



A YEAR ON – REFLECTIONS ON THE IMPACT OF COVID-19 ON PROJECT FINANCED TRANSACTIONS



Introduction |

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Agenda |



Introduction



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Force Majeure

As a generality, a **force majeure** clause will typically be formulated as an event beyond the reasonable control of an affected party that could not be prevented or avoided by such affected party in accordance with prudent industry practices.

Force Majeure |

The recent High Court decision in **2 Entertain Video Ltd v Sony DADC Europe Limited****[2020] EWHC 972 (TCC)** serves as an important reminder of the limits of force majeure clauses.

The defendant attempted to rely upon the following:

"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."

It is also a timely reminder that: (i) the position always depends on the terms of the force majeure clause as applied to the facts and (ii) force majeure clauses will not protect parties that could have reasonably taken action to avoid the type of problem or event set out in the clause but failed to do so.

Whilst it is likely that the COVID-19 crisis will in most cases constitute an unforeseeable event outside of a party's reasonable control, parties must establish that the pandemic's effect on their ability to perform contractual obligations was beyond their control.

Duty to Mitigate |

A Contractor would not be entitled to an extension of time where the -

“Contractor failed to use all reasonable endeavours consistent with Good Operating Practices to prevent, avoid and minimise the delay.”

In respect of the Good Industry Practice threshold termed, "*Prudent Operating Practices*" in the EPC Contract, FIDIC combines statutory and common law duties into a single clause requiring the contractor to use the level of reasonable skill and care to be expected of an experienced contractor.

The FIDIC approach includes a requirement for the Contractor to act in accordance with "*Good Industry Practice*", which then good lawyers amend even further to raise the contractual standard to **highly** skilled and **highly** experienced turnkey contractors engaged in carrying out activities the same as or similar to the Works under the same or similar circumstances and applying generally accepted good international engineering practices and methods.

The "*Bolam Test*" established that where special skill and competence are involved, the test for negligence is "*not that of the man on the Clapham omnibus*"



Change In Law

As a result of COVID-19, governments have introduced measures including in relation to restrictions on travelling and health and safety obligations. This has resulted in “change in law” claims being raised across the project documents.

Change In Law |

A “change in law” clause provides that the law in force at the time of signing a project agreement will continue to apply for the duration of the agreement. In current market practice, the concept of “a change in law” clause includes protection against:

- i. the introduction of new law;
- ii. modification of existing law; and
- iii. changes in the interpretation of law by anybody that has applicable jurisdiction or regulatory oversight with respect to the project or project companies.

The PPA change in law regimes in a project finance transaction is typically “passed down” across the suite of project documents so that the suite of project documents mirror one another.

Thus, across the transaction chain a project company may have a claim against the off-taker and/or government; a contractor may have the same claim against the project company and the sub-contractors may have the same claim against the contractor.

Change In Law |

Change in law claims as a consequence of COVID-19 have included :





Demand Risk

As result of COVID-19, certain governments have purportedly seen reduced demand for electricity and have sought in certain instances to transfer such “demand risk” to project companies.



Equivalent Project Relief

In a project finance transaction, the contracts between the project company and its contractors may include equivalent project relief (EPR) clauses.



Concurrency

Concurrent delay describes a situation when two (2) or more critical delay events (one a contractor culpable event and one not a contractor culpable event) occur at the same time and their effects are felt at the same time.

Concurrency |

North Midland Building v Cyden Homes demonstrated the challenges in proving true concurrency...

“(b) any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account;”

To be entitled to an extension of time (EOT) the contractor will usually have to demonstrate that:

- an event has occurred which entitles it to an EOT;
- the end date of the works is going to be delayed;
- the event in question caused the delay to the works.

While parties may be in dispute about the first two of these, it tends to be the final requirement which causes the most vexation.

A challenge in determining true concurrency is that one delay event may be more dominant than another delay event.

The impact of COVID-19 underscores this issue as notwithstanding historic delays, a contractor may still be entitled to an extension of time due to force majeure as a result of COVID-19, as this may be the “dominant” delay event despite the contractor experiencing parallel delays unrelated to COVID-19.



Notification Obligation

As a result of the impact of COVID-19, notification obligations may arise under the financing documents and project documents.



Considerations Under The Finance Documents

In a project finance transaction, the project company is often a newly created special purpose vehicle with no recourse beyond its initial equity and its debt. Further, during the construction phase of a project, a project does not generate any revenue; completion delay is therefore a serious concern for lenders.



Concluding Remarks

Causation, Contracts, Records



Questions & Answers

A stylized map of the African continent is centered within a circular graphic that resembles a globe. The globe is composed of several concentric circles and is set against a dark blue background. The map of Africa is a lighter shade of blue.

Thank You

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