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Economic downturn held by court not to be a force majeure event.

by **Teena Grewal**

Despite some politicians' optimism about a wider financial and economic recovery, events in the various markets are continuing to cause many parties to consider the terms of their contracts closely. There seems to be a particular focus on establishing termination rights in light of perceived or actual performance issues and identifying rights to vary the underlying financial drivers or assumptions of projects.

Another area of current concern involves parties' rights to request additional time to perform their contractual obligations, which is obviously of critical importance to those involved in the marine construction industry, especially for offshore projects. Against this background, it may be interesting to note the judgment of the Commercial Court earlier this year in *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC and Insured Aircraft Title Service Inc* (2010) that the force majeure clause in the contract was not triggered by the financial crisis.

Tandrin had agreed to sell a new aircraft to ATS under an Aircraft Sale Agreement. ATS paid a deposit to the escrow agent. The deposit and the balance of the purchase price were due to be paid to Tandrin under the Agreement upon delivery of the aircraft.

ATS failed to accept delivery of the aircraft from Tandrin or pay the balance of the purchase price. Tandrin exercised its contractual right to terminate the Agreement due to ATS's breach of contract and sought to recover the deposit as liquidated damages.

The parties ended up in court. ATS pleaded various defences including that it was entitled to rely upon the force majeure clause (clause 7.17) in the Agreement and defer acceptance of and payment for the aircraft due to the "unanticipated, unforeseeable and cataclysmic downward spiral of the world's financial markets."

The Court pointed out that it is well established under English law that a change in economic/market circumstances affecting the profitability of a contract or the ease with which the parties' obligations can be performed is not regarded as being a force majeure event. It went on to state that whether or not a force majeure clause in a contract is triggered depends upon the proper construction of the wording of that clause and that "force majeure" is not a term of art. There were a number of hurdles in construing clause 7.17 so as to permit ATS to rely upon market conditions as a force majeure event.

Economic downturn, market circumstances or the financing of the deal were not expressly included within clause 7.17. Nor, the Court held, did the phrase "any other cause beyond the seller's reasonable control" in clause 7.17 entitle the purchaser to rely upon that clause since an alleged inability of the purchaser to obtain finance for the deal could not properly be construed as being a cause beyond the seller's reasonable

control. The Court also stated that it would be absurd if clause 7.17 could be construed so that the purchaser could rely upon force majeure events beyond the seller's rather than the purchaser's own control.

The Court confirmed that, to the extent that there may be some overlap between the operation of force majeure clauses and the doctrine of frustration, existing case law made it clear that an increase in the mere expense or onerousness of the contract could not constitute frustration of the contract.

The previous legal position has not been changed by this judgment, although the case emphasises the need for there to be specific wording in the contract giving the parties the right to claim force majeure in the event of an economic downturn, if that is what the parties want. The inclusion of such specific wording is in our experience unlikely to be commercially acceptable to all parties, although it would be interesting to see how this develops in practice if the economic downturn continues.

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