

## **How far can you push the boundaries of force majeure and walk away from a commercially non-viable contract, e.g., significant delay or inadequate inflation mechanisms?**

### **Introduction**

A force majeure clause (“**FMC**”) is the principle that where a certain event occurs which is outside a party’s control, that party is excused or suspended from all or part of its obligations. The party will not be liable for failure to perform said obligation(s).

A standard force majeure clause commonly included in Contracts, will offer relief to a contracting party from otherwise enforceable contractual obligations where an event has occurred which was unforeseeable and unavoidable, for example, a war or pandemic.

The key issues I am seeking to address in this paper are:

- (i) how far can parties reasonably hope to push the boundaries of FMCs?
- (ii) how important is the specific wording of the clause? and/or
- (iii) does the wording need to be specific?

## The Limitations of Force Majeure Clauses

*Force majeure* is a French legal principle, originating under the French civil law code. It is not (strictly speaking) a concept recognised under the general principles of our common law system – and has no recognised meaning in Irish (or English/Welsh) law, save where it is expressly incorporated into a contractual arrangement.

This being said, it is an increasingly recognised principle, where it has been expressly negotiated and articulated in the contract terms. It is not uncommon to see FMCs incorporated into commercial contracts, and more particularly in the wider construction industry. Invariably, agreements incorporating FMC provisions will only provide limited remedies, where the operation of that agreement becomes impossible to perform.

In the construction industry we see arguments being raised that even if no express FMC provision has been incorporated into the Contract that parties still have implied rights under the **doctrine of frustration** to avoid full compliance with the stated obligations of the Contract.

However, be warned that if you are promoting a frustration argument it will only have limited application, and where the circumstances arising are so severe that the party claiming relief can demonstrate that there has been a *Fundamental breach of the Contract* provisions. Irish and UK law differs here, as Irish law still recognises the concept of fundamental breach of contract (whereas the UK Courts do not), and it is commonly accepted that it is a very high bar of proof that is required to set aside an otherwise fully enforceable contract – as such frustration and fundamental breach tend to be ancillary, rather than stand-alone arguments.

### **Need to expressly incorporate the FMC terms into the Contract.**

As a general rule of thumb, FMC's must be expressly incorporated into contracts and cannot be implied into the contract. The English Courts have helpfully articulated that if a party seeks to rely upon an FMC it must be clearly defined, and failing this will be found to be ineffective – this requirement dates back 60 years to the 1953 decision of

***British Electrical and Associated Industries (Cardiff) Ltd. v Patley Pressings Ltd.***<sup>1</sup> Here the Court held that where a clause stated "the usual Force Majeure clauses shall apply" the court considered this void and therefore unenforceable.

Therefore, not only was it a requirement that the FMC was explicitly included in an agreement, **but** it must also be clearly defined in its wording.

Lawyers (and construction professionals) who are drafting FMC's which they are seeking to incorporate into Contracts must take care that you have fully discussed with your clients the scope of the FMC which is sought to be included, and have explained how narrowly or how broadly your client understands that the FMC will apply and be interpreted in the event of an *event* arising. Simply put this is not an exact science and expectations should be tempered.

To this end, consideration should be given as to whether the intention is for the FMC to be employer or contractor friendly.

In my firm, we regularly see employer-friendly clauses, which mimic the language below:

*"Force Majeure" for the purpose of this Contract shall mean an exceptional event which could not have been reasonably foreseen by the parties as at the Designated Date and which is beyond the parties' control, including:*

- (a) war, hostilities (whether war be declared or not), invasion, act of foreign enemies;*
- (b) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war;*
- (c) munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor's use of such munitions, explosive, radiation or radio-activity; and*

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<sup>1</sup> [1953] 1 WLR 280.

*(d) natural catastrophes such as earthquake, hurricane, volcanic activity and typhoon.*

*For the avoidance of doubt, COVID-19 (and any legislation, enactments, rules, order or exercise by the Government of its powers in relation to COVID-19) is a known event and risk is not an event, risk or circumstance which comes within this definition.*

*The Employer shall not be liable for any breach, non-performance or delay in performance of this Contract that is due to Force Majeure."*

In stark contrast a contractor friendly clause, as extracted from the FIDIC Yellow Book 2017 provides for "exceptional events" under Clause 18 and provides for:

*"Exceptional Event means an event or circumstance which:*

- (i) is beyond a Party's control;*
- (ii) the Party could not have reasonably have provided against before entering into the Contract;*
- (iii) having arisen, such Party could not reasonably have avoided or overcome;*  
*and*
- (iv) is not substantially attributable to the other Party.*

*An Exceptional Event may comprise but is not limited to any of the following events or circumstances provided that conditions (i) to (iv) above are satisfied:*

- (a) war, hostilities (whether war be declared or not), invasion, act of foreign enemies;*
- (b) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war;*
- (c) riot, commotion or disorder by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors;*
- (d) strike or lockout not solely involving the Contractor's Personnel and other employees of the Contractor and Subcontractors;*

- (e) *encountering munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity; or*
- (f) *natural catastrophes such as earthquake, tsunami, volcanic activity, hurricane or typhoon.*

As such, extreme caution should be exercised when incorporating FMC clauses, and particular attention should be paid to ensure that (unless intentional), the language deployed is clear and not equivocal, and not vague language, which does not specify the precise force majeure events which will trigger the contract. Where a contract includes wording noting that the FMC events are a non-exhaustive list of trigger events, then this leaves the contract open to wider interpretation and ambiguity as to the trigger events beyond those listed.

Care needs to be taken at drafting stage not to push the boundaries of an FMC where the plain English does not permit it. For example, if an FMC states that the force majeure event must "prevent" performance, the relying party must demonstrate that performance is impossible, not just difficult.<sup>2</sup> Similarly, the English courts have accepted that where an FMC states that if a party is "unable" to complete performance due to a force majeure event arising then this creates a higher bar, and would not trigger an event if the relying party was simply hindered or delayed in its performance of the Contract. The courts will seek to examine whether the force majeure event materially undermined the commercial viability of the contract.<sup>3</sup> This is really the key question in modern contracts.

Further, FMCs will in general be required to show that the event involved an aspect which was "beyond the control" of the relying party. The relying party cannot be responsible for the event, and it must have taken all reasonable steps to avoid or mitigate the consequences of such an event.<sup>4</sup>

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<sup>2</sup> *Tennants (Lancashire) Ltd v G.S. Wilson & Co. Ltd* [1917] AC 495.

<sup>3</sup> *NKD Maritime Ltd v Bart Maritime (No 2) Inc.* [2022] EWHC 1615 (Comm).

<sup>4</sup> *Channel Island Ferries Ltd v Sealink UK Ltd* [1988] 1 Lloyd's Rep. 323.

Issues of foreseeability of the event are critical to determination of whether an FMC event has arisen looking at the plain English wording of the FMC. While it is often presumed that there must be an unforeseen element for an FMC to be effective, this is not actually the case – and we have not found any Irish or English authority which supports this proposition or that it should be implied from the FMC itself.

It is our view that the parties should expressly include foreseeability wording in their FMC for it to be effective, and failure to do so will often result in cogent arguments being made that the alleged force majeure event was foreseeable at the time of contract and does not permit the relying party any relief.

When the English courts have examined the circumstances in which an FMC may be effective, they have accepted that *the event* can be found to have existed as of the date of entry into the contract and did not have to be *non-existent*. In the **2005 case of SHV Gas Supply & Trading SAS v Naftomar Shipping & Trading Co Ltd Inc**<sup>5</sup>, the court stated that the force majeure clause was not inapplicable where the event already existed at the date of contract; in that case problems had arisen for the Plaintiff due to bad weather resulting in a consequent berthing delay when the contract was made. It was argued that their likely ability to continue would have been known if there had been “*diligent inquiry*” – but the court dismissed the argument that the poor weather could have been foreseen citing **Navrom v Callitsis Ship Management SA (The Radauti) [1982]** 2 Lloyds Rep. 416 where Staughton J. stated that:

*“Some wars may be foreseen, some strikes and some abnormal tempests or storms. I would suggest it is more a question of causation, whether the incidence of a particular peril which could have been foreseen can really be said to have caused one party’s failure of performance.”*

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<sup>5</sup> [2005] EWHC 2528 (Comm).

Equally, where the FMC includes an unforeseen requirement, narrows the scope of the FMC and its application. The English courts require a degree of specificity to be deployed where the contract seek to incorporate foreseeability into the FMC. In **Great Elephant Corp v Trafigura Beheer BV (The Crudesky)**<sup>6</sup>, the court considered an FMC which stated “*unforeseeable act or event which was beyond the reasonable control of either party*”. The court found “*it does not seem to me that the word “unforeseeable” adds much to the concept of “within reasonable control”*”. Meaning that where the act was within a party’s control, then it was foreseeable.

### How do courts interpret Force Majeure Clauses?

As I have already mentioned FMCs must be in express terms and will not be implied, and accordingly courts have sought to interpret FMCs on a very limited application looking at the express wording in play. In **Coastal (Bermuda) Petroleum Ltd v VTT Vulcan Petroleum SA (No. 2) (The Marine Star)**<sup>7</sup>, the court held that the way to interpret an FMC was to look at the wording of the FMC and the contract and not to the parties’ general intention. In *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC and others*<sup>8</sup> the court held that a FMC was triggered by its own wording and that force majeure is “*not a term of art*”. Interpretation by the Courts will in all likelihood be similar to the manner of interpreting insurance contracts, where the court will look to the agreement as a whole and not seek to interpret the FMC in isolation.

Drafters need to be aware of the Latin maxim “*expressio unius est exclusio alterius*”, meaning expression of one thing excludes another and, by extension be aware that should a dispute later arise that a court will in all likelihood interpret the inclusion of specified events as excluding other events not similarly listed. As such a potentially relying party will want to try to ensure that the events stated are not deemed as an exhaustive list.

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<sup>6</sup> [2013] EWCA Civ 905.

<sup>7</sup> [1996] 2 Lloyds Rep. 383.

<sup>8</sup> [2010] EWHC 40.

Also the legal principle of the *ejusdem generis* rule, literally meaning “of the same kind”, needs consideration at the time of drafting the contract – as a list of specific words/events followed by the use of a general word, may result in the general words being confined to the category of the specific words used. For example, in **Tandrin**, the FMC stated “*any other cause beyond the Seller’s reasonable control*” and the court held this should be read in the context of the entire clause. Not just *any other cause* but also to any other cause which related to the specified events listed.

In **Tandrin**, the specific words were

*“act of God or the public enemy; war; insurrection or riots; fires; governmental actions; strikes or labour disputes; inability to obtain the aircraft materials, accessories, equipment or parts from the vendors”,*

Where the issue under consideration was an *economic downturn event*. The court found that none of the specified events were remotely connected with economic downturn or market circumstances, so it did not qualify as a force majeure event.

**Lessons from case law**

"But for" the Force Majeure

In *Classic Maritime v Limbungan*,<sup>9</sup> the Defendant, Limbungan, was contracted to deliver cargoes of iron ore pellets from Brazil to Malaysia in tonnage to be provided by Classic Maritime. The shipping period was to span over 2015 and 2016 and halfway through this period a dam burst; this restricted the ore from being mined.

Limbungan claimed that performance for the next five shipments was impossible. The relevant force majeure clause in this instance provided:

*"Neither the Vessel, her Master or Owners, nor the Charterers, Shippers or Receivers shall be responsible for... failure to supply, load... cargo resulting from: Act of God...floods...landslips...accidents at mine or production facility... or any other causes beyond the Owners', Charterers', Shippers' or Receivers' control; always provided that such events directly affect the performance of either party under this Charter Party."*

It transpired that Limbungan had intended to default on its shipments due to a lack of demand in Malaysia; and that this was not related to the dam bursting.

The Court of Appeal upheld the trial judge's decision that Limbungan could not rely on the FMC as it was required to demonstrate causation between the event and the non-performance. The trial judge distinguished between exception from liability and "contractual frustration" finding that the words "resulting from" meant that the party relying upon the exception had to show that **but for** the force majeure event, they would have performed.

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<sup>9</sup> [2019] EWCA Civ 1102.

### Cost of the Contract

The English courts have continuously found that even where there is a change in economic or market circumstances or if the profitability of the contract is affected, it will not then give rise to a force majeure event, unless expressly provided for.

### ***Tandrin***

Here, the purchaser was due to receive financing but due to the economic collapse of the world financial markets it could not obtain the necessary financing. The purchaser argued that this triggered the force majeure clause so it could not complete its purchase. The English High Court rejected this argument, on the basis that none of the events preceding the phrase "*any other cause beyond the seller's reasonable control*" in the force majeure clause were connected to the specific events mentioned. Further the FMC referred to "beyond the **seller's reasonable control**" [emphasis added], so the purchaser was not permitted to rely upon the FMC for recovery.

### ***Seadrill Ghana Operations Ltd v Tullow Ghana Ltd***<sup>10</sup>

The defendant in this instance sought to terminate its contract with the claimant. Tullow Ghana was due to hire a drilling rig from the claimant, however, the Government of Ghana had issued an order disallowing drilling of new wells in a particular area of water that was the subject of an offshore boundary dispute with the Ivory Coast. Tullow Ghana claimed this was a moratorium on drilling which was listed as a force majeure event in the contract. Seadrill Ghana claimed, that Tullow Ghana merely wanted to terminate the contract as it had become less commercially attractive. In or around the same time period, oil prices had collapsed and there was a subsequent reduction in demand for the hire of drilling rigs.

Similar to the court in ***Classic Maritime***, the English High Court held that the force majeure event must be the only cause of the default and could not rely on the FMC to terminate the contract where it was merely no longer commercially attractive.

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<sup>10</sup> [2018] EWHC 1640 (Comm).

***Thames Valley Power Ltd v Total Gas & Power Ltd***<sup>11</sup>

In this case, Heathrow Airport Limited put out to tender the contract to run and operate a combined heat and power facility at Heathrow for 15 years. The two successful bidders formed Thames Valley Power Limited to own and run the facility. The facility required a supply of gas and so Thames Valley sought bids and Total was successful. There was a complex pricing mechanism within the gas supply agreement and Thames Valley were required to pay for the minimum amount of gas, regardless of whether they required and took it.

Ten years after the date of the agreement, Total served a force majeure notice on Thames Valley stating that due to increasing prices of gas it would be “*uneconomic*” to supply gas under the agreement for large parts of the year. Total stated that unless there was a “*significant fall*” in the price of gas during autumn and winter, they would be unable to provide the gas going forward.

Total argued that a “sufficiently dramatic” increase in the market price of gas could amount to a force majeure circumstance. Total’s counsel submitted that there must be a point at which the market price becomes so high that it is commercially impracticable for Total to continue.

The court rejected this argument for a number of reasons, including that the force majeure event must have caused Total to be unable to carry out its obligations. Its obligations were to deliver the gas. The fact that gas had become more expensive, “even very greatly more expensive” did not amount to a force majeure event. Further, Total’s obligations were not related to the market price of gas nor was there any reference to its obligations being tied to the commercial viability of these prices.

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<sup>11</sup> [2005] EWHC 2208 (Comm).

The court cited *Tennants Lancashire Limited v Wilson CS & Co Ltd*,<sup>12</sup> where Lord Loriburn stating (in 2017) that:

*"The argument that a man can be excused from performance of his contract when it becomes 'commercially impossible' seems to me to be a dangerous contention which ought not to be admitted unless the parties plainly contracted to that effect."*

The court said that the case in hand is no exception and that companies must be aware of fluctuations and address these in much more explicit terms.

#### Epidemics and Pandemics

The advent of Covid-19 and the resulting question if it was a force majeure event, was ultimately a question that was and will be tied to the wording deployed by parties on a contract by contract basis. As such the date on which the contract was entered into and the wording deployed will require very careful consideration.

#### ***Fibula Air Travel Srl v Just-US Air Srl***<sup>13</sup>

Fibula was a Romanian company selling package holidays and Just-US also a Romanian company offering wet leases to commercial airlines. The parties had entered a wet lease agreement in December 2019. The lease was for a 6-month period from 1 April 2020 to 31 October 2020.

Fibula attempted to recover the security deposit due to measures imposed by the Romanian government. Fibula claimed that the agreement terminated the day before the first instalment was due to be paid due to these measures. In the injunction application, the court had to determine whether there was a relevant force majeure event. At the time Fibula was claiming the event, flights had not yet been suspended between Romania and Turkey. The court found that as the flights had not yet been

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<sup>12</sup> (1917) AC 495.

<sup>13</sup> [2020] EWHC 3048 (Injunction Application) and [2023] EWHC 1049 (Comm).

suspended, there was no force majeure event and Fibula was to pay the amount which had been due on 18 March 2020.

***NKD Maritime Ltd v Bart Maritime (No. 2) Inc.***<sup>14</sup>

In this case, Bart Maritime was the owner of a converted ore carrier but wished for it to be scrapped. Bart entered into a contract to sell the carrier to NKD, which was a company specialising in the acquisition of shipping tonnage for scrapping and / or recycling. It was agreed that the carrier would be scrapped and recycled in India.

The FMC in this instance applied if the seller was unable to "transfer title" in the vessel due to "restraint of governments". The English High Court determined that although, the Covid-19 restrictions imposed by the Indian government did qualify as a "restraint of government" for the purposes of the FMC, it did not render Bart Maritime unable to transfer title and the FMC was **not** triggered in this instance.

**What do the standard form contracts say?**

RIAI

In the RIAI standard form, force majeure is considered a 'relevant event' that may allow the party to claim an extension of time if they have been prevented or impeded from performing their obligations.

The only express reference to force majeure in the RIAI standard form contract is under clause 30 (Delay and Extension of Time). Clause 30 provides:

*"If in the opinion of the Architect the Works be delayed:*

*(a) by force majeure; or..."*

The contract does not have a definition for force majeure and does not set out events which may arise as a force majeure event.

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<sup>14</sup> [2022] EWHC 1615 (Comm).

Without amendment, this could lead to ambiguity as to what is a force majeure under the RIAI contract. Remembering in the UK the courts have held that a mere reference to force majeure is not sufficient to uphold its validity.<sup>15</sup>

### Public Works Contracts

The Public Works Contracts do not specifically permit for force majeure clauses. Yet during the pandemic the Office of Government Procurement issued guidance documents on events which under other contracts would qualify as force majeure events, and this included Covid-19 and inflationary pressures.

### JCT

Clause 2.26.14 defines force majeure as a 'Relevant Event'. It also arises under clause 8.11.1 as a termination event.

### FIDIC

The FIDIC 1999 suite defines force majeure under clause 19 as:

*"an exceptional event or circumstance:*

- (a) which is beyond a Party's control,*
- (b) which such Party could not reasonably have provided against before entering into 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.*

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<sup>15</sup> British Electric and Associated Industries (Cardiff) Ltd. v Patley Pressings Ltd

*Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied:*

- (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's Personnel and other employees of the Contractor and Sub-contractors,*
- (iv) munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity, and*
- (v) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity."*

Interestingly the 2017 suite provides an almost identical clause but does not reference force majeure; instead, the clause is titled '**Exceptional Events**'. It also further extends natural catastrophes to include tsunamis.

### NEC

The NEC contracts do not contain a FMC. However, under clause 60.1(19) (Compensation events) there is a provision for events 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 to have allowed for it; and is not one of the other compensation events stated in the contract. While this does not claim to be a FMC, it does have all the key elements of a FMC. Drafters should take care.

**Conclusion**

There is no stock answer on how far one might be permitted to push the boundaries of an FMC; but it does seem that courts are likely to look to the plain meaning of the words used and to the express language used, and not accept that any language is implied. They will also look at the entire contract and interpret FMC's on a case by case / clause-by-clause basis.

Drafters should take care and check your professional indemnity cover!