

@DLS CONSULTANCY SEMINAR ON CURRENT ISSUES  
AFFECTING THE CONSTRUCTION INDUSTRY

# LEGAL IMPLICATIONS OF THE RECENT LAND SAND EXPORT BAN ON EMPLOYERS

*presented by*

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## What is “*force majeure*”

- Expression of French origin
- “greater force” or “irresistible compulsion or coercion”
- A defence to claim for damages for breach of contract

## What is “*force majeure*”

- Needs to show that event:
  - made performance impossible
  - was unforeseeable
  - was unavoidable in occurrence and effects



## What is “*force majeure*”

- No precise meaning under English law
- Does not give rise to any special legal doctrine or consequences
- Available only where contract provides
- Use of expression “*force majeure*” by itself of little meaning in English law
- eg. “subject to *force majeure* conditions” or “usual *force majeure* clauses to apply” – void for uncertainty

## What is “*force majeure*”

- Construed to cover acts of God, war and strikes, embargoes, refusals to grant licences, abnormal weather conditions
- Caveat – parties cannot invoke *force majeure* clause if they are relying on their own acts or omissions



## What is “*force majeure*”

- *Sonat Offshore SA v. Amerada  
Hess Development Ltd (1987)*  
39 BLR 1

**Sonat Offshore SA v. Amerada Hess  
Development Ltd (1987) 39 B.L.R. 1**

- *Force majeure* clause entitled Sonat, an oil rig operation, to payment ‘...when performance is hindered or prevented by strikes (except contractor induced strikes by contractor’s personnel) or lockout, riot, war (declared or undeclared), act of God, insurrection, civil disturbances, fire, interference by any Government Authority or other cause beyond the reasonable control of such party...’
- English Court of Appeal held – it does not include Sonat’s negligence



## What is “*force majeure*”

- *Sonat Offshore SA v. Amerada Hess Development Ltd* (1987)  
39 BLR 1
- *Lebeaupin v Richard Crispin and Company* [1920] 2 K.B. 714



**Lebeaupin v Richard Crispin and Company**  
**(1920) 2 K.B. 714**

- Seller contracted to supply 5000 cases of 'British Columbia fraser river salmon' in 2 contracts with terms that salmon was to be packed in ½ lb tins by the St. Mungo Cannery and acme cannery
- Seller failed in its deliveries because the run of fish had ceased
- Held – Seller was not entitled to rely on *force majeure* clause to release itself of its obligation to supply the fish

*Lebeaupin v Richard Crispin and Company*  
(1920) 2 K.B. 714

- *force majeure* clause provided - seller was entitled to cancel the contract “in the event of destruction, or partial destruction, of the cannery, plant, or material, or the packing being interfered with, or stopped, or falling short through short run of fish, or through strikes or lock-out of fishermen or workmen, or from any cause not under the control of the canners or shippers ... causing non-arrival at destination”



**Lebeaupin v Richard Crispin and Company**  
**(1920) 2 K.B. 714**

- Court found that there was no failure of the fish crop at all
- In fact, the fish crop was larger than usual
- Reason for default was the omission of St. Mungo Cannery to provide good tins and the deliberate choice of Acme cannery to pack 1 lb. tins in priority to ½ lb

## Construction of *force majeure* clause

- *Contra proferentum* rule - if there is an ambiguity in any document, the ambiguity is to be construed against the person who drafted the document
- But, parties can contract out



# Construction of *force majeure* clause

## Article 7 of SIA standard form of contract - INTERPRETATION AND GUIDANCE NOTES

The Contract Documents shall be read and construed as a whole, and no special priority other than that accorded by law shall apply to any one document or group of documents, nor shall the *contra proferentem* rule apply either to these Articles or to the conditions of Contract. ...

## Construction of *force majeure* clause

- *Ejusdem generis* rule - words of a general class, following words of a specific or particular class, will be treated as having the same meanings as the words of the specific or particular class



## Construction of *force majeure* clause

- When a broad “catch-all” phrase, such as “anything beyond the control of the parties”, follows a list of more specific *force majeure* events, the catch all phrase will be limited to events analogous to the listed events

## Construction of *force majeure* clause

- Rule would not be applied unless the words in the provision concerned is capable of constituting a particular class
- *Henry Boot Construction Ltd v Central Lancashire New Town Development Corporation* [1980] 15 BLR 1 – “delay on the part of artists, tradesmen or others engaged by the employer”



## *Force majeure* provisions under the standard forms of contracts

- SIA standard form of contract –  
clause 23(1)(a)
- PSSCOC – clause 14.2(a)
- REDAS standard (design and build)  
form of contract – clause 16.1.2

## *Force majeure* provisions under the standard forms of contracts

SIA 23(1) - “The Contract Period ... may be extended ..., by such further periods ... as may reasonably reflect any delay in completion which, ..., has been caused by:

(a) Force majeure.



## *Force majeure* provisions under the standard forms of contracts

PSSCOC 14.2 - “The time within which the Works ... is to be completed may be extended by the Superintending Officer ... by such further period ... as may reasonably reflect delay in completion of the Works which, ..., will or might be or has been caused by any of the following events:  
(a) Force majeure.

## *Force majeure* provisions under the standard forms of contracts

REDAS 16.1 - “The Contractor may apply to the Employer’s Representative for an extension of time if he is or will be delayed ... by any of the following causes:

16.1.2. A force majeure events as defined in clause 18.2 below, or ...



## *Force majeure* provisions under the standard forms of contracts

REDAS 18.2 - “Force majeure” means the  
following:

18.2.1. Exceptionally adverse weather  
conditions, or

...

18.2.3. Industrial action by workmen,  
strikes, lockouts or embargoes affecting  
directly the Works.

## *Force majeure* provisions under the standard forms of contracts

SIA 23(1)(m) - Shortage of goods or materials which could not reasonably have been foreseen at the date of the Contract resulting from domestic or foreign government actions, embargoes or regulations notwithstanding the Contractors readiness by himself or his sub-contractors direct or indirect to pay a reasonable price therefore.



## *Force majeure* provisions under the standard forms of contracts

PSSCOC 14.2(c) – Industrial action by workmen, strikes, lock-outs or embargoes affecting any of the trades employed upon the Works or in the preparation, manufacture or transportation of materials or goods required for the Works and provided the same are not due to any unreasonable act or default of the Contractor or of any subcontractor. Provided that this event shall only apply if the industrial action by workmen, strike, lock-out or embargo causing the delay is in Singapore.

## *Force majeure* provisions under the standard forms of contracts

- “embargo” means “order by a government prohibiting trade with a country” (Oxford Dictionary)
- “industrial action” means “any action, esp. a strike or work to rule, taken by employees as a protest (Oxford Encyclopedic English Dictionary)



## Burden of proof

- Burden is on the party relying upon a *force majeure* clause to bring himself squarely within its terms
- Essential elements to be proven:
  - the occurrence of one of the events referred to in the clause, and
  - that he has been prevented, hindered or delayed (as the case may be) from performing the contract by reason of that event

## Burden of proof

- Must further prove that:
  - the event cannot have reasonably been foreseen by the parties, and
  - it was completely beyond the parties' control and they could not have prevented its consequences



## Burden of proof

- Must take reasonable steps to avoid having to suspend or abandon his obligations
- If he can mitigate in a 'commercially reasonable manner', it is obliged to do so and cannot rely on the *force majeure* clause to suspend its obligation
- What is commercially reasonable would depend on the facts of each individual case

## Burden of proof

- The *force majeure* event must be a legal or physical restraint and not merely an economic one
- *Glade International Expo AG v ACS Computer Pte Ltd* (1999) 2 SLR 620
  - CA dismissed the contention that changes in law and the effect of high inflation fell within the auspices of the *force majeure* clause contained in the parties' agreement



## Burden of proof

- But see *Sato Kogyo (S) Pte Ltd v RDC Concrete Pte Ltd* (2006) SGHC 213
  - Court held that the defendant was entitled to rely on the *force majeure* clause to justify the non-delivery due to shortage of raw materials
  - This was so notwithstanding that it was argued that the defendant took the risk of a fixed price contract and should bear the consequences

## Effects of *force majeure* clauses

- To be gathered from the contract itself
- Usual contractual remedy – extension of time – not additional payment for increased costs



## Other possible remedy

- Doctrine of frustration and impossibility
- “radical change” or emergence of a fundamentally different situation
- Actual physical impossibility of performing contract
- *Davis Contractors v Fareham* (1956) AC 696

**THE END**



## **Speaker's profile (Monica K. C. Neo)**

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"The Singapore Court Forms"

"The Singapore Standard Form of Building Contract – An Annotation"

"Construction Defects: Your Rights and Remedies" title of the Sweet & Maxwell's Law for Layman Series

Singapore Civil Procedure 2003 (White Book)

Real Estate Developers' Association of Singapore's (REDAS) Design and Build standard form contract