ARE YOUR FORCE MAJEURE CLAUSES IN NEW CONTRACTS "PANDEMIC PROOF"? PERSPECTIVES FROM BRAZILIAN AND ENGLISH LAW

For a single oil and gas project multiple contracts are required to get the job done. These start from the operators, main contractors and eventually down to the plethora of subcontractors. In this mix no one ever expects a uniform approach to force majeure terms across the contracts.

Each one is typically negotiated by different parties up and down the line, with different laws applying to disputes. Perhaps before COVID-19, the problems these inconsistencies had the potential to create may not have been obvious. Having lived through a global pandemic for more than a year now, we have seen all manner of arguments used to justify the application (or not) of force majeure.

What does this mean for new force majeure clauses going forward? To help answer this question, we look to Brazilian and English law - two very different legal systems, but often seen in the same contracting chain for oil and gas projects in Brazil.

Brazilian Law – we're a long way off

While you may have contract terms providing force majeure relief, these will have to be construed alongside the Civil Code which deals with force majeure in several articles setting out what the debtor's responsibility are in non-compliance with the obligation when they are present. What must be shown is that the force majeure effects could not have been prevented, and it exempts the person responsible for the breach of the contract from being liable for the losses caused by its breach. Currently, there is little guidance from Brazilian Courts regarding the applicability of force majeure clauses to COVID-19 related events. As such, we unfortunately cannot look towards the Court for guidance in drafting future force majeure clauses. We are therefore a long way off from the Brazilian courts providing a final and unappealable definitive guidance through jurisprudence.

English Law – one size does not fit all

As a matter of English law, force majeure is a creature of contract. So close attention will be paid to what the actual provision says. If the force majeure clauses are not uniform (as is often the case), there will not be any 'one size fits all' definitive guidance from the English courts. As one Lord Justice noted in a judgment from the Court of Appeal for force majeure provisions, it is 'not the label but the content of the tin' that is important when construing these provisions.

So any guidance from the English courts on force majeure will certainly be more focused on contract construction than anything broader.

The Future of Force Majeure Clauses in a COVID-19 World

All this leaves parties negotiating new force majeure clauses in a position where the only reference points are shared histories of what happened in the world since early 2020. A typical force majeure definition tends to include a pandemic exception provided that it was unknown at the time of contracting. If such a clause is agreed today, new events that may subsequently arise from the known pandemic are likely to be excluded. What perhaps became readily apparent during 2020 and so far in 2021 is that COVID-19 has not gone away. It should be accepted by all that it will remain a reality for some years to come. While temporary periods of respite did come, so did waves of resurgence, leading to delays in completion of works. With this in mind, what questions should you be asking?

- Will your new force majeure clause include or exclude these new events?
- Should you also be reconsidering the maximum number of force majeure days, after which a party might have a right to terminate?
- Should new COVID-19 events be treated entirely separately from the force majeure regime allowing a party a right not just to claim time, but also compensation in certain circumstances?
- It is notable that the Brazilian Civil Code does allow for compensation for hardship under certain circumstances (outside force majeure).

Oil and gas project contracts tend to be detailed and project specific, and frustration rarely arises under these contracts which are subject to English law. Against this background of well-developed contracts, it will not be out of place to revisit and reconsider force majeure clauses, in order to make them work for the benefit of both parties in the world as it is today.

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