Frustration and Force Majeure: A paper in light of COVID-19

Introduction

1. The 2020 Covid-19 pandemic is in full rage. The battle to cope with and ultimately defeat the pandemic has caused immediate profound changes in society and the economy (at least for now) although it is currently difficult to predict the full effects of what will happen or how long they will be felt. The future, at least in the short to medium term, looks uncertain but bleak. Already there is major curtailment of daily life in the UK and across the globe of a sort not witnessed in living memory. Societies and working environments have been turned upside down. Travel bans preclude travel abroad from the UK. European borders are closed. Whole populations have been told (or ordered) to isolate or distance themselves from others; in the UK people are told (and may soon be compelled) to work from home, to self-isolate if they or a member of their family have symptoms that might be Covid-19, to avoid bars, restaurants, concerts, theatres or any social gathering. Shortly after that advice the Prime Minister 'told' bars and restaurants to close. Major festivals, shows and sports events have been/are being cancelled. Schools have been closed down indefinitely. Businesses big and small are left stranded and facing economic ruin, unable to function: lacking available employees or employees who are vulnerable to redundancies. At this stage this is not because of outright bans but because without customers or staff they cannot continue. Leaving aside the more important health ramifications for the population and the understandable worry about the safety of their family and friends, many people are facing weeks and months without work or pay. Supply chains across the world and contracts are undoubtedly going to be substantially adversely affected. Almost universally the performance of contracts will be difficult. And for many, performance may be practically impossible either physically or economically.

2. People and businesses have begun looking at their contracts and their insurance policies and wondering or worrying about cancellation, compensation and refunds. Among the questions are the following: What happens to our various contractual obligations when something potentially life-threatening and so disruptive to daily life and commerce effectively ends normal societal functioning? Is there recourse for the losses that will follow? Who pays and is there any compensation? Will this be covered by insurance? They will probably find, in many cases, that the words 'pandemic' or 'virus' are not expressly addressed in their contracts although there may be wording such as 'other events beyond our control'. It may well be that government prohibition or restrictions are addressed, but I suspect that official advice short of mandatory restrictions may not be addressed. And what happens if the contract is silent on a situation such as the Covid-19 pandemic?

3. The words Frustration and its older civil law cousin, Force Majeure, are now on the lips of lawyers in what until now has been one of the least visited areas of contract law. It will inevitably attract a lot of attention over the coming months and years as the 2020 Covid19 ripple effect is worked out.

4. Interestingly, in recent days, people have been talking of Force Majeure more than Frustration. This is probably because it has become prevalent in modern contracts to see clauses which are described as Force Majeure clauses. As a general concept they appear to cover much the same types of events as crop up in discussions about Frustration and Force Majeure which are originally rooted in principles of common or civil law. Too often laypeople and (too many) lawyers treat them as if they are the same, much in the same way that non-medical people use the terms "viral" and "bacterial" interchangeably. It needs to be understood that there is a distinction between Frustration (at common law)

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
DX: DX 303 LDE www.4pumpcourt.com

and Force Majeure (at civil law – usually enshrined in a civil code) and force-majeure clauses in contractual terms. Although they may sound and look the same in some respects, they are not.

5. In the light of Covid-19 it is timely, therefore, to examine what Frustration and Force Majeure mean and what the legal consequences are. This paper does not provide advice about Covid-19 as such, but explores some of the questions that may arise if claims arise out of Covid-19. Most of this paper will focus on what I will call Contractual Force Majeure because it more likely than not that the answer to the questions are to be found in the terms dealing with exceptional and unexpected events. It also happens that such clauses share many characteristics of specified peril insuring clauses in insurance policies. The trend in commercial contracts to include such clauses is to overcome the harshness and limitations of the legal doctrine of Frustration in the common law or Force Majeure in civil jurisdictions. I will examine some of the force majeure clauses that are in use to demonstrate some common features but also some significant differences.

6. Until now "Force Majeure" is one of those phrases and concepts that contracting parties and most lawyers professed to understand without needing to think too hard about it, and certainly without seeking to capture it in a concise definition or an explanation of what legal consequences follow. In definitional terms the concept is one that meets the 'Elephant Test' – difficult to define but you know it when you see it. Like the wild animal itself, having an elephant test appreciation of Force Majeure has the potential to be dangerous. In the main, there are two wrong assumptions that people make about force majeure: (1) there is some universal, standard definition of what Force Majeure means and that in general terms all it needs to mean is a major event beyond your control; (2) that once a Force Majeure event occurs, certain contractual consequences automatically follow.

7. It is important to bear in mind however that there is no all embracing concept of what Force Majeure means, nor does a force majeure event have the same legal consequences in each case. Instead, what is meant by Force Majeure and the consequences that flow most often depend upon what has been captured expressly (but usually not exhaustively) in different ways in different contracts.

8. That said, there is a general consensus among people about the type of events that should be included as "Force Majeure". It will almost certainly conjure up events that are catastrophic natural disasters and the most obvious ones that will instantly occur to many people include earthquakes, volcanic activity, hurricanes, tsunami, floods, drought, or lightning strike. But different ones will instinctively occur to people depending on where in the world they are: if you are in Australia you will certainly think of bush fire (the more so since the horror of the fires in 2019/2020); If you are a Canadian oilman or Siberian or Alpine engineer you will think of blizzard, freeze and avalanche. In the MENA regions, sandstorms will feature whereas they would not instinctively occur to those in Europe. Depending on your field of work, you may think of events which may not straightaway occur to others. If your work involves communications systems you would think of solar electromagnetic pulse. If you work in mining, quarrying or tunneling, uppermost in your mind will be explosion, rockfall, landslide or tunnel collapse. If you are involved in shipping, icebergs. Collectively these are traditionally known and referred to in legal books as 'Acts of God' – because they involve overwhelming destructive force.

9. In my opinion, plague, pestilence, epidemic and pandemic are likely to be natural phenomena that are (or should be) treated at law as Force Majeure events. However, it should be noted that they are not universally expressly included in the lists that appear in contractual force majeure clauses. For example, they are not to be found in JCT, NEC or ICE standard forms contracts – no doubt because it is not something that would instinctively be thought to have an impact on the progress of building or engineering projects: the ICC Force Majeure clause is a notable exception. Equally, and perhaps more of a shock, they are not generally found in most business interruption insurance policies either. Normally, as I will briefly explore later, BI policies tend to depend largely on physical damage which has the consequence of then preventing the business from operating.

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
DX: DX 303 LDE www.4pumpcourt.com

10. In addition to natural phenomena there are political events, caused by human activity, which in modern times are commonly thought of as Force Majeure events: war, civil war, rebellion, riot or civil unrest, invasion, and, more recently, terrorism. I doubt many of the contracts in use today will expressly include the new buzzwords: lockdown, movement restriction, social isolation particularly if those are in the nature of or the result of official 'advice' rather than direct legislation or executive power. There are other less obvious ones capable of wreaking havoc on contractual performance – some may provoke debate as to whether or not it is, or should be, an example of Force Majeure. Widespread Extinction Rebellion protests capable of closing airports and cities might be considered as a contender by some, but not by others.

11. People generally understand Force Majeure to mean that when one of the events of the sort I have mentioned above occurs it automatically excuses the non-performance by a contracting party of that party's contractual obligation. There is a tendency to think of Force Majeure as an escape clause or get-out-jail-free card. Although, as I shall explore, the contractual consequences that flow from a Force Majeure event are more nuanced: they do not necessarily always lead to the same result.

12. It is understandable for clients to be mesmerised by the horror of an unexpected turn of events and to jump to the conclusion that once the event has occurred there will be a potential or actual adverse effect upon performance of the contract or that the event has automatic consequences. But it is it is always necessary to be able to demonstrate a causal link between the event, and the prevention of your ability to perform the obligation. The effect on performance must usually be strong enough to show prevention in terms of 'impossibility' or radically different performance. A common misunderstanding is be beguiled into thinking if it has become commercially uneconomic to perform that this will be sufficient to invoke Force Majeure: it rarely will be, unless your contract says so.

13. Before looking at contractual force majeure it is important to understand the origins of the principles at play in civil jurisdictions and the English common law.

Force Majeure as a principle of law in civil law jurisdictions

14. The concept itself is of ancient origin beginning with the Roman Law concept of "Vis Maior cui resisti non potest": superior force which is incapable of being resisted. Roman law excused a party from liability when there was superior force against which it was not possible to resist because, to the Roman mind, it was futile to punish a person for what Fate dictates.

15. The expression "Force Majeure" originates from the French Napoleonic Code of 1804 and these days is to be found in Article 1148 of the French Civil Code. There are three main requirements: *"l'extériorité, l'imprévisibilité et l'irrésistibilité*".

16. To qualify it must be absolutely impossible for a party to perform its obligations due to an event which is external, unpredictable and unavoidable. In French law, if Force Majeure is found, the parties are discharged from the contract and damages cannot be claimed. This is faithful to the civil law theory that a party cannot be held to a contract which is impossible. Having said that I understand that, in practice, French Courts are extremely reluctant to find there is force majeure in law save in extreme circumstances and are very strict in their approach.

17. Similar provisions are to be found throughout civil code jurisdictions, some of which are seemingly more permissive than others. In Libya, Article 360 of the Civil Code provides '*An obligation is extinguished if the debtor establishes that his performance has become impossible by reason of causes beyond his control*'.

18. In the United Arab Emirates, the Civil Code address force majeure and other exceptional events as follows:

249 *If exceptional events of a general nature occur which were not capable of being foreseen, and the occurrence of which renders performance of a contractual obligation oppressive, albeit not impossible, for the obligor as it threatens him with*

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
DX: DX 303 LDE www.4pumpcourt.com

exorbitant loss, it shall be permissible for the judge, in accordance with the circumstances, and after weighing up the interests of the two parties, to bring the oppressive obligation back to what is reasonable, if justice so requires. Any agreement to the contrary shall be null."

273 *If force majeure interrupts the performance of a contract such as to make it impossible for the contract to be performed, either wholly or in part, then the contract, or the relevant part of the contract, is extinguished or may be treated as suspended.*

287 *If a person proves that the loss arose out of an extraneous cause in which he played no part such as natural disaster, unavoidable accident, force majeure, act of a third party, or act of the person suffering loss, he shall not be bound to make it good in the absence of a legal provision or agreement to the contrary.'*

19. Under Article 117 of the Turkish Code of Obligations if a party's performance is impossible and there is no negligence on his part the obligation is invalid. Article 138 provides relief to both parties in the event of Force Majeure, whereas Article 480/2 only provides relief to a contractor. Under the latter the contractor can demand an increase in price or rescind the contract if there has been an occurrence of extraordinary circumstances which is unforeseen and which prevents or unduly impedes performance provided it is not caused by the contractor and provided the contractor informs the employer that the work cannot be completed due to force majeure.

20. The difficulty in understanding and applying these civil codes in practice is that force majeure is often not defined either at all or particularly well. It is all too easy for international practitioners from a common law background to assume from the English translation of the civil codes that there is an apparent liberalism in the way they are applied, which in practice is not matched by reality. For example, during the economic crisis of 2008/2009 developers in the UAE attempted to argue that this constituted a force majeure event beyond their control allowing them to escape from their projects, but they were given short shrift. Some Arabian Courts tend to interpret force majeure restrictively as really only applying to natural phenomena whereas in Libya and Egypt the courts seem to have been willing to interpret force majeure as applying to events such as civil unrest.

21. Courts and Arbitral Tribunals across the world have traditionally been generally resistant to claims of Force Majeure especially where it is clear that what the claiming party really means is that if it had to perform would lose a very substantial amount of money. If parties want to protect themselves against that risk they should include contractual terms to that effect. It is possible in some jurisdictions to include 'hardship' provisions and good faith renegotiation clauses to avoid oppressive effects of performance – although there is little empirical evidence available to show how useful these might be. Because contractual force majeure clauses are common, where the parties have addressed the risks on their own terms the Courts and Tribunals tend to apply those clauses just like any other term of the contract. This means that care must be taken when considering the cases: very few decisions tend to turn on the pure principles of Force Majeure in the law themselves, rather they tend to reflect the terms of the contract in each particular case.

Frustration

22. The English common law tradition has been different. It does not recognise the civilian concept of 'force majeure' as such. Instead English law has a different doctrine, known as frustration. In *British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressing Ltd* [1953] 1 WLR 280 the Court rejected as uncertain a clause that purported to exclude liability for the 'usual force majeure risks'. The lesson from Patley Pressing is that it is not safe to assume there is a usual force majeure risk. In that context, it is depressing to find that standard forms such as the JCT mention Force Majeure but without defining what it is (see JCT DB 2016, clause 2.26.14).

23. The common law doctrine of Frustration operates automatically to end the contract when the circumstances of frustration arise. If an event happens after the contract has been made which is so catastrophic or fundamental in nature

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
DX: DX 303 LDE www.4pumpcourt.com

beyond the control of either party which has made performance of that contract impossible or makes the performance of it so radically different, then both parties are released from their obligations immediately and automatically. Examples of a contract which is frustrated are almost always extreme (and in the law books tend to be hypothetical): a contract to paint the Forth Bridge would be frustrated if subsequently the Forth Bridge collapsed or was destroyed. Frustration is so rare that there have been few cases. It is rarer still for the Court to find that a contract was frustrated. In *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1960] 2 QB 318 at 370 (CA) affirmed [1962] A.C. 93 (HL), Harman LJ said "*Frustration is a doctrine only too often invoked by a party to a contract who finds performance difficult or unprofitable, but it is very rarely relied on with success. It is in fact a kind of last ditch*".

24. In *Davis Contractors v Fareham UDC* [1956] A.C. 696 a building contractor had agreed to build 78 houses within 8 months for a fixed price. However, there were unanticipated shortages of labour and materials so that the work took 22 months and cost £17,000 more than the price. The House of Lords held that the hardship to the contractor was not sufficient to amount to a frustration – "*It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for*". The job the contractor was being asked to do always remained the same but it was more arduous to perform and no longer profitable: disappointed expectations do not lead to frustrated contracts.

25. The doctrine applies by application of the law, without any need for any contract clause to give it effect. And yet the Court will look closely at the terms of the contract because, where the contract caters for unexpected events, the fact that there are such terms may operate to oust the doctrine. It has become common for parties to commercial contracts to make provision within their contracts for what happens in the event of various catastrophic events with a variety of consequences. Obviously if parties have expressly catered for the catastrophic event in question the doctrine of frustration will not apply. The wider the ambit of contractual clauses dealing with exceptional events, the narrower is the practical scope of the doctrine of frustration.

26. A contract whose performance has become illegal because of a change in the law might well be frustrated: the caveat 'might' is important because it will depend on whether the contract terms say anything about what happens if there is a change in law – if they do, frustration will not arise and instead the terms of the contract will govern the situation. In cases where there is a supervening prohibition, much will depend on whether the prohibition is temporary or permanent and a value judgment may need to be made as to whether the prohibition is so abnormal as to amount to frustration: *Cricklewood Property & Investment Trust Ltd v Leighton's Investments Trust Ltd* [1945] A.C. 221 at 236 HL. So in *Metropolitan Water Board v Dick Kerr & Co Ltd* [1918] A.C. a contractor who agreed to construct reservoirs over the course of 6 years, starting in July 1914 before the outbreak of war was unable to perform when in 1916, the government prohibited the work and requisitioned the contractor's plant and materials: the House of Lords held the contract was frustrated when it heard the appeal in 1918, even though the contract did provide scope for extending time for performance in the event of "*any difficulties, impediments or obstacles whatsoever and howsoever occasioned*".

27. War is something that many assume will amount to frustration. But the fact of war itself does not count as frustration, only that it has the potential for widespread upheaval and difficulty. A state of war can give rise to events which may frustrate the contract. Whether frustration occurs depends on whether, for example, the war makes the contract illegal to perform for example if it involves trading with the enemy or because selling certain goods are prohibited or restricted. Or it may be that certain acts done during war cause insuperable difficulties to performance: for example if a factory is requisitioned so that it can no longer manufacture its intended product.

28. The current pandemic is talked about as if a wartime situation prevails and there are some similarities in my view as to the way in which the doctrine of frustration is likely to apply to the current pandemic as it would to a wartime situation. In my view the current Covid-19 pandemic in and of itself is not sufficient to frustrate contracts but it might give rise to events that make performance impossible. For example the Government's restrictions banning travel from

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
DX: DX 303 LDE www.4pumpcourt.com

the UK will frustrate a contract for an orchestra to perform a concert abroad. And it might be sufficient to frustrate a contract to provide catering services to schools or hotel groups that have now been ordered to close. However, far more difficult is the question whether a shop's lease with the landlord is frustrated where the shop has to close because it has no customers for 6 months as a result of Covid-19 and/or social distancing advice from the Government.

29. Frustration at common law is a doctrine with hard lines and harsh results. Where is it found "*It kills the contract itself*" per Lord Simon in *Constantine Ltd v Imperial Smelting Ltd* [1942] A.C. 154 at 164 (HL). Frustration brings a contract to an end "*forthwith, without more and automatically*": *Hirji Mulji v Cheong Yue S.S. Co Ltd [1926] A.C. 497, 505*. That means both parties are freed from any further obligations. But it does not unwind the contract like rescission nor does it compensate for what was expected from performance. In its early days, the Court let the losses lie where they fell.

30. The Law Reform (Frustrated Contracts) Act 1943 mitigated some of the harsher effects so as to prevent unjust enrichment by allowing a payer to recoup payment from the payee. In principle the Act allows a party to recover the value of a benefit accrued to the other party where performance has been partly rendered to the extent that the Court thinks just but this is notoriously difficult to identify and prove. But the Act does not seek to apportion the losses that will be felt by either party and so for most situations, Frustration is of little assistance in dealing with losses.

31. It was said in *Hirji Mulji* (ibid at 510) that the impossibility of performance "*should not be due to the act or election of the party seeking to rely on it*", and a frustrating event must take place "*without blame or fault on the side of the party seeking to rely on it*": see Joseph Constantine S.S. Line Ltd v Imperial Smelting Corp Ltd [1942] A.C. 154, 171. That last point can give rise to some complications if one party decides perhaps prematurely to call the contract to an end by utilising a termination provision or claiming frustration when there may not be. Although frustration is said to kill the contract automatically, the difficulty is in knowing whether frustration has occurred and parties may disagree about this. Because of the uncertainty of whether there is a frustrating event there is an understandable reluctance by either party to be seen to be the one calling the contract as ended for fear of being held in repudiatory breach of contract. One example is where a contractor deliberately delayed work in the hope that, before long, the government will prohibit completion of the work: his delay in the run up to the prohibition played its part, with the result that he was liable in damages: *Mertens v Home Freeholds* [1921] 2 K.B. 526 (CA).

32. The Court will not tolerate a self-induced frustration where a party decides to perform (or not perform a contract) in a certain way because it has become uneconomic or loss-making, sometimes even in a situation which might be seen as emminently commercially sensible or one in which there was no real choice. So in *J Lauritzen AS v. Wijsmuller BV*, The "Super Servant Two" [1990] 1 Lloyd's LR 1 the defendant had agreed to carry the claimant's drilling rig from A to B using the "transportation unit", which referred to one of two barges, The Super Servant One and The Super Servant Two. The Super Servant Two was allocated to the Claimant's job whereas The Super Servant One was allocated to other contracts. However when the Super Servant Two sank, the defendant contended that it could not perform the contract due to frustration. The Court of Appeal held that this was a case of self-induced frustration: the defendant could have used The Super Servant One to perform the contract, although that would probably have involved the defendant breaching other contracts. The defendant's conduct was not unreasonable but it appears that the Court appears to have considered that because the defendant had two barges, it could have ensured some spare capacity in the event that unforeseen circumstances put one barge out of action. The defendant had not done so and it was treated as an election which prevented the case from being one of frustration.

33. A useful discussion of the limits and scope of Frustration is now to be found in *Canary Wharf (BP4) T1 Limited and others v European Medicines Agency* [2019] EWHC 335 (Ch) and demonstrates how the doctrine is narrowly construed. The European Medicines Agency had a £500 million lease in Canary Wharf which was its EU headquarters. After the Brexit referendum led to the UK deciding to exit the EU, the EMA argued that its lease in Canary Wharf was frustrated as it had to relocate to Amsterdam. There was no doubt that EMA's position was materially adversely affected by Brexit and would need to relocate, but their capacity to deal with the property in the UK remained. Mr Justice Smith held that the EMA's

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
DX: DX 303 LDE www.4pumpcourt.com

decision to relocate was not in fact a legal necessity. Although Brexit itself was not foreseeable at the time the parties entered into the contract, the long lease contained express provisions catering for the involuntary departure of the EMA from the UK in circumstances beyond its control and Brexit was one such circumstance. Brexit did not provide EMA with a legal excuse to walk away from its lease on the basis of frustration. In short, the terms of the contract provided the answer, rather than frustration.

Contractual Force Majeure

34. 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.

35. 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.

36. 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.

37. 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.

38. 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.

39. What typically constitutes contractual force majeure:

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

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
DX: DX 303 LDE www.4pumpcourt.com

(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.

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

41. 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.

Typical consequences in contractual force majeure regimes

42. Where force majeure exists most of the contracts will give protection which excuses or exempts the party affected from performance or liability for failure to perform. The precise ambit of this and any other remedies, however, depend upon what has been negotiated. The options that are features of many contractual force majeure regimes include one or more of the following:

- **Excused from performance or non-liability**: if the force majeure clause is triggered, the non-performing party's liability for non-performance or delay in performance is excused (although for how long depends) and failure to perform will not count as a breach of contract.
- **Notification and duration**: Quite often the excuse or exemption will be dependent upon service of notices the content of which can vary – some requiring substantiating evidence of the event, the inability to perform, and the likely duration of the inability to perform.
- **Suspension**: often, at least as a first stage, the obligations remain but are suspended by the force majeure event and become reactivated afterwards once its effects have passed.
- **Obligation to mitigate**: The entitlement to be excused by a force majeure clause is usually subject to the affected party (sometimes both parties) having taken steps (e.g. best efforts, all possible steps, reasonable endeavours) to avoid the event or minimise its consequences. In many cases, this will be difficult for the affected party to prove. A duty to mitigate may be implied in any event.
- **Right to terminate**: Some force majeure clauses allow either party to terminate if the event lasts a sufficiently long duration which can vary from anything from 1 month to 6 months. Sometimes that right is limited to one of the parties.
- **Financial Compensation**: This is often overlooked. Some (but by no means all) force majeure regimes allow the affected party to be compensated for the additional expense or losses it incurs. Other regimes allow each side to

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
DX: DX 303 LDE www.4pumpcourt.com

bear their own losses. As contractor if you do not ask, you will not get this.

43. Some contrasting examples set out below will help to demonstrate the wide variety of contractual force majeure regimes.

An EPC Contract

44. This is a clause from an EPC contract which was in dispute in 2011. The project involved the supply of large plant from Asia which was to be installed at a power station in the UK, delivery of which was delayed. The delay was beyond the contractor's control and was due to genuine problems that his supplier was experiencing and the general non-availability of suitable shipping: he wanted to see whether an extension of time was available, or extra money under any of the contractual provisions – in the EOT regime the only potential delay event which might assist was for Force Majeure. The client was adamant that it was force majeure because it was an event beyond his control and he should not be penalised. However, on analysis the Force Majeure regime offered little comfort. It is a good example of how parties decide to restrict what constitutes an event of force majeure and what the remedies are. It also demonstrates that in order to benefit from the protections of force majeure it is necessary to give prompt and detailed notice.

21.1 *An Event of Force Majeure means any of the following events (a) Act of God, which shall be deemed to exclude weather conditions of any kind (b) war, hostilities (whether declared or not), invasion, act of a foreign enemy, mobilisation requisition or embargo; (c) civil war, rebellion and revolution, military or usurped power, insurrection; (d) radioactive contamination from nuclear fuel or nuclear waste from the combustion of nuclear fuel or other hazardous properties of any explosive nuclear assembly (e) riot, commotion, national strike unless restricted to employees of the contractor. Neither the Employer nor the Contractor shall be considered in breach of contract or liable to the extent that the performance of obligations is prevented by an Event of Force Majeure.*

21.2 *If a party is or will be prevented from performing any of its obligations by an Event of Force Majeure then it shall give notice to the other party of the event or circumstances constituting the Event of Force Majeure and shall specify the obligations the performance of which is prevented. The notice shall be given within 5 business days after the party became aware or should have become aware of the relevant event or circumstances constituting the Event of Force Majeure.*

21.3 *The party shall, having given notice under clause 21.2, be excused performance of such obligations for so long as such Event of Force Majeure prevents it from performing them.*

21.4 *Notwithstanding any other provision of clause 21 an Event of Force Majeure shall not apply to obligations of either party to make payments to the other party under the Contract.*

21.5 *Each party shall at all times use all reasonable endeavours to minimise any delay in the performance of the Contract as a result of an Event of Force Majeure.*

21.6 *If the Contractor, having given notice under clause 21.2 suffers delay by reason of an Event of Force Majeure the Contractor shall be entitled to an Extension of Time for such delay in accordance with clause 20.*

21.7 *If the execution of substantially all the Works in progress is prevented for a continuous period of 180 days by reason of an Event of Force Majeure of which notice has been given in accordance with clause 21.2, then either party may give to the other party a termination notice and the Contract shall be considered terminated as at the date the notice is received.*

45. The key features of this regime is that Force Majeure is limited to those events which are expressly listed. If it is something other than a listed event there is no Force Majeure. A similar or analogous event will not be included. Note that the draftsman does not spell out what constitutes an 'Act of God'. If that was all it said you might consider all the normal natural catastrophic disasters were covered. But in this contract there was also a specific list of exclusions as well: the exclusion of 'weather conditions of any kind' is ripe for disputes. The only sort of natural disasters had to be ones which were not due to weather of any kind: i.e. volcanic activity and earthquakes would be force majeure but hurricanes, floods, drought, avalanche, lightning and solar flares etc would be weather related and so excluded. If a typhoon had caused a flood which prevented the Asian supplier that would not be protected, whereas if the same flood had been the result of a Tsunami it would.

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
DX: DX 303 LDE www.4pumpcourt.com

46. Epidemic or pandemic is not expressly mentioned in the list, though it might well fall within 'Act of God'. Suppose the client's problem had been connected to an outbreak of Covid-19. It may well be that the problem with getting shipping was not the virus itself but the response of sovereign powers, who, being worried about the potential spread, declared quarantine or imposed travel or shipping restrictions. It would be arguable that the prevention is caused not by an Act of God (virus) itself but the response to it by sovereign powers. In that situation it may be argued that this is a political event not covered by the list (since the list covered all of the political events intended and did not include quarantine or travel/shipping restrictions), even though what sparked the political event was Covid-19. Road-testing this clause with the Covid-19 situation demonstrates that this sort of clause is perhaps too restrictive to cover the potential exceptional circumstances that might affect performance.

47. The protection only applies where a force majeure event has 'prevented' performance. This requires the party to prove that it is impossible to perform either physically or legally. Anything less than impossible will not suffice – economic unprofitability or more onerous methods of performance will not count.

48. The regime has a notice requirement which is based on either actual knowledge of the event (if sooner) or constructive knowledge based on when objectively the party ought to have been aware. Contractual relief only applies if notice is given from the date when a party affected is aware or should be aware of the Force Majeure.

49. Likewise termination can only be invoked if performance is prevented continuously for 180 days provided that notice had been given – indeed that is the starting point for counting the 180 days.

50. Although an extension of time is available, note there is no financial remedy. It may be very discomfiting not only to have the performance prevented but then lose the benefit of the whole contract as well when it is terminated.

Construction Contract in Kazakhstan

51. Compare and contrast this with this very different approach in a construction contract in Kazakhstan:
12.1 *Force Majeure means any event or occurrence whatsoever beyond the reasonable control of that party which delays, prevents, or hinders that party from performing any obligation on the party under this contract, including to the extent such event or occurrence shall delay prevent or hinder, war (declared or undeclared), terrorist activities, acts of sabotage, blockade, fire, national strikes (excluding those involving the Contractor's group) riots, insurrections, civil commotions, quarantine restrictions, epidemics, earthquakes, landslides, avalanches, floods, hurricanes, explosions and regulatory and administrative or similar actions or delays to take action by any governmental authority.*
12.2 *To the extent that a party is fully or partially prevented by Force Majeure from performing any obligation under this Contract, the failure to perform shall be excused by the occurrence of the Force Majeure until it ceases or is corrected or this Contract is terminated.*
12.3 *A party claiming that its performance is excused by an event of Force Majeure shall promptly after the occurrence of such Force Majeure notify the other party of the nature, date of inception and the expected duration of such Force Majeure and the extent to which the party expects the event will prevent the party from performing its obligations under this Contract. The notifying party shall use its best efforts to eliminate or mitigate the effects of the Force Majeure.*
12.4 *The following events shall not constitute Force Majeure: Late delivery to the Contractor of machinery equipment, spares or consumables unless itself caused by Force Majeure. Delay in performance by any sub-contractor third party of that third party's obligations wear and tear or random flaws in goods materials plant and equipment or breakdowns in plant and equipment unavailability of funds adverse weather (save for those weather conditions defined as Force Majeure)*
12.5 *If performance of a substantial part of either party's obligations is delayed, hindered or prevented for a period of 30 days the parties shall meet to discuss available alternatives including amendment of the Contract, suspension of performance and termination.*
12.6 *If Force Majeure prevents performance of a substantial part of either party's obligations for a period of 90 continuous days either party shall be entitled to terminate this Contract by giving notice to that effect to the other party. All payments*

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
DX: DX 303 LDE www.4pumpcourt.com

that have been earned or fallen due before the effective date of termination shall be paid within 90 days of such termination.

52. This is a very different approach to defining force majeure and is on the face of it very broad. Any event 'whatsoever' which is beyond the reasonable control of that party might in principle count as a Force Majeure. A non-exhaustive list is given – note that in the words highlighted this clause includes words that would capture the Covid-19 and quarantine or regulatory or administrative action taken by government in response.

53. The listed events are only force majeure 'to the extent that' they '*delay prevent or hinder*' that party from performing. The formulation 'delay, prevent or hinder' is a considerable watering down of the absolute 'prevention' or impossibility of performance that one tends to find in civil codes. It is considerably less stringent than one finds in many standard contracts too – see for example FIDIC below. Yet this type of formulation is quite common in Power Plant and Process Construction contracts based on the Engineering Advancement Association of Japan Model Form International Contracts.

54. Note that some events are specifically excluded from constituting Force Majeure. The draftsman has included 'adverse weather' despite the initial apparent wideness of the definition of Force Majeure.

55. There is a requirement to give notice 'promptly. However a failure to give timely notice does not meet with any particular sanction.

56. The contractual relief obtained by an affected party is not much more than being excused for performance: there is no mention of financial relief or compensation for the effects of the Force Majeure. From a contractor's perspective this is a major drawback with this regime, particularly given the obligation on the affected party to make best efforts to eliminate or mitigate the effects of the Force Majeure. Arguably if he does not make best efforts he will be deprived of the protection from liability and yet his extra expense and effort is unrewarded.

57. Note too that the relief from liability lasts only as long as the occurrence of the Force Majeure event continues. This type of formulation is a trap for the unwary. The Force Majeure event itself might be a shortlived event – say progress stopped due to a hurricane – however its effects might be longer in duration as the interference continues in its aftermath. Really an affected party needs protection not just for the happening of the event itself but also its aftermath: in other words protection for the entire period during which its performance is inhibited or affected by the Force Majeure event rather than just the duration of the event itself.

58. If the Force Majeure event continues for 90 days and 'prevents' performance (note the more restrictive requirement, here) either party can terminate the Contract. In the case of political events such as the current Covid-19 restrictions which look likely to last longer than 90 days that is quite a short timescale. There is the potential for mischief if one party decides to cut and run from the project if an event of force majeure lasts for 3 months without much recourse for the other party.

JCT D&B 2016

59. The JCT standard form does not have a detailed force-majeure regime.

60. The JCT D&B2016 is typical of the suite. Clause 2.26.14 provides that force-majeure is a Relevant Event for the purposes of an contractor's entitlement to an extension of time, but it does not give rise to loss and expense as a Relevant Matter. As I have indicated already, the JCT makes no attempt to define what constitutes Force Majeure which is regrettable. Under Clause 8.11.1.1. an event of Force Majeure may ultimately give rise to termination of the Contractor's employment if there has been a continuous suspension for 2 months (unless a different period is agreed in

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
DX: DX 303 LDE www.4pumpcourt.com

the Contract Particulars).

NEC4

61. Although not called a force majeure clause, the NEC form has a clause which operates as a Compensation Event in a situation of force majeure:
Clause 60.1.9 "(19) An event which
• Stops the Contractor completing the works or
• Stops the Contractor completing the works by the date shown on the Accepted Programme, and which
• neither Party could prevent,
• an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it and
• is not one of the other compensation events stated in this contract."

62. A Compensation Event under the NEC form (provided that notification is given in accordance with the terms) allows a contractor to obtain both an extension of time as well as additional monies. That is good news for the contractor, but bad news for the Employer.

Clause 19 FIDIC 1999 (Clause 18 in FIDIC 2017)

63. The 1999 FIDIC suite of Contracts provides a fairly sophisticated regime for Force Majeure. This is to be found in clause 19 of the General Conditions in the Red Book (Construction Contract) Multilateral Development Bank (MDB); Yellow Book (Plant Design and Build) Silver Book (EPC/Turnkey) and an equivalent clause 18 in the Gold Book (Design, Build, Operate) where the expression force majeure has been changed to 'exceptional risks'. Under the 2017 forms, FIDIC has changed the title from "Force Majeure" to "Exceptional Events" and moved clause 19 to clause 18. The scope of the clause remains very similar. I shall use the clause 19, 1999 version.

64. The FIDIC regime adopts a general formulation, followed up by an illustrative and nonexhaustive list of 5 categories of events that might qualify.

65. Clause 19.1 begins with the general formulation and defines force majeure as '*an exceptional event or circumstance(a) which is beyond a Party's control;(b) which such Party could not have reasonably provided against before entering in the Contract (c) which having arisen, such Party could not reasonably have avoided or overcome, and (d) which is not substantially attributable to the other Party.*' This last qualification is important. In other general formulations the concept of something beyond that party's control is often used (abused) to invoke force majeure for acts or omissions of the other contracting party. This qualification cuts out the potential for those type of arguments.

66. The cause then sets out the following numbered categories of events which is said to be non-exhaustive:
(i) War, hostilities (whether war be declared or not), invasion, act of foreign enemies
(ii) Rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war,
(iii) riot, commotion, disorder, strike or lockout by persons other than the contractor personnel and other employees of the contractor and subcontractors
(iv) munitions of war, explosive materials, ionising radiation or contamination by radioactivity except as may be attributable to Contractor's use of [them]
(v) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity.

67. The reason for categorising them in this way (i) to (v) is deliberate because the available remedies apply depending on what type of event it is. Note that the natural catastrophes appear to limited to natural processes of the earth, rather

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
DX: DX 303 LDE www.4pumpcourt.com

than disease or virus. However, there is a further category to be found in clause 19.7 which also provides relief from performance where it is impossible or unlawful for one or both parties to fulfil their obligations or under the applicable law entitles the parties to be released from further performance: this effectively incorporates the principles of Force Majeure under civil law codes or frustration at common law.

68. Clause 19.2 obliges the affected party to give notice to the other of the event or circumstance said to give rise to Force Majeure and to identify the obligations that are or will be prevented. The notice must be given in writing to the other party and copied to the contract administrator within 14 days after the party became aware or should have become aware of the Force Majeure.

69. The force majeure event must have 'prevented' the performance of the obligations. The event occurring of itself is insufficient to justify claiming force majeure.

70. Once notice is given clause 19.2 provides relief by way of an excuse from performance so long as the event prevents performance. This relief applies to all categories. However, there is no relief from a party's payment obligations. The exclusion of payment obligations is sometimes provided in other contracts – it is tough if the force majeure event is the closure or a failure of a bank which temporarily prevents performance and puts that party in breach of contract.

71. However clause 19.3 provides that the party has a duty to use all reasonable endeavours to minimise delay in performance as a result of Force Majeure.

72. Clause 19.4 requires a party to give notice when the Force Majeure has ceased. The clause goes on to specifically allow the contractor an entitlement to an extension of time for delays arising from being prevented from performing due to the Force Majeure event. Whilst this may seem obvious it prevents potential disputes about liquidated damages.

73. Clause 19.4 makes clear that the contractor is not entitled to recover its costs in relation to category (v) (natural catastrophes) – the parties are assumed to bear their own costs of that risk.

74. However, FIDIC permits the contractor to recover its costs for category (i) events (War etc) without geographical limitation. It also permits the recovery of costs for the other categories provided they occur in the country where the site is located. Profit is never recoverable.

75. A lacuna in the drafting is that if the event falls within the general formula but not neatly within one of the five listed categories it is unclear what financial remedy is available. If the event was the current Covid-19 pandemic, it is unclear what if any remedy would apply. In my opinion it is likely that pandemic would fall under clause 19.7. While parties are likely to argue that costs should be recovered by analogy with whichever category is most similar, it is probably more likely that a Tribunal or Court will say that the absence of an express financial entitlement means that it is only the listed events that attract a financial remedy.

76. Apart from financial relief, by clause 19.6 either party has a right to terminate the contract on notice if (a) the Force Majeure event lasts for more than 84 days for one event or (b) more than 140 days in total for multiple periods from two or more events which substantially prevents the execution of all the works. The notice takes effect 7 days later and the contractor has to cease all further work and hand over all documents, plant and materials for which he has been paid and to clear and leave the site. The contract administrator values the work to be paid to the contractor. This will include the value of the work done to date, any cost or liability reasonably incurred by the contractor in anticipation of completing the contract, the cost of removal or temporary works and equipment and return of these to the contractor's own country and the cost of repatriating staff and labour.

77. It is unclear how the clause 19.6 termination provision sits with a force-majeure under clause 19.7 because that type of event may lead to an immediate discharge by operation of law (as soon as notice is given).

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
DX: DX 303 LDE www.4pumpcourt.com

ICC Force Majeure Clause

78. In February 2003 the ICC produced a draft Force Majeure clause and a related 'hardship' clause for parties to introduce into their commercial contracts. The force majeure terms are set out in the Appendix to this paper. The regime balances a drafting approach of providing a general formula for force majeure against the need for producing a lengthy list. That said, in my opinion, the list is as comprehensive as any I have yet seen, and includes epidemic and compliance with government order or direction (see the highlighted list below).

79. The ICC clause begins in paragraph 1 by stating that where a party fails to perform one or more of its contractual obligations certain consequences set out in the clause will follow if that party proves the following three things:
(a) that its failure to perform was caused by an impediment beyond its reasonable control; and
(b) that it could not reasonably have been expected to have taken the occurrence of the impediment into account at the time of the conclusion of the contract; and
(c) that it could not reasonably have avoided or overcome the effects of the impediment."

80. Paragraph 3 of the clause provides that that there is an evidential presumption the first two matters above have been established (unless there is proof to the contrary) if the impediment is one of those listed in (a) to (g) below:
(a) war (whether declared or not), armed conflict or the serious threat of same (including but not limited to hostile attack, blockade, military embargo), hostilities, invasion, act of a foreign enemy, extensive military mobilisation;
(b) civil war, riot rebellion and revolution, military or usurped power, insurrection, civil commotion or disorder, mob violence, act of civil disobedience;
(c) act of terrorism, sabotage or piracy;
(d) **act of authority whether lawful or unlawful, compliance with any law or governmental order, rule, regulation or direction, curfew restriction, expropriation, compulsory acquisition, seizure of works, requisition, nationalisation;**
(e) act of God, plague, epidemic, natural disaster such as but not limited to violent storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tidal wave, tsunami, flood, damage or destruction by lightning, drought;
(f) explosion, fire, destruction of machines, equipment, factories and of any kind of installation, prolonged break-down of transport, telecommunication or electric current;
(g) general labour disturbance such as but not limited to boycott, strike and lock-out, goslow, occupation of factories and premises."

81. The ICC's approach is to have a general formula covering any impediment beyond a party's reasonable control followed up by a list of particular impediments that will be presumed to qualify for relief.

82. There is specific provision where the impediment is the failure of a third party to perform all or part of the work. In that situation the contractor has to demonstrate the third party is affected by force majeure and meets the requirements. Whatever the impediment, a party must still show that it could not reasonably have avoided or overcome the effects of the impediment. The inclusion of 'reasonably' suggests a watering down of the requirement of impossibility.

83. If a party establishes the impediment caused the failure to perform and that it could not reasonably have avoided the consequences the clause provides the following protections to that party (NB not both parties): the party does not have to perform its obligations from the moment the impediment causes the failure to perform if notice is given without delay. If notice is delayed the protection only applies from the moment notice is received by the other party. The party is relieved from any liability in damages, or any other contractual remedy for breach of contract from the time it is relieved from performing. The party is still under an obligation to take all reasonable means to limit the effect of the event or impediment. If the 'effect of' the impediment (rather than the impediment itself) is only temporary, then the protections afforded to the party are also only temporary. The party has to notify the other party when the effect of the impediment

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
DX: DX 303 LDE www.4pumpcourt.com

ceases.

84. Although the clause protects the invoking party from being held to be in breach of contract, it does not prevent the other party invoking the right to terminate. Paragraph 8 provides that if the duration of the event or impediment has the effect of "*substantially depriving either or both of the contacting parties of what they were reasonably entitled to expect under the contract*" either party has the right to terminate the affected contract by giving reasonable notice to the other party.

85. Paragraph 9 provides that where the contract is so terminated and a party has, by reason of anything done by the other party, derived "a benefit" before the termination of the contract, then the party in receipt of that benefit is obliged to pay to the other party a sum of money equivalent to the value of such benefit. This could result in both parties being obliged to value their respective benefits and to make cross-payments in respect of them.

86. While there is much to commend the ICC clause, in my view I would be wary about using this regime without at least considering substantial amendments: Unlike other force majeure clauses in use, it does not have the effect of suspending the contract for both parties – only the affected party. The other party may still be obliged to perform, but is getting nothing in return. How this clause will sit with the law of the contract may not be clear – the civil code law in many countries suggests that if one party does not perform its obligation the other party is discharged from rendering performance.

87. The right of termination on reasonable notice coupled with the handing back of benefits is and attempt to provide some form of equitable recompense but in my view is likely to be a magnet for disputes – it could be used as a way of rewinding the contract. Other force majeure regimes provide for extensions of time, and the recovery of loss and expense, particularly where steps are taken to overcome this.

Insurance

88. Unfortunately many business interruption policies respond only to "physical damage" and as such will not cover the loss or interruption in the event of forced closure or an inability to perform contracts, unless it is a result of physical damage to the business premises. The impact of Covid-19 would constitute an infectious disease but that does not form part of the normal scope of cover. The ABI issued a press release on 17 March 2020 as follows:

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
DX: DX 303 LDE www.4pumpcourt.com

89. There are extensions such as a notifiable diseases" extension or a "denial of access" extension. On 5 March 2020, Covid-19 was added to the list of "notifiable diseases" under law by the government. If a business has one of these extensions, the cover under such an extension is now available. It is unlikely any new extensions can be obtained. There is likely to be an argument, however, about whether closures are a response to government recommended social distancing (rather than being required by law). In my opinion, given the extent of the government advice/direction and the threat of compulsion if it is not followed, I believe a Court or Tribunal is likely to find that the closure because of direction from the Government to deal with the pandemic is likely to fall within the cover.

90. Some policyholders may be covered by an "all risks" policy which engages in respect of any losses suffered of a kind not excluded. That could provide scope for cover for private schools who have been forced to close by the Government. The policy wording will need to be checked to see if specifically excluded risks include communicable diseases. There may be a battle over whether the closure is due to government order to avoid the spread of communicable disease rather than the actual communicable disease.

What about whether Covid-19 can amount to Frustration/Force Majeure?

91. My view is that Covid-19 and the restrictions directed by the UK Government are events that (absent contractual provision about them) would be sufficient to amount to frustration of the contract but only if it has caused performance to be impossible or radically different, which inevitably be fact-sensitive.

92. However, that may be of little comfort to those who (a) want to stay in a contractual relation but be excused from any breach because of a temporary inability to perform and/or (b) are looking for financial protection from its effects. I suspect most businesses are not looking to escape from contracts, but rather to be excused for the time being from having to perform them: if so frustration at law (or force-majeure if their contracts are governed by a civil law jurisdiction) is the last thing they need.

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
DX: DX 303 LDE www.4pumpcourt.com

93. More helpful may be the contractual force-majeure or exceptional events clauses which provide a different range of remedies, some including suspension or excuse from breach or an extension of time: these have the advantage of a 'wait and see' approach rather than immediately killing the contract dead. Parties should check whether they have such provisions and follow them. For the many who do not have such provisions, in principle, there is nothing to stop parties who wish to remain in contract with one another, from agreeing to continue, but on the basis of a temporary suspension and no liability to one another (or such other terms as they may wish to negotiate). It may not be too late to agree this now whilst there is a shared interest in maintaining goodwill.

94. As for financial protection, unless you have terms in the contract for it, there is unlikely to be financial protection to recoup losses. What remains to be seen is the extent to which there is any effective insurance cover that will pay.

95. A particular worry is how insurers will respond. If insurers face enormous bills, I can foresee that they might seek to limit their losses by arguing that the underlying contract was frustrated. It may be relevant for insurers and policyholders (and businesses more generally) to consider whether "force majeure" clauses in their contracts could be engaged as a result of Covid-19 and how that impacts on any insurance cover.

What to do when there is Force Majeure

96. For the here and now, the contract clauses and insurance policies need to be considered in some detail to see what protection you may have.

97. For the future, prevention is better than cure. The Covid-19 pandemic teaches us that it would be sensible to have a robust contractual mechanism for major unexpected events. For future contracting choose the right terms for you if you can, and understand your rights when you negotiate the contract and have suitable procedures in place to be able to comply with the clause. As a contractor you are likely to want something similar to FIDIC with its financial remedies. You may prefer to a formulation similar to the Power Plant contracts of '*delays, prevents, or hinders*' rather than absolute 'prevention'. The key is to make your terms bespoke to your project and the potential exceptional risks. You will need to price those risks – possibly by choosing a contingency price that only becomes payable if an event occurs. Likewise it is important to choose an appropriate independent decision maker to decide disputes particularly where there is likely to be disagreement about whether political force majeure events exists where the other party is a state entity.

98. Your personnel operating the contract at site level need to be familiar with, and not afraid to, utilise the contractual provisions.

99. Of utmost importance is the requirement to communicate by notice as soon as you believe a force majeure event has occurred. The timescale available for doing so is often very short. A failure to give notice on time can lead to you losing protection.

100. You will need to keep a constant eye on the news and public domain for warnings of trouble ahead and the impact. Indeed this may help to provide objective evidence of the event and its likely impact. And it will often be a useful indicator of when time begins to run for the purposes of notice requirements.

101. Draw up a list of contingency plans and investigate alternative options for performance and be in a position to justify why those steps cannot be taken. If you fail to consider this, and be seen to consider it, your claim of force majeure will look weak in front of a Tribunal or Court later on. It is also sensible to maintain a dialogue with the other party so that alternatives can be explored. Often in the aftermath of an event parties are more likely to agree about the potential impact of an event – and this may become useful evidence later on when attitudes harden.

102. You should make sure that an effective diary of events and hindrances, and attempts to overcome them is recorded.

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
DX: DX 303 LDE www.4pumpcourt.com

Absent records which show prevention you may struggle to prove it.

103. You should keep under assessment the likely duration of the impact of the event. Remember you must take reasonable steps to mitigate the effect of the Force Majeure. Keep records of the actual expense or losses involved in taking such steps.

104. You will need to keep an eye on how long the event has lasted (you may need to give notice when the event has ended). It is sensible to record, if it is the case, that the impact from the event is continuing even though the event itself has ceased.

105. If the delay is prolonged you must consider the potential risk of a termination notice from the other side.

106. In practice the major obstacles to winning a force majeure argument:
It was not included in the list of events and is held to be an event that could reasonably have been protected against
• The performance is not impossible, and that alternative performance was possible, if only more onerous and expensive
• Failure to give notice
• A failure to collate adequate evidence of prevention and insufficient evidence to link the event with the ability to perform.
• A failure to take steps to be seen to be mitigating the effect.
• If the party invoking force majeure is in culpable delay or has not performed well, this is often invoked as the 'real' cause of the delay and force majeure is stigmatised as a false 'cry wolf'.

107. The Covid-19 pandemic has been overwhelming and at the moment appears to be a superior force. To defeat it without destroying our economic wellbeing parties will need to be very cooperative and understanding to limit the economic losses being felt by everyone.

APPENDIX – ICC Force Majeure Clause

1. Unless otherwise agreed in the contract between the parties expressly or impliedly, where a party to a contract fails to perform one or more of its contractual duties, the consequences set out in paragraphs 4 to 9 of this Clause will follow if and to the extent that that party proves:[a] that its failure to perform was caused by an impediment beyond its reasonable control; and[b] that it could not reasonably have been expected to have taken the occurrence of the impediment into account at the time of the conclusion of the contract; and [c] that it could not reasonably have avoided or overcome the effects of the impediment.

2. Where a contracting party fails to perform one or more of its contractual duties because of default by a third party whom it has engaged to perform the whole or part of the contract, the consequences set out in paragraphs 4 to 9 of this Clause will only apply to the contracting party:[a] if and to the extent that the contracting party establishes the requirements set out in paragraph 1 of this Clause; and [b] if and to the extent that the contracting party proves that the same requirements apply to the third party.

3. In the absence of proof to the contrary and unless otherwise agreed in the contract between the parties expressly or impliedly, a party invoking this Clause shall be presumed to have established the conditions described in paragraph 1 [a] and [b] of this Clause in case of the occurrence of one or more of the following impediments:
(a) war (whether declared or not), armed conflict or the serious threat of same (including but not limited to hostile

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
DX: DX 303 LDE www.4pumpcourt.com

attack, blockade, military embargo), hostilities, invasion, act of a foreign enemy, extensive military mobilisation;
(b) civil war, riot rebellion and revolution, military or usurped power, insurrection, civil commotion or disorder, mob violence, act of civil disobedience;
(c) act of terrorism, sabotage or piracy;
(d) act of authority whether lawful or unlawful, compliance with any law or governmental order, rule, regulation or direction, curfew restriction, expropriation, compulsory acquisition, seizure of works, requisition, nationalisation;
(e) act of God, plague, epidemic, natural disaster such as but not limited to violent storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tidal wave, tsunami, flood, damage or destruction by lightning, drought;
(f) explosion, fire, destruction of machines, equipment, factories and of any kind of installation, prolonged break-down of transport, telecommunication or electric current;
(g) general labour disturbance such as but not limited to boycott, strike and lock-out, goslow, occupation of factories and premises.

4. A party successfully invoking this Clause is, subject to paragraph 6 below, relieved from its duty to perform its obligations under the contract from the time at which the impediment causes the failure to perform if notice thereof is given without delay or, if notice thereof is not given without delay, from the time at which notice thereof reaches the other party.

5. A party successfully invoking this Clause is, subject to paragraph 6 below, relieved from any liability in damages or any other contractual remedy for breach of contract from the time indicated in paragraph 4.

6. Where the effect of the impediment or event invoked is temporary, the consequences set out under paragraphs 4 and 5 above shall apply only insofar, to the extent that and as long as the impediment or the listed event invoked impedes performance by the party invoking this Clause of its contractual duties. Where this paragraph applies, the party invoking this Clause is under an obligation to notify the other party as soon as the impediment or listed event ceases to impede performance of its contractual duties.

7. A party invoking this Clause is under an obligation to take all reasonable means to limit the effect of the impediment or event invoked upon performance of its contractual duties.

8. Where the duration of the impediment invoked under paragraph 1 of this Clause or of the listed event invoked under paragraph 3 of this Clause has the effect of substantially depriving either or both of the contracting parties of what they were reasonably entitled to expect under the contract, either party has the right to terminate the contract by notification within a reasonable period to the other party.

9. Where paragraph 8 above applies and where either contracting party has, by reason of anything done by another contracting party in the performance of the contract, derived a benefit before the termination of the contract, the party deriving such a benefit shall be under a duty to pay to the other party a sum of money equivalent to the value of such benefit.

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
DX: DX 303 LDE www.4pumpcourt.com