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THE CIVIL CODES AND COMMON LAW JURISDICTIONS COMPARED: GOOD FAITH AND FORCE MAJEURE

CONSTRUCTION PROJECTS FROM CONCEPTION TO COMPLETION

Jeremy Glover

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IBA CONSTRUCTION CONFERENCE, BRUSSELS

INTRODUCTION

One of the potential difficulties with international projects is that the contracts entered into are governed by laws which may be unfamiliar to one or other of the contracting parties. Therefore it is important that you do not make assumptions on either what particular clauses mean or as to which legal principles you can imply into that contract, as sometimes particular jurisdictions take an entirely different approach to that which you might have been expecting. This is particularly the case if you are familiar with English or Common Law jurisdictions and you are faced with a Civil Code, or vice versa.

The purpose of this paper is to consider the way in which the following two civil code concepts are treated under English law:

(i) Good faith; and

(ii) Force majeure.

GOOD FAITH

As the majority of you are from jurisdictions where the civil code prevails, there should be no need to define the concept of good faith. For example, Article 6:248 of the Dutch 1992 Civil Code provides that:

> A rule binding upon the parties as a result of the contract, does not apply to the extent that, in the given circumstances; this would be unacceptable according to the requirements of reasonableness and equity.

Thus the Dutch Courts have the ultimate sanction of being able to replace the effects of a contract (or a statutory provision) with a solution which is reasonable and equitable.

The commission on European contract law is trying to establish principles of European contract law. Article 1.106 of (1) of the principles reads:

> In exercising his rights and performing his duties each party must act in accordance with good faith and fair dealing.

The intention is that this rule runs through the entire contract, from negotiation to final ultimate completion. However that does not actually assist in establishing what good faith actually is. And this uncertainty is one of the main reasons why the English Courts are reluctant to deal with the concept.

The English Way

The insurance policy is one of the small number of types of contract, under English law, which are subject to the duty of utmost good faith. Under an insurance contract this means that each party is under an obligation:

(i) Not to misrepresent material facts; and

(ii) To disclose material facts even if no question has been raised about then.

The reason why insurance contracts require parties to act with the utmost good faith is because the contracts are based on knowledge solely in the sphere of the proposer or the insured. Thus, section 17 of the Marine Insurance Act 1906 confirms that the duty of utmost good faith applies to both parties, and sets out the consequences of any breach of that duty as follows:

> A contract of machine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

The duty of good faith has actually been around for over 200 years. In 1776, Lord Mansfield in the case of *Carter v Boehm*[1] said:

> Good faith forbids either party, by concealing what he privately knows to draw the other into a bargain from his ignorance of the fact, and his believing the contrary.

However this apparent policy statement was not followed by others. One reason for this might be the basic, and to many fundamental, issue of freedom of contract and the extent to which, if at all, the Court should interfere in the bargains made by the parties to the contract. For example, the Courts will be most unlikely to interfere with a contract because a party discovers he has made a bad bargain.[2]

Thus Jessel MR said:

[1] (1766) 97 ER 1162

[2] *C.P Haulage v Middleton* [1983] 3 All ER.

> …if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider - that you are not lightly to interfere with freedom of contract.[3]

Can You Imply A Duty of Good Faith?

Accordingly the English Courts, from a construction context (and indeed largely from a contractual context) do not recognise any separate duty of good faith. Vinelott J said:

> Although the courts will imply a duty to do whatever was necessary in order to enable a contract to be carried out, the requirement of good faith has not been incorporated into English law.[4]

To imply such a term at English law, the principles from the Australian case of *BP Refinery (Western Port) PTY Ltd* v *Hasting Shire Council*[5] must be followed:

(i) The term must be reasonable and efficacy;

(ii) The term must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it.

(iii) The term must be so obvious that "it goes without saying";

(iv) The term must be capable of clearing expressions;

(v) The term must not contradict any expressed term of the contract.

To Vinelott J, the concept of good faith in English law was restricted, in construction contracts, to the duty not to act fraudulently. Devlin J in the case of *Mona Oil Equipment Company v Rhodesia Railways*[6] was only prepared to go as far as co-operation and that co-operation was limited or restricted to doing what is required under the contract:

> I can think of no terms that can properly be implied other than one based on the necessity of co-operation. It is, no doubt, true that every business contract depends for its smooth working on co-operation, but in the ordinary business contract and apart, of course, from express terms, the law can enforce co-operation only in a limited degree to the extent that it is necessary to make the contract workable. For any higher degree of co-operation the parties must rely on the desire that both of them usually have that the business should get done.

The requirement to act in good faith is often seen as amounting to no more than an "agreement to agree" which is unenforceable. Reference is often made to House of Lords' decision in *Walford and others v Miles and another*.[7] That case considered in the context of lock out agreements whether the obligation to negotiate an agreement in good faith could be implied. The House of Lords decided not only that an obligation to negotiate an

[3] *Printing and Numerical Registering v Sampson* (1875) LR 19 Eq
[4] *London Borough of Merton v Leach* (1986) 32 BLR 51
[5] (1997) 52ALJR20
[6] (1949) 1014
[7] [1992] 1 All ER 453

agreement was unenforceable, but also that an obligation to negotiate such an agreement in good faith was similarly unenforceable.

In relation to the first issue, Lord Ackner stated that

> The reason why an agreement to negotiate, like an agreement to agree, is unenforceable is simply because it lacks the necessary certainty.

In relation to the second issue, according to Lord Ackner:

> A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party … In my judgment, while negotiations are in existence either party is entitled to withdraw from these negotiations, at any time and for any reason.

However, even co-operation can only go so far. Thus, the case of *Ultraframe (UK) Limited v Taylor Roofing Systems Limited*[8], provides a good example of the approach of the English courts. Here, TRS fabricated conservatory roofs and sold them on to installers. Ultraframe supplied the roof components. The parties entered into an exclusivity agreement. However, after a few months, Ultraframe began a campaign to induce customers of TRS to deal direct with them. Ultraframe offered price inducements to those customers. There was no express term which would make it a breach of contract for Ultraframe to make a deliberate concerted effort to persuade TRS's customers to switch business. TRS sought to imply a term that Ultraframe should act at all time and good faith towards them.

LJ Waller understandably noted that, at first sight, the conduct of Ultraframe appeared to be unmeritorious. However, the Court had to look at the actual contract and the problem for the Courts was that Ultraframe were considered to be indulging in a form of competition which fell outside normal healthy competition but was short of unlawful competition. If the Court was to imply a term into the contract, it would be dealing with matters for which the parties themselves made no provision. LJ Waller said:

> I would suspect that the lack of particularity of precisely what TRS would seek to impose on Ultraframe and the need to use words such as 'deliberate' or 'intentional' or 'good faith', all of which would in any event give rise to serious problems when considering what was or was not a breach, demonstrate that the framing of the term devoid was itself so difficult but as to make implication impossible.

Good Faith In Contracts

Although, good faith will not be implied by the courts, it is being found (and considered by the Courts) in an increasing number of contracts. For example, in the case of *Petromec Inc and Others. v Petrobras and Others*[9], the Court of Appeal had to consider the following contractual term:

> B agreed to negotiate in good faith with P the extra cost referred to in [the Contract]

The term was drafted by solicitors and expressly agreed by the parties. LJ Mance said:

[8] [2004] EWCA CIV 585
[9] [2005] EWCA Civ 891

> The traditional objections to enforcing an obligation to negotiate in good faith are (1) that the obligation is an agreement to agree and thus to uncertain to enforce, (2) that it is difficult, but not impossible, to say whether, if negotiations are brought to an end, the termination is brought about in good or in bad faith, and (3) that, since it can never be known if good faith negotiations would have produced an agreement at all or what the terms of any agreement would have been if it would have been reached, it is impossible to assess any loss caused by breach of the obligation. I doubt, however, if any of these objectives would be good reasons for saying that the obligations in negotiating good faith contained in clause 12.4 is unenforceable in this particular case.

There were two reasons for this. First the requirement was expressly agreed by the parties as part of a contract drawn up by lawyers. Second, the Court recognised that it would be able to calculate the cost referred to and so would be able to establish whether there was a lack of good faith on the part of anyone.

In the case of *ABB Ag v Hochtief Airport Gmb H and Another*[10], Mr Justice Tomlinson had to consider a challenge to an arbitrator's decision pursuant to section 68 of the 1996 Arbitration Act on the grounds of serious irregularity. This was an arbitration conducted under the LCIA rules. The seat of the arbitration was London. The arbitration was governed by Greek law. The dispute related to the transfer of shares and the ownership of Athens International Airport. One of the issues was whether during the course of the negotiations leading up to the consortium agreement, the parties were under an obligation to act towards one another in accordance with the obligations of good faith and loyalty. Article 207 of the Greek civil code provided that:

> A condition shall be deemed fulfilled if its fulfilment was impeded contrary to the requirements of good faith by the person who would have suffered a prejudice from its fulfilment.
>
> A condition shall be deemed not having been fulfilled if its fulfilment was brought about contrary to the requirements of good faith by the person who would have benefited by its fulfilment.

What mattered to the Court of Appeal was whether ABB had had the opportunity fairly to address whether *Hochtief* either did or could be said by ABB to have acted contrary to good faith in its actions. It was clear that ABB did have a fair opportunity. The tribunal considered the case and rejected it. Therefore the case failed. However it is clear that the Judge had no difficulty in considering the "good faith" argument made during the arbitration hearing.

There are an increasing number of construction contracts which now impose a duty of good faith. For example, the concept of good faith does sit quite easily with a number of the new arrangements in procurement, such as partnering or alliance relationships and for longer term relationships based on undertakings to act in good faith. With these long-term supply contracts, distribution systems based upon franchises, employment relationships and term contracts there is a need to evolve mechanisms for recognising and supporting expectations for flexibility, co-operation and to support the development of such long-term relationships.

[10] [2006] EWHC 388

Clause 10.1 of the NEC Third Edition states:

> The Employer, the Contractor, the Project Manger and the Supervisor shall act as stated in this contract and in a spirit of mutual trust and cooperation.

This comes close to a requirement to act in good faith. It should be noted that the first part of clause 10.1 requires the parties to act in accordance with the provisions of the contract. Thus, the requirement for the parties that act in a partnering context does nothing to change their respective responsibilities under the contract as a whole.

In addition, the NEC does not actually define what it means by "mutual trust and cooperation".[11] Thus there may be a question mark over the enforceability of this clause. For example in the case of *Bedfordshire County Council v Fitzpatrick Contractors Limited*[12] Dyson J would not imply a term into a road maintenance contract that neither party should conduct itself in such a way that would "damage the relationship of confidence and trust" between them. One reason for this was the care taken by the parties to detail out the terms which were to govern their contract. Thus there was no scope to imply this further relationship.

Of course, as will be clear from the above, there is a difference between implying a term and enforcing a term which the parties have agreed upon. Therefore, it is likely that the courts will consider the term, although they may well be met by doubts that the clause is to uncertain to be enforceable.

And in so considering, it does appear that the English Courts will pay attention to the intentions of the parties. Thus, in *Birse Construction v St David Ltd* [13] HHJ LLoyd QC held that the terms of a Partnering Charter' which was not and was never intended to be a binding contract, even though it had been signed by the parties:

> Though clearly not legally binding, are important for they were clearly intended to provide the standard by which the parties were to conduct themselves and against which their conduct and attitudes were to be measured.

The Judge accordingly considered the conduct of the parties in the context of the Partnering Charter in deciding when and whether a contract had been concluded.[14]

Indeed, Lord Hobhouse in *Manifest Shipping v Polaris* [15]said:

> Having a contractual obligation of good faith in the performance of a contract presents no conceptual difficulty in itself. Such an obligation can arise from an implied or inferred contractual term. It is commonly the subject of an express term in certain types of contract such as partnership contracts.

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[11] In fact, the explanatory guidance notes merely state that the requirement was added on the recommendation of the 1994 Latham report entitled "Constructing the Team".

[12] (1998) CILL 1440

[13] [1999] BLR 194

[14] This first instance decision was over-turned on appeal, although the Court of Appeal did not deal with the comments made by the Judge on the charter itself.

[15] [2001] 1 All ER 743

So what if you have a long term arrangement or contract which requires that you negotiate in good faith or using reasonable endeavours in order to extend that relationship? Negotiations, whether conducted in good faith or conducted using reasonable endeavours, mean more and involve more than an invitation to take part in a tender process. A typical definition of negotiations can be found in *Capital Court Health Limited v New Zealand Medical Laboratory Workers Union Inc*[16], where Hardie Boys J stated:-

> Negotiations are as I have said a process of mutual discussion and bargaining, involving putting forward and debating proposal and counter-proposal, persisting, conceding, persuading, threatening, all with the objective of reaching what will probably be a compromise that the parties are able to accept and live with.

The area of tender negotiation is obviously important. In the case of *Fairclough Building v Borough Council of Port Talbot*[17], the Court of Appeal held that:

> It was the duty, in my judgment, of the Defendants honestly to consider the tenders of those whom they had placed on the short-list, unless there were reasonable grounds for not doing so.

The New Zealand case of *Pratt Contractors Limited v Transit New Zealand*[18] arose from a dispute over a claim for damages by Pratt in relation to competitive tendering procedures adopted for a state highway contract in New Zealand. Having failed with its tender, Pratt alleged that the terms of the request for tenders gave rise to a preliminary contract which laid out certain expressed and implied terms in relation to the selection of the successful tenderer. Pratt said that Transit had been in breach of those terms. Pratt found out that its bid had been scored by the tender valuation team on a similar footing to that of the successful party. Pratt was also thought by some parties to practice low balling, which is tendering a low price to obtain the contract in the expectation of being able to make a profit by making aggressive claims for all additional payment. Indeed, the decisive factor against Pratt had been the perception that they were more litigious and aggressive than the successful party. Pratt duly lived up to its reputation taking the case through every stage of appeal.

The Privy Council did not have to consider whether the tender proposal did give rise to a preliminary contract as the parties agreed that it did and that implied within that contract were the duties to act fairly and in good faith. This disagreement was over what acting fairly and in good faith was.

In his judgment, Lord Hoffman considered the implied duty to act fairly and in good faith which had been the subject of discussion in a number of commonwealth authorities. Slightly unhelpfully in *Pratt Contractors Limited v Palmerston North City Council*,[19] Gallen J had said that Fairness was "a rather indefinable term". In the Australian case of *Hughes Aircraft Systems International v Air Services Australia*[20] Finn J had said that the duty in

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[16] 1 NZLR 7 at 19

[17] [1992] 62 BLR 86

[18] [2003] UKPC 83

[19] [1995] 1NXLR 469

[20] [1997] 146ALR1

cases of preliminary procedural contract of dealing with tenders was a manifestation of a more general obligation to perform any contract fairly and in good faith. However, in the Pratt case it was accepted in general terms that such a duty did exist.

Lord Hoffman held:

> The duty of good faith and fair dealing is supplied to that particular function [evaluating the tender] required that the evaluation ought to express the views honestly held by the members of the TET. The duty to act fairly meant that all the tenderers had to be treated equally. One tenderer could not be given a higher mark than another if their attributes were the same. But Transit was not obliged to give tenderers the same mark if they honestly thought that their attributes were different. Nor did the duty of fairness mean that Transit were obliged to appoint people who came to the task without any views about the tenderers, whether favourable or adverse. It would have been impossible to have a TET, to perform its function unless it consisted of people with enough experience to have already formed opinions about the merits and de-merits of ..... contractors. The obligation of good faith and fair dealing also did not mean that the TET had to act judicially. It did not have to accord Mr Pratt a hearing or enter into a debate with him about the rights and wrongs of, for example, the Pipiriki contract. It would no doubt have been bad faith for each member of the TET to take steps to avoid receiving information because he strongly suspected that it might show his opinion on some point that was wrong. But that is all.

The Australian Experience

The Australian experience is different to that in England and the Australian jurisdiction has moved far further down the road to accepting good faith. Indeed, in Australia there does appear to be a contractual duty of good faith. This dates from the judgement (given in the New South Wales Court of Appeal) of Priestley JA in 1992 who said that:

> ... people generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard, and anything less is contrary to prevailing community expectations. [21]

Although, this is not yet a question that has been examined by the High Court of Australia, the same NSW Court of Appeal in the case of *Burger King v Hungry Jack's PTY Ltd*[22] confirms that the courts in the various Australian jurisdictions:

> have ... proceeded upon an assumption that there may be implied, as a legal incident of a commercial contract, terms of good faith and reasonableness.

Renard JA defined good faith thus:

> ... in ordinary English usage there has been constant association between the words fair and reasonable. Similarly there is a close association of ideas between the terms unreasonableness, lack of good faith and unconscionability.

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[21] *Renard Constructions (ME) PTY Ltd v Minister for Public Works* - (1992) 26 NSW LR 234.

[22] [2001] NSWCA.

The use of the word "unconscionability" is interesting as the Part IV of the Australian Trade Practices Act 1974 contains three sections, 51AA, AB and AC which prohibit corporations from engaging in unconscionable conduct. Section 51AC was added to the Trade Practices Act in 1998 following concerns that existing statutory and common law causes of action did not adequately protect small businesses against unfair or exploitative conduct. Section 51AC proscribes "conduct that is, in all the circumstances, unconscionable" in connection with dealings with small businesses. It prohibits conduct in trade or commerce in connection with the supply or possible supply of goods or services (not exceeding AUS$3million in value) to a person or corporation (other than a publicly listed company)

Section 51AC also contains a non-exhaustive list of factors that the courts may consider when determining if a given course of conduct is unconscionable. These are:

(i) the extent to which the supplier's conduct towards the business consumer was consistent with the supplier's conduct in similar transactions between the supplier and other like business consumers;

(ii) the requirements of any applicable industry code;

(iii) the requirements of any other industry code if the business consumer acted on the reasonable belief that the supplier would comply with that code;

(iv) the extent to which the supplier unreasonably failed to disclose to the business consumer, any intended conduct of the supplier that might affect the interests of the business consumer or any risks to the business consumer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer);

(v) the extent to which the supplier was willing to negotiate the terms and conditions of any supply contract; and

(vi) the extent to which the supplier and the business consumer acted in good faith.

Thus the Australian legislation is moving in the same direction as the Australian judiciary in adopting the requirement that contracting party's should act in good faith towards one another.

Good Faith - Conclusion

One of the features of the Common Law is its ability to adapt. Thus in the case of *Full Metal Jacket Limited v Gowlain Building Group Limited*[23], Lady Justice Arden said:

> The Courts must keep the principle applying to the interpretation of contract up-to-date like any other branch of law. It may be that in the future the law will develop so that evidence such as subsequent contact is admissible interpretation of certain types of contract, or that certain types of subsequent conduct are admissible in interpretation. However, Courts have not taken that step…

[23] [2005] ALL ER (D) 147

With good faith it is apparent that the Courts are comfortable in addressing the concept when it forms part of the contract agreed by the parties. The questions is hether (in time) such an approach will lead to the English courts following the lead of the Courts elsewhere.

FORCE MAJEURE

The situation in relation to force majeure is far more straightforward. Again, there is a difference in the way that force majeure is treated in common and civil law jurisdictions. Whilst most civil codes make provisions for force majeure events, at common law, force majeure is not a term of art and its meaning is far from clear. No force majeure provision will be implied in the absence of specific contractual provisions and the extent to which the parties deal with unforeseen events will be defined in the contract between them.

Thus without a specific clause, there will not necessarily be relief for force majeure events.

The aim of the force majeure clause is to exempt a party from performance on the occurrence of a force majeure event. Commercially the clause is there to address risks which cannot necessarily be economically insured and which are outside the control of the parties to the contract. There are, of course, many definitions of that force majeure event. For example, in the case of *Atlantic Paper Stock Ltd v St Anne-Nackawic Pulp and Paper Co*[24], Dickson J in the Supreme Court of Canada said that:

> An act of God or force majeure clause, … generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond the control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill.

According to Keating on Construction Contracts[25], the English Courts following the decision of McCardie J in *Lebeuaupin v Crispin*[26] have adopted the following meaning of force majeure as provided by Goirand (a French lawyer):

> This term is used with reference to all circumstances independent in the will of man, and which it is not in his power to control … thus, war, inundations and epidemics are cases of force majeure; it has even been decided that the strike of workman constitutes a case of force majeure.

However attendance at football matches or funerals will not be covered by force majeure.[27] According to Bailhache J such events are:

> the usual incidents interrupting work, and the defendants in making their contract no doubt took them into account.

[24] [1976] 1 SCR 580

[25] 8th Edition, paragraph 9-111

[26] [1920] 2KB 714

[27] *Matsouki v Priestmore Co* [1915] 1KB 681

The typical contractual regime in England can be found with the JCT[28] scheme of contracts. These were revised in 2005 and a new suite of contracts has been introduced. For those of you familiar with previous versions, the Standard form of Building Contract 1998 edition has been replaced with what is known as the Standard Building Contract or SBC. The SBC regime does include force majeure at item 13 of the list of relevant events, which may entitle a contractor to an extension of time, to be found at clause 2.29. No definition of force majeure is provided.

However, McCardie J also said that a force majeure clause should be construed in each case with close attention to the words which proceed or follow it. The effects of a force majeure clause will thus vary with each contract. This is particularly the case with clause 2.29 of the SBC as amongst the other relevant events are exceptionally adverse weather conditions, specified perils, civil commotion or terrorism, strike and the execution by the UK government of any statutory power which directly affects the execution of the works after the base date.[29] Thus, the authors of Keating consider that the force majeure clause here has a "restricted meaning" because of the other type of matters which might typically fall within the definition of force majeure are expressly dealt with in the contract.

At the other end of the scale, the HM Treasury advice on the standardization of the PFI contracts[30] limits force majeure events to the following:

> 5.4.1.2:
>
> (a) war, civil war, armed conflict or terrorism; or
>
> (b) nuclear, chemical or biological contamination unless the source or cause of the contamination is [the result of actions of the Contractor]; or
>
> (c) pressure waves caused by devices traveling at supersonic speeds.

Of course, the force majeure events must directly cause either party to be unable to comply with all or a material part of its obligations under the contract. Thus although, the authors of Keating consider that the definition of force majeure under the SBC standard form must be somewhat restricted when taken in the context of the other delaying events, by not defining what force majeure means, the approach of the SBC is far less restricted than the UK government would allow in any PFI contract. Indeed, the aim of the PFI proposed condition is to define and limit and the events for which an extension of time would be granted and also to avoid generic descriptions such as "events out with the contractors control" to thereby impose some form of limit on the proposed clause. Thus, the contractor will have to bear the apparently higher level of risk, something which will no doubt, be reflected in the ultimate contract price.

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[28] The Joint Contracts Tribunal includes representatives from the Royal Institute of British Architects, the Building Employers Confederation, the Royal Institution of Chartered Surveyors, the Association of County Councils, the Association of Metropolitan Authorities, the Association of District Councils, the Specialist Engineering Contractors' Group, the National Specialists Contractors Council, the Association of Consulting Engineers, the British Property Federation and the Scottish Building Contract Committee.

[29] Clause 2.29.8-12

[30] Version 3, April 2004

The FIDIC Form

The definition of force majeure provided in the new FIDIC form at clause 19 is more widely and, perhaps fairly, drawn. Clause 19.1 defines a force majeure event thus:

> (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.
>
> 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.

The broad definition of force majeure to be found here reflects the basic premise of a force majeure clause namely that it to serve to exempt party from performance on occurrence of a false majeure event.

One problem with the FIDIC form, is that there is a risk of potential overlap and/or contradiction between sub-clause 19.1 and the definition of force majeure, which one can find in the civil codes of most, if not all, civil law jurisdictions. For example, the definition of force majeure under the Quebec civil code is much narrower in scope. Article 1470 simply provides that:

> A superior force [in the French version, force majeure] is an unforeseeable and irresistible event, including external causes with the same characteristics.

This has lead one commentator to express caution that "*incorporating a clause such as Clause 19 into a contract not only duplicates what is usually provided for in the civil code of a civil law jurisdiction, but also enlarges the scope of the meaning and application of force majeure. This could result in the Parties getting into a muddle and a contradictory*

situation".[31] In any event, the Particular Conditions note that the Employer should verify, before inviting tenders, that the wording of Clause 19 is compatible with the law governing the Contract.

In fact, there was no specific force majeure clause in the Old Red Book FIDIC 4th Edition. However, the Contractor was afforded some protection by Clause 65 which dealt with special risks including the outbreak of war and Clause 66 which dealt with payment when the Contractor was released from performance of its contractual obligations. The scheme of the FIDIC form is that the party affected, which is usually the Contractor but could here be the Employer, is entitled to an extensions of time are due and (with exceptions) additional cost where a "force majeure" occurs.

For Clause 19 to apply, the force majeure event must prevent a Party from performing any of its obligations under the Contract. The now classic example of this is the refusal of the English and American courts to grant relief as a consequence of the Suez crisis during the 1950's. Those who had entered into contracts to ship goods were not prevented from carrying their contractual obligations as they could go via the Cape of Good Hope even though the closure of the Suez Canal made the performance of that contract far more onerous.

Clause 19.7 of the FIDIC form is also of interest. Here, the parties will be released from performance (and the Contractor entitled to specific payment) if (i) any irresistible event (not limited to force majeure) makes it impossible or unlawful for the parties to fulfil their contractual obligations, or (ii) the governing law so provides. It acts as a fall-back provision for extreme events (i.e., events rendering contractual performance illegal or impossible) which do not fit within the strict definition of force majeure laid out under sub-clause 19.1. It also grants the party seeking exoneration the right to rely on any alternative relief-mechanism contained in the law governing the contract.

If English law applies, following the landmark case of *Davis Contractors v. Fareham UDC*, the affected party will be able to rely on the common law concept of frustration, which "*occurs whenever the law recognises that without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract*".[32] Here, the contract was to build 78 houses for a fixed price in 8 months. Because of labour shortages and bad weather, it took the contractor 22 months to build the houses. It was held by the House of Lords that the contract had not been frustrated. To claim frustration, therefore, it will not be enough for a contractor to establish that new circumstances have rendered its contractual performance more onerous or even dangerously uneconomic.

For frustration, what is required is a radical turn of events completing changing the nature of the contractual obligations. It is a difficult test to fulfil, but not as difficult as that of sub-clause 19.4 (force majeure) or the first limb of sub-clause 19.7 which both refer to the concept of impossibility (or illegality). To take the example put forward by A.Puelinckx of

[31]Professor Nael Bunni - FIDIC's New Suite of Contracts - Clauses 17 to 19 – available on the FIDIC website

[32] Davis Contractors Ltd v Fareham UDC 2 All ER 145 at 160, HL, per Lord Radcliffe

a wine connoisseur signing a contract for the construction under his house of a very sophisticated wine cellar.[33] If the house is burned down before execution of the contract, leaving the basement part in perfect condition, this will certainly be considered frustration under English law. However, no claim could be put forward under a strict interpretation of sub-clauses 19.4 or 19.7 as the house could in theory be rebuilt and the contractual obligation to build the cellar performed. French law would apply the same reasoning as sub-clauses 19.4 or 19.7 and because performance is still possible, would hold the above-described events as a mere *imprévision*, which will not afford any financial relief to the affected party.[34]

What is common to both the notion of frustration and that of force majeure as interpreted under English law though, is that no relief will be granted in case of economic unbalance. A recent illustration concerning the interpretation of a force majeure clause under English law can be found in the case of *Thames Valley Power Limited v. Total Gas & Power Limited.*[35] Here there was a 15-year exclusive gas supply contract between Thames Valley Power Limited (buyer) and Total Gas & Power Limited (supplier) for the operation of a combined heat and power-plant at Heathrow Airport. Clause 15 of the supply contract provided in part as follows:

> if either party is by reason of force majeure rendered unable wholly or in part to carry out any of its obligations under this agreement then upon notice in writing […] the party affected shall be released from its obligations and suspended from the exercise of its rights hereunder to the extent that they are affected by the circumstances of force majeure and for the period that those circumstances exist […].

The supplier sought to rely on Clause 15 to stop supplying gas at the contract price as the market price for gas had increased significantly and rendered it "uneconomic" for the supplier to supply gas. Christopher Clarke J, however, found that:

> The force majeure event has to have caused Total to be unable to carry out its obligations under the [agreement]. […] Total is unable to carry out that obligation if some event has occurred as a result of which it cannot do that. The fact that it is much more expensive, even greatly more expensive for it to do so, does not mean that it cannot do so.

Clause 19 would certainly be interpreted in much the same way by English courts. In large projects where the performance of the parties' contractual obligations is spread over several years, the parties might thus consider whether or not to add a hardship clause to the contract which will stipulate when and how the parties will rearrange the contractual terms in the event the contract loses its economic balance.

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[33] Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschä-ftsgrundlage, Unmöglichkeit, Changed Circumstances :A Comparative study in English, French, German and Japanese Law Journal of International Arbitration, Vol. 3 No. 2 (1986), pp. 47 - 66

[34] Can de Cassation, 6 mars 1876 (Canal de Gapomme). This decision is to be contrasted with the position taken by the French Administration Tribunals regarding contracts with a French Public Body, where the affected party may be able to claim an additional sum of money to compensate for the effect of the *"imprévision"* [Conseil d'Etat, Gaz de Bordeaux, 30 mars 1916].

[35] (2006) 1 Lloyd's Rep 441

The FIDIC form has, however, made some potential provision for this by way of sub-clauses 13.7 and 13.8. If included as part of the Contract, these sub-clauses entitle a Contractor to time and money as a consequence of any impact of changes in legislation and make provision for increased cost due to inflation.

The NEC 3rd Edition

Finally, there is the NEC form, whose third edition was published in July 2005. At first look, the new NEC form does not include a force majeure event. However, reference to the guidance notes shows that clause 60.1(19) qualifies as a force majeure event. This clause refers to events which:

- Stops the Contractor from completing the works or
- Stops the Contractor completing the works by the dates shown on the Accepted Programme, and which
- Neither Party could prevent,
- An experienced Contractor would have judged that the contract dates 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.

Thus it looks very much like a force majeure clause and that is exactly what it is. Indeed the reference to the Guidance Notes confirms this explicitly referring to "force majeure".

The drafting of this compensation/force majeure event is plainly very broad. Indeed maybe it is too broad. Therefore, it may well be that this is exactly the type of clause that many employers will seek to delete or revise.

Conclusion – Force Majeure

The advantage that the common law has over the civil codes is that the parties are bound by the contractual routes they choose to adopt. There is therefore far less risk of potential overlap with the provisions of the civil codes, which might serve to expand or restrict the approach the parties may have thought they had chosen to adopt. Force Majeure is one such issue and you should always check whether your contractual definition is altered in any way by the Local Civil codes, if they apply.

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Jeremy Glover

Fenwick Elliott LLP