However, some cases have left open the possibility that an increase in expense may be so extreme that contractual performance has in truth been rendered impossible: *Brauer & Co (Gt Britain) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 Lloyd's Rep 147 per Singleton L.J. at p.153 and per Denning L.J. at p.154; *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] 2 Lloyd's Rep 628 per Teare J. at [92].

16. It is important to distinguish here between extra expense to be incurred because of the event relied on (not generally force majeure) and quite what expense a party may be expected to incur to prevent or overcome it; the latter is generally a reasonableness standard, subject to the precise wording of the clause relied on. It is also important to distinguish between a contract which

only permits of one method of performance and one which may permit performance in a number of different ways. A party will not usually be excused if any of the permitted methods of performance remain open to it, even if its favoured or intended method does not, either on the simple basis that performance in truth remains possible or because adopting an alternative method of performance is the reasonable response to the event relied on.

17. It has also been said that in "*most cases*", a force majeure clause may only be invoked where contractual performance has become physically or legally impossible: *Channel Island Ferries Ltd v Sealink UK Ltd* [1988] 1 Lloyd's Rep 323 per Parker L.J. at p.327. That is putting it too high. A clause may, by its terms, apply only if performance has become impossible; a clause on other terms may apply if performance is merely hindered, which gives considerably broader protection.

18. Difficult questions of causation can arise. In *Seadrill v Tullow*, Teare J. was persuaded that the force majeure clause could only be relied on if the force majeure event was the sole effective cause of the inability to perform (at [77]-[80]). In *Classic Maritime*, the Court of Appeal at [57]-[62] distinguished the exceptions clause in the contract before it, which on its true construction required the test of "but for" causation to be satisfied, from clauses which result in a party being automatically discharged from future performance (such as that considered by the House of Lords in *Bremer Handelsgesellschaft v Vanden Avenne-Izegem* [1978] 2 Lloyd's Rep. 109) which generally do not; c.f. Chitty on Contracts at §15-156, which states: "*Once a party has discharged the burden of proving that performance has been prevented by the relevant event, he need not normally prove that he could have performed but for the occurrence of the event*".

19. Whether the standard provided for by a particular clause is 'prevention' or 'impossibility', or the lower threshold of 'hinderance', it is important to identify the exactly what obligation a party has been unable to perform and why. Consider the following examples:

20. Example One: Party A is not legally required by government restrictions imposed in response to COVID-19 to shut down its offices in central London. However, as a 'responsible employer', it decides to do so anyway to allow its employees to work from home. As a result, it is unable meet its obligations under its contract with party B, for example, because it no longer buys in catering at an agreed rate. Has A been prevented or hindered in performing those obligations by a force majeure event? On the face of it, it seems unlikely that it would be able to rely on government action for this purpose. More likely it would instead have to rely on the pandemic itself as constituting the relevant force majeure event. Complications are possible: do an employer's health and safety obligations require it to shut its physical premises? If A can

partially perform, is it obliged to? There may also be arguments around due diligence (discussed below), depending on how far beyond the legal requirements A went.

21. Example Two: Party A enters into an agreement to purchase party B's shares in company C. As a result of the COVID-19 crisis, the value of company C collapses prior to completion (either because it is shut down by the government, or because its customers are required to or choose to stay at home). In those circumstances, a force majeure clause is unlikely to be of assistance to party A. The COVID-19 pandemic and the government action may be force majeure events falling within the scope of a force majeure clause, but it is difficult to see how they prevent or hinder party A from performing its obligations. It is still possible to purchase the shares in C. It is merely less attractive to do so.

D. Notice requirements

22. In many cases, it has been assumed, without argument, that the giving of a valid notice in accordance with the force majeure clause is a condition precedent of the right to invoke the same: see, for example, *Hoecheong Products v Cargill Hong Kong* [1995] 1 W.L.R. 404 (PC) per Lord Mustill at p.410. However, whether the giving of a force majeure notice at the time and in the form mandated by the clause in question is a condition precedent of the right to invoke the clause is in all cases a question of construction of the clause. It may be that, on its true construction, a breach of the obligation to give notice sounds only in damages and does not affect the right to rely on force majeure. As a generality, a clause which requires notice to be given within a set number of number of days is more likely to be construed as a condition than one which requires notice to be given promptly or within a reasonable time; questions of timing aside, English law is quite hostile to the idea that technical defects will render a notice invalid.

23. Where the giving of notice is on the clause's true construction a condition precedent to the right to invoke force majeure, it is fundamental that valid notice must be given. If it is given too late, or the force majeure events relied upon are not adequately identified, the right to rely on force majeure will be lost.

24. The practical difficulty is how to ensure that notice is given timeously, that all relevant force majeure events are captured, and that any other requirements of the force majeure clause are complied with, in circumstances in which, as a result of the COVID-19 crisis, many companies may find themselves in the position where they need to issue many force majeure notices to a number of different counterparties (potentially under contracts containing different terms) in a short space of time.

25. The use of a pro-forma force majeure notice can assist in ensuring that the sender satisfies all the requirements of the clause. Any standard form force majeure notices need to be as user friendly as possible, especially if notices have to be issued *en masse* by less sophisticated personnel under time pressure. A "tick box" form may work well (as opposed to a more traditional letter), if appropriately designed. However, the important point is that any pro-forma notice used must accurately reflect the requirements of the force majeure clause in question.

26. Consideration should be given to whether the clause requires the force majeure notice, beyond identifying the force majeure event relied on, is required to state any of the following:

    a. How long is the event expected or predicted to last?

    b. What steps are being taken in response to it?

    c. That a meeting will be arranged to discuss the event?

27. Lastly on notices, care should be taken that any requirement to give notice that the force majeure event is over, or to give periodic updates, is satisfied.

E. Due diligence

28. Generally, a force majeure clause can only apply where the event in question is beyond the control of the party invoking it, either on general principle or, where "any other cause" must be beyond the control of the party relying on the clause, by applying that limitation to the enumerated events.

29. Either way, that imports an active duty to take reasonable steps to avoid the effects of the event in question. Force majeure does not entitle parties to "*fold their arms and do nothing*": *Bulman & Dickson v Fenwick & Co* [1894] 1 Q.B. 179 per Lord Esher M.R. at p.185. More elaborately expressed, a force majeure clause can only apply where the party relying on it has "*taken all reasonable steps to avoid its operation, or mitigate its results*": *Channel Island Ferries Ltd v Sealink UK Ltd* [1988] 1 Lloyd's Rep 323 per Parker L.J. at p.327. In *Seadrill v Tullow* at [93], Teare J. cited *Reardon Smith Line v Ministry of Agriculture, Fisheries and Food* [1963] A.C. 691 per Lord Devlin at pp. 729-730 as authority for the proposition that a party cannot ignore the commercial interests of the other party in the force majeure being avoided or circumvented when considering what steps to take. That should not be taken too far: the taking of reasonable steps will not usually require the party claiming force majeure to completely subsume its own interests to that of the other contracting party.

30. In the circumstances of the sudden worldwide COVID-19 crisis and government action taken in response, there will in many cases be little or nothing that could have been done to prevent the effects of the force majeure event. However, that will not necessarily be the case. If, in a

particular industry, standard good practice is to maintain a particular buffer of supply over demand, and that buffer has not been maintained, such a failure may imperil a party's ability to rely on force majeure. In any event, now that the potential force majeure events of the pandemic and related legal restrictions have occurred, parties seeking to rely on those events as force majeure will be required to take reasonable steps to overcome or mitigate them and their effects.

31. Practically, whether or not a party has acted with sufficient due diligence to entitle it to rely on force majeure is an area ripe for dispute. Such disputes are inevitably determined months or years after the events in question. In those circumstances, a party seeking to rely on force majeure to excuse a failure to perform its contractual obligations would be wise to consider the impact of the force majeure event and ways in which it might be prevented, mitigated or overcome, and to document that analysis. That process may even yield solutions which do help to mitigate the impact of the force majeure event. If not, it should help to leave a paper trail which can be relied upon in litigation or arbitration down the line in support of the party's claim to have exercised due diligence.

F. The consequences of force majeure

32. It goes without saying that the consequences of successfully invoking clause majeure are governed by the force majeure clause itself. Some clauses may provide for the contract, or some the obligations under it, to be cancelled for good. Others may merely suspend a party's performance obligations for so long as the force majeure event or its impact upon those obligations continues. In that scenario, the clause may also require the party relying on the force majeure clause to provide periodic updates to the other party.

33. In each case, it depends upon the terms of the clause in question. Unlike the doctrine of frustration, a party cannot safely assume that, once it has successfully invoked force majeure, its outstanding performance obligations are terminated.

G. Multi-party disputes

34. The essentially contractual nature of force majeure in English law can be particularly significant in a multi-party context. Consider the position of party B in the middle of a commodities supply chain. B normally purchases goods from party A, and then sells them onwards to party C. It has separate contractual relationships with A and C. As a result of the COVID-19 crisis, A validly invokes the force majeure clause in the A-B contract to excuse its failure to deliver the goods to B.

35. Does it follow that B is also entitled to rely on force majeure to excuse any consequent failure of its own to deliver the goods to C? Not necessarily. The answer to that question will be a function of the force majeure clause in the B-C contract. If there is a disconnect between the

force majeure clauses in the two contracts (e.g. because the clause in the A-B contract is very broadly drafted, and the B-C contract contains either a narrow clause or no force majeure clause at all), B might find itself caught in the middle, liable to C for its failure to perform but with no recourse against A further up the chain.

CLAIRE BLANCHARD Q.C.
STUART CRIBB

Essex Court Chambers
24 Lincoln's Inn Fields
London
WC2A 3EG

1 May 2020