FORCE MAJEURE AND CONSTRUCTION CONTRACTS

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172

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Introduction

The expression *force majeure* is of French origin. Under the French Civil Code *force majeure* is a defence to a claim for damages for breach of contract. The event relied upon for a claim of *force majeure* must have made performance of the contract impossible, must have been unforeseeable and must have been unavoidable in occurrence and effects. Under English common law there is no provision for the doctrine of *force majeure* and it is 'frustration' which must be pleaded as a defence in contract law. However the expression may be provided for in English law as an express contractual term. The threshold for a contractually based plea of *force majeure* is similar to that of frustration, in the sense that there must be no fault attaching to the party claiming it.[1]

The doctrine of *force majeure*, although at first sight somewhat exotic, is likely to be of interest to many contractors. It frequently happens that the work contracted for turns out much more difficult and expensive than expected. The contractor may then wish to say that he should have more money or time, or even be excused from performing entirely, on the grounds that there is a supervening impossibility. How do the standard forms deal with such a situation?

Before considering the forms, it is first necessary to set the discussion of *force majeure* in its proper context by considering the approach of English law to clauses of this kind generally, and the way in which the courts deal with the similar plea of frustration in the building contract sphere.

Force majeure clauses – meaning generally

Chitty states that the expression '*force majeure* clause' is normally used to describe a contractual term by which one (or both) of the parties is entitled to cancel the contract or is excused from performance of the contract, in whole or in part, or is entitled to suspend performance or to claim an extension of time for performance, upon the happening of a specified event or events beyond his control.[2] *Force majeure* clauses have been said not to be exemption clauses, although it is difficult to draw any clear line of demarcation between them

1 Brian Eggleston, *The NEC 3 Engineering & Construction Contract: A Commentary* (2nd edition, Blackwell Publishing 2006), para 6.11.

2 Hugh Beale (general editor) *Chitty on Contracts* (30th edition Sweet & Maxwell, London 2008), para 14-140.

since the effect of each may be to relieve a contracting party of an obligation or liability to which he would otherwise be subject.

The burden of proof lies upon a party relying upon a *force majeure* clause to prove the facts bringing the case within the clause. He must therefore prove 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. He must further prove that his non-performance was due to circumstances beyond his control; and that there were no reasonable steps that he could have taken to avoid or mitigate the event or its consequences.

Where a party seeks to invoke the protection of a clause which states that he is to be relieved of liability if he is 'prevented' from carrying out his obligations under the contract or is 'unable' to do so, he must show that performance has become physically or legally impossible, and not merely more difficult or unprofitable.[3] Further, where the word 'prevention' is not specifically mentioned in the clause, it may be so construed. If the clause provides that one party is to be 'excused' or 'not to be responsible' upon the occurrence of certain events or any other causes beyond his control, he must show that he has been prevented from fulfilling the contract by one of the specified events or some other cause beyond his control.

The English courts have traditionally taken a restrictive approach, as a matter of construction, to clauses that seek to excuse one party from performance on the grounds of supervening events. Although this is, strictly, a matter of construction only, rather than a matter of law, and every contract must be read in accordance with its own terms, this approach does inform many of the cases.

For example, the courts apply the 'presumption that the expression *force majeure* is likely to be restricted to supervening events which arise without the fault of either party and for which neither of them has undertaken responsibility'.[4] Thus, where a party seeks to invoke such a clause in relation to 'strikes beyond [its] control', it has been held that the clause did not cover a strike that could have been settled by taking reasonable steps such as increasing wages.[5] Similarly, the clause will not apply where the contract provides for alternative ways of performing, only some of which are affected by the *force majeure* event. So, where shipping from one port is impossible, and the seller intends to ship from there, the clause will not apply where other ports can be used.[6]

By the same token, the party relying on such a clause must show not only that the *force majeure* event has occurred but also that it has had the effect stipulated for upon his ability to perform the contract. So, where a clause

3 *Thames Valley Power Ltd v Total Gas & Power Ltd* [2005] EWHC 2208 (Comm); *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] EWHC 40 (Comm).

4 See *Fyffes Group Ltd v Reefer Express Lines Pty Ltd* [1996] 2 Lloyd's Rep 171 (QBD Comm Crt), page 196.

5 *Channel Island Ferries Ltd v Sealink UK Ltd* [1998] 1 Lloyd's Rep 323 (CA).

6 *Warinco AG v Mauthner* [1978] 1 Lloyd's Rep 151 (CA).

provided a seller with an excuse in the event of 'prohibition of export … preventing fulfilment', he must show not merely that there was a prohibition of export, but also that this prevented him from performing his part of the contract.[7]

Sometimes the actual expression *force majeure* is employed. *Force majeure* is not a term of art in English law, although it is well known in continental legal systems, for example that of France. The meaning of *force majeure* may nevertheless be ascertained by reference. Thus the incorporation into a contract of sale of the *force majeure* (exemption) clause of the International Chamber of Commerce will mean that a party is not liable for failure to perform any of his obligations in so far as he proves:

- that the failure was due to an impediment beyond his control; and
- that he could not reasonably be expected to have taken the impediment and its effects upon his ability to perform the contract into account at the time of the conclusion of the contract; and
- that he could not reasonably have avoided or overcome it or at least its effects.[8]

The concept of *force majeure* in English law is wider than that of 'Act of God' or *vis major*, as these latter expressions appear to denote events due to natural causes, without any human intervention. McCardie J reviewed the previous authorities on *force majeure* in *Lebeaupin v Crispin.* He held that the term was:

> '... used with reference to all circumstances independent of 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 a strike of workmen constitutes a case of *force majeure* … [But] a *force majeure* clause should be construed in each case with a close attention to the words which precede or follow it, and with a due regard to the nature and general terms of the contract. The effect of the clause may vary with each instrument.'[9]

Chitty comments that it:

> '… seems that war, strikes, legislative or administrative interference, for example, an embargo, the refusal of a licence, or seizure, abnormal storm or tempest, flooding which inhibits shipment from river ports, interruption of the supply by rail of raw material, and even the accidental breakdown of machinery can amount to *force majeure*, but not 'bad weather, football matches or a funeral', a failure of performance due to the provision of insufficient financial resources or to a miscalculation, a rise in cost or expense the failure by a third party to fulfill his contract, or any act, negligence, omission or default on the part of the party seeking to be excused. The words '*force majeure*' are, however, rarely

7 *Tradax Export SAv Andre & Cie SA* [1976] 1 Lloyd's Rep 416 (CA).
8 ICC Force Majeure Clause (International Chamber of Commerce Publication No 650, 2003 edition).
9 *Lebeaupin v Richard Crispin & Co* [1920] 2 KB 714 (KBD), pages 719 and 720.

> unqualified. The type of circumstance envisaged by the parties will often be set out, so that those circumstances may apply to limit, extend or explain the meaning of '*force majeure*'. Further the clause may refer to performance being 'prevented,' 'hindered' or 'delayed' by *force majeure*. The expression must therefore be construed with regard to the words which precede and follow it and also with regard to the nature and general terms of the contract.'[10]

Frustration and construction contracts

Construction contracts often end in frustration for one party or the other, but it is not often that a court will so find. The leading case is still *Davis Contractors v Fareham Urban District Council*.[11] The contractors entered into a building contract to build 78 houses for a local authority for a fixed sum within a period of eight months. They had attached to their form of tender a letter, dated 18th March 1946, stating that it was subject to adequate supplies of labour being available as and when required. Owing to unexpected circumstances, and without fault of either party, adequate supplies of labour were not available and the work took 22 months to complete. The contractors contended (i) that the contract price was subject to there being adequate supplies of labour available by reason of the letter of 18th March 1946; (ii) that the contract was frustrated. The House of Lords rejected both arguments. It held that the letter of 18th March 1946 was not incorporated in the contract and that the contract had not been frustrated. The fact that, without the fault of either party, there had been an unexpected turn of events, which rendered the contract more onerous than had been contemplated, was not a ground for relieving the contractors of the obligation which they had undertaken. As Lord Simonds put it: '… it by no means follows that disappointed expectations lead to frustrated contracts'.[12]

In accordance with this general approach, the courts have rejected arguments that building contracts were frustrated by reason of unexpected difficulty or expense or delay. By the same token, changes in prices, bad weather and even the outbreak of war will not usually lead to a finding of frustration. Even where the subject matter of the contract is destroyed by flood or fire, the contractor will not be released from his obligation to complete.

Force majeure clauses in construction contracts

It follows, therefore, that at common law, the parties to a construction contract will rarely obtain relief on the grounds of supervening impossibility. In practice, we are here usually talking about the contractor upon whom many of these risks seem to fall. But, of course, the parties to a substantial construction contract are rarely in fact 'at common law'. They operate under the complex code of the particular standard from which they have chosen and which ought, in principle, to cater for frustrating events.

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10 *Chitty*, note 2, para 14-148.

11 *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696; also [1956] 3WLR 37, [1956] 2 All ER 145 (HL).

12 *Davis Contractors*, note 11, page 715.

The presence of a *force majeure* clause does not of itself exclude the operation of the doctrine of frustration. But a *force majeure* clause may be relied upon as evidence that the parties have made express provision for the alleged frustrating event or at least that the event was one which was within the reasonable contemplation at the time of entry into the contract. Such provisions may take the form of clauses permitting one or both the parties to terminate the contract in certain defined events or (if a suspension is caused by a defined event) for more than a certain period. On the other hand, certain clauses may provide for the contract to continue, with provision for compensation. In some events, the only remedy given may be that of an extension of time for completion.

JCT Standard Building Contract (SBC)

The JCT contract expressly refers to *force majeure*. Pursuant to clauses 2.29.14 and 8.11, when *force majeure* occurs, then either an extension of time or the determination of the contract may take place.[13] *Force majeure* has not been defined in the JCT contracts and since references to the term are without qualification, the court may be expected to interpret the clause according to the ordinary principles of construction of contracts. *Keating* suggests that a court would follow *Lebeaupin v Crispin*,[14] although there are no reported cases under the JCT form.

Under the JCT 2011 suite of contracts, *force majeure* is listed as a 'Relevant Event' under clause 2.29.14, which entitles the contractor to an extension of time for completion.[15] However, as this event is not listed as one of the 'Relevant Matters' (as stated under clause 4.24), the contractor cannot claim payment for loss and expense.

It should be noted that clause 2.29 also provides for other 'extenuating' grounds for extension of time, such as:

> '.7 any impediment, prevention or default, whether by act or omission, by the Employer, the Architect/Contract Administrator, the Quantity Surveyor or any of the Employer's Persons, except to the extent caused or contributed to by any default, whether by act or omission, of the Contractor or of any of the Contractor's Persons;
>
> .8 the carrying out by a Statutory Undertaker of work in pursuance of its statutory obligations in relation to the Works, or the failure to carry out such work;
>
> .9 exceptionally adverse weather conditions;
>
> .10 loss or damage occasioned by any of the Specified Perils;

13 Standard Building Contract, 2011, The Joint Contracts Tribunal Ltd.

14 Stephen Furst QC and Hon Sir Vivian Ramsey (editors), *Keating on Construction Contracts* (12th edition Sweet & Maxwell, London 2010), para 19-111; *Lebeaupin v Crispin*: note 9.

15 JCT Standard Building Contract: note 13..

.11 civil commotion or the use or threat of terrorism and/or the activities of the relevant authorities in dealing with such event or threat;

.12 strike, lock-out or local combination of workmen affecting any of the trades employed upon the Works or any of the trades engaged in the preparation, manufacture or transportation of any of the goods or materials required for the Works or any persons engaged in the preparation of the design for the Contractor's Designed Portion;

.13 the exercise after the Base Date by the United Kingdom Government of any statutory power which directly affects the execution of the Works …'

It would be a bold contractor who sought an extension of time under a JCT contract for *force majeure*. First of all, the only assistance on meaning is the elderly case of *Lebeaupin v Crispin*.[16] The fact that there are no reported cases on the JCT form suggests that there may not have been many takers. Secondly, care must be taken when interpreting *force majeure* in JCT contracts, particularly having regard to other events. Where the term *force majeure* is used in the JCT Standard Building Contract, Intermediate Building Contract and Design and Build Contract, its meaning will be effectively restricted, as events otherwise falling within the *force majeure* category are included under specific headings. Such matters as strikes, fire and exceptional weather are examples.[17]

Force majeure is also stated as an event that justifies 'Termination by either P arty' under clause 8.11. Clause 8.11 states:

'If, before practical completion of the Works, the carrying out of the whole or substantially the whole of the uncompleted Works is suspended for the relevant continuous period of the length stated in the Contract Particulars by reason of one or more of the following events:

.1 force majeure …

.4 civil commotion …

.5 the exercise by the United Kingdom Government of any statutory power which directly affects the execution of the Works,

then either Party, subject to clause 8.11.2, may upon the expiry of that relevant period of suspension give notice to the other that, unless the suspension ceases within 7 days after the date of receipt of that notice, he may terminate the Contractor's employment under this Contract. Failing such cessation within that 7 day period, he may then by further notice terminate that employment.'

The Guide explains this bilateral right of termination under clause 8.11 as not entirely dissimilar to termination by the Contractor under clause 8.9 for

16 *Lebeaupin v Crispin*: note 9.

17 David Chappell, *Building Contract Claims* (5th edition, Wiley-Blackwell 2011), page 247.

extended suspension as it has the same default period and, apart from the entitlement to direct loss and damage, the same consequences follow.

> 'It is based on events beyond the reasonable control of either party, such as *force majeure* (as understood under the French Civil Code), negligence, or default of Statutory Undertakers, Specified Perils damage, civil commotion and UK Government action'.[18]

Again, it might be thought to be a bold contractor (or, in this case, employer) who would seek to terminate under this clause. Apart from any other considerations, invoking a concept 'under the French Civil Code' is an ambitious basis for the drastic step of terminating a contract. Note, again, that clauses 8.11.4 and 5 sweep up a number of matters that might otherwise fall under the *force majeure* umbrella.

FIDIC contracts

Clause 19 of the FIDIC Red book is headed '*Force majeure*' and sets out the parties' remedies in the event that performance of their obligations under the contract is prevented, either practically or legally by events outside of their control.[19]

Definition of force majeure*: Clause 19.1*

In order for an event to be classified as *force majeure*, it must possess the following qualities:

> 'In this Clause, 'Force majeure' means an exceptional event or circumstance:
>
> (a) which is beyond the 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,

18 JCT Standard Building Contract Guide 2011, para 177.

19 The FIDIC 1999 Red Book, Conditions of Contract for Construction. For Building and Engineering Works designed by the Employer (International Federation of Consulting Engineers, 1st edition 1999).

(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 earthquakes, hurricane, typhoon or volcanic activity.'

The occurrence of one of these events or circumstances does not necessarily mean that it constitutes *force majeure*. The conditions listed from (a) to (d) in Clause 19 must be satisfied, and the event or circumstance must be exceptional.[20] However, the civil law influence is clear. Note that the list of events set out at (i) to (vi) is non-exhaustive and the events specified are examples only.

The FIDIC Gold book has substituted the term *force majeure* with 'Exceptional Event' and the heading of clause 18 of this contract has accordingly been changed to 'Exceptional Risks'.[21] The non-exhaustive list of examples which are set out in paragraphs (a) to (f) of Sub-Clause 18.1 also contain changes to the list in Sub-Clause 19.1 of the Red Book. In the Gold Book the list has been expanded to include 'strikes or lockouts not solely involving the Contractor's Personnel'. Natural catastrophes are restricted to such instances which are 'unforeseeable or against which an experienced contractor could not reasonably have been expected to have taken adequate precautions'. Furthermore, rebellion and terrorism is restricted to only those incidences that occur within the country.

Notice of force majeure*: Clause 19.2*

Sub-Clauses 19.2 of the Red Book and 18.2 of the Gold Book state that a party who is prevented from the performance of its contractual obligations due to *force majeure* is required to give notice to the other party specifying the cause of its prevention.

Clause 19.2 states:

> 'If a Party is or will be prevented from performing any of its obligations under the Contract by Force Majeure, then it shall give notice to the other Party of the event or circumstances constituting the Force Majeure and shall specify the obligations, the performance of which is or will be prevented. The notice shall be given within 14 days after the Party became aware, or should have become aware, of the relevant event or circumstance constituting Force Majeure.

20 Ellis Baker, Ben Mellors, Scott Chalmers and Anthony Lavers, *FIDIC Contracts: Law & Practice* (Informa Professional 2010), para 8.340.

21 The FIDIC 2008 Gold Book, Conditions of Contract for Design, Build and Operate Projects (International Federation of Consulting Engineers, 1st edition 2008).

> The Party shall, having given notice, be excused from performance of such obligations for so long as such Force Majeure prevents it from performing them.
>
> Notwithstanding any other provision of this Clause, Force Majeure shall not apply to obligations of either Party to make payments to the other Party under the Contract.'

Sub-Clause 19.2 (18.2 of the Gold Book) therefore provides that pursuant to such notice being given, the party serving it is excused from performance of the obligations as set out in the notice, so long as such *force majeure* or exceptional event prevents it from performing them. It must be noted that no relief is provided in respect of the parties' contractual payment obligations. The excuse from performance is accompanied by a duty on both parties under Sub-Clause 19.3 to use all reasonable endeavours to minimise any delay in the performance of the contract.

Consequences of force majeure*: Clause 19.4*

Sub-Clause 19.4 of the Red Book is headed 'Consequences of Force Majeure' and provides that a Contractor who has given the required notice of being prevented from performance of his obligations by reason of *force majeure*, is entitled to an extension of time and payment from the Employer of Cost incurred or delay sustained.[22] The Contractor is entitled to payment of Cost if the event or circumstance that has occurred and been notified, amounts to Force Majeure/the Exceptional Event and falls within items (i) to (iv) in the illustrative list of events in Sub-Clause 19.1. Sub-Clause 19.4(b) states that no entitlement to cost arises in respect of natural catastrophes falling within item (v) or other types of Force Majeure/Exceptional Events. Moreover, events falling within (ii) to (iv) attract a Cost entitlement only if they occur within the Country.

Optional Termination, Payment and Release: Clause 19.6

Sub-Clause 19.6 governs the Contractor's entitlement to payment in the event of termination. Items (a) to (e) list the matters which form the basis for valuing the amounts due to the Contractor:

> 'If the execution of substantially all the Works in progress is prevented for a continuous period of 84 days by reason of Force Majeure of which notice has been given under Sub-Clause 19.2 [*Notice of Force Majeure*], or for multiple periods which total more than 140 days due to the same notified Force Majeure, then either Party may give to the other Party a notice of termination of the Contract. In this event, the termination shall take effect 7 days after the notice is given, and the Contractor shall proceed in accordance with Sub-Clause 16.3 [*Cessation of Work and Removal of Contractor's Equipment*].
>
> Upon such termination, the Engineer shall determine the value of the work done and issue a Payment Certificate which shall include:

22 The entitlement to cost is subject to the provisions of sub-clause 20.1 of the FIDIC Red Book (note 19).

(a) the amounts payable for any work carried out for which a price is stated in the Contract;

(b) the Cost of Plant and Materials ordered for the Works which have been delivered to the Contractor, or of which the Contractor is liable to accept delivery: this Plant and Materials shall become the property of (and be at the risk of) the Employer when paid for by the Employer, and the Contractor shall place the same at the Employer's disposal;

(c) any other Cost or liability which in the circumstances was reasonably incurred by the Contractor in the expectation of completing the Works;

(d) the Cost of removal of Temporary Works and Contractor's Equipment from the Site and the return of these items to the Contractor's works in his country (or to any other destination at no greater cost); and

(e) the Cost of repatriation of the Contractor's staff and labour employed wholly in connection with the Works at the date of termination.'

It must be noted that the pre-condition in the first sentence to Sub-Clause 19.6 relates to an impediment to progress and does not relate to the extent to which the Works are substantially complete. Under sub-paragraph (a) the Contractor is entitled to payment for any work carried out for which a price is stated in the Contract. In many cases the work completed to date may not have been priced in the Contract. In such circumstances sub-paragraphs (b) and (c) provide a method for determining a reasonable payment in respect of work carried out for which a price is not separately stated.[23]

Release from Performance under the Law: Clause 19.7

Under Sub-Clause 19.7, where an event occurs during the duration of the Contract which makes it impossible or unlawful for any contractual obligations under the Contract to be carried out, or where the law of the Contract allows the parties to be released from their obligations under the Contract, then the Parties may be discharged from further performance of the Contract and the amount payable by the Employer to the Contractor should be the same as would be due under Sub-Clause 19.6 mentioned above.[24]

Notwithstanding the relief available to the Parties under the other provisions of Clause 19, Sub-Clause 19.7 makes a further provision for relief to the Parties in two extreme situations.[25] The first of these situations covers legal and physical impossibility which in turn depends on the applicable law, including the law governing the Contract. The second situation expressly recognises that the laws of different jurisdictions release the parties to a contract from performance in certain situations where an event occurs outside

23 The FIDIC Contracts Guide (1st edition 2000, FIDIC), page 297.
24 Nael Bunni, *The FIDIC Forms of Contract* (3rd edition, Blackwell Publishing 2005), para 23.3.16.
25 The FIDIC Contracts Guide, note 23.

the control of the parties that significantly affects their performance under the contract.[26] Both of these situations discharge the Parties from further performance of their contractual obligations with immediate effect upon service of notice to that effect.[27]

NEC 3 contracts

Prevention: clause 19.1

Clause 19.1 of NEC 3 is headed 'Prevention' and is in effect a *force majeure* clause.[28] It is not concerned with prevention caused by the Employer but rather prevention arising from matters described as '*force majeure*' or matters beyond the control of the Parties.[29] This clause covers events that either stop the Contractor completing the works or make it impossible for him to complete on time, irrespective of the measures he may take. The events are notified under clause 16 (Early warning), and therefore do not require any specific notification. The clause states:

> 'If an event occurs 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 and
> - an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it,
>
> the Project Manager gives an instruction to the Contractor stating how he is to deal with the event.'

Panel briefing on prevention under the NEC contracts[30]

In preparation for the 3rd edition of the NEC contracts, the NEC Panel recognised the need to incorporate a new provision dealing with *force majeure* situations. *Force majeure* was described as 'significant, unexpected events causing major problems to the project'. It was decided that provision for such an event was to be made in two cases:

- when the event prevented the work being completed on time; and
- when the event prevented the work being completed at all.

In both cases the event was to be described in a way which excluded the normal risks one would expect on a project. In addition it was considered

26 For example, *force majeure* in civil law systems and frustration in common law systems.
27 Baker, Mellors, Chalmers & Lavers: note 20.
28 NEC 3 Engineering and Construction Contract Guidance Notes (2005, NEC).
29 Eggleston, note 1, para 6.11.
30 Peter Higgins, *Prevention under NEC3 Contracts* (NEC Panel Briefing 2009).

essential to equip the Project Manager with authority to control such situations.

The Panel decided to draft two clauses:

(i) Clause 19, which provided the Project Manager with the necessary authority to give instructions upon the occurrence of the event, which in turn was defined by three tests, and all of which were required to be passed mandatorily in order to meet the provisions of the clause; and

(ii) Clause 60 provided for compensation upon the occurrence of such event under clause 19 as mentioned above.

The first test requires the event to be one which *stops* the Contractor from completing work by the completion date, or which *stops* him completing the work absolutely. The test for completing work on time is a strict test. In order to attract the provisions of this test, there must be no reasonable way of completing the works on time. It is not sufficient to show that the Contractor has been delayed and that it will be expensive or difficult to make up the delay. If additional resources are needed to overcome the delay, they must be mobilised.

The second test is that the event must be one that neither party could prevent. This is also a fairly strict test, such that the event could not have been prevented from occurring by any reasonable measures. Under this test, an act or inaction of the Employer or the Project Manager acting on his behalf cannot be considered and have to be dealt with separately under other provisions of the contract.

The third test is that it would have been unreasonable for an experienced contractor to have allowed for the event.

Upon the occurrence of such an event, the Project Manager gives an instruction.

> 'He may decide to abandon the work because the project is no longer viable – the Employer terminates under the contract. He may decide to change the work to overcome the problem – a change to the works information. A third option is to allow progress to be delayed until the event is overcome, and accept a delay to completion. Whatever action the Project Manager takes, the event itself is a compensation event, and in addition the instruction of the Project Manager changing to the works information would be a further compensation event.'[31]

Caution must be exercised in interpreting the provisions of clause 19.1 as it is not a conventional *force majeure* clause and goes well beyond the definition of what is known in law as *force majeure*. The provisions of clause 19.1 are repeated in clause 60.1(19) which converts it into a compensation event and its further repetition in clause 91.7 provides a specified reason entitling

31 Peter Higgins, 'Prevention under the NEC Contracts' (NEC Panel Briefing, NECP/BO3 – March 2009).

termination by the Employer. Thus it can be said that clause 19.1 defines 'Prevention' in terms which are capable of a very wide interpretation, there being only two qualifications for its application. First, when it is no longer possible to complete the works, thereby suggestive of discharge by frustration; second being when it is no longer possible to complete the works by the planned programme date.

Compensation events

Clause 60 of NEC 3 is headed 'Compensation events' and specifically clause 60.1(19) is a *force majeure* event.[32] It is important to note that the term *force majeure* is not used to describe this event in the contract itself. Further the provisions of clause 60 are triggered in circumstances different from those in which *force majeure* usually would occur. This clause only covers events that neither Party could prevent. Further, the event need not be unforeseeable, but it must be one which an experienced contractor would reasonably not have made allowance for. The clause states:

> 'An event 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 for him to have allowed for it and
> - is not one of the other compensation events stated in this contract.'

Clause 60.1(19) encompasses an event which is also covered by clause 19.1. Under clause 19, if such an event occurs, the Project Manager is obliged to give an instruction to the Contractor stating how he is to deal with the event. If that instruction does not change the Works Information, then the event itself will be a compensation event under clause 60.1(19). For example, a clause 60.1(19) event may destroy a part of the works and result in an instruction to the Contractor to re-do this part of the works, without changing the Works Information.[33] The last listed bullet point above indicates that this compensation event only operates if no other compensation event is applicable.[34]

32 *NEC3 Guidance Notes*: note 28.
33 David Thomas, *Keating on NEC: Clause by clause commentary* (Sweet & Maxwell 2011).
34 Thomas: note 33.

Termination event

Clause 91 is headed 'Reasons for termination'. Specifically clause 91.7 deals with circumstances in which the Employer may terminate the contract and constitutes recognition of a possible effect of *force majeure*.[35] The clause states:

> 'The Employer may terminate if an event occurs which
>
> - stops the Contractor completing the works or
> - stops the Contractor completing the works by the date shown on the Accepted Programme and is forecast to delay Completion by more than 13 weeks,
>
> and which
>
> - neither Party could prevent and
> - an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it (R21).'

This is a new clause in NEC 3 and is effectively a *force majeure* clause but one that gives only the Employer the opportunity to terminate. The description of the event in this clause is identical with that to clause 19.1 as discussed above, save that clause 19.1 does not have reference to the forecast delay to completion of more than 13 weeks. If the event as contemplated for under clause 91.7 occurs, the Project Manager is required by operation of clause 19.1 to give an instruction to the Contractor stating how he is to deal with it. A delay to planned Completion which can (as opposed to will) be recovered by acceleration, by increased resources, or by adjusting the programme does not stop the Contractor from completing on time. The Contractor must demonstrate that there is no reasonable means by which he can complete the works on time for the event to be recognised under the second bullet point of clause 91.7.[36]

The event set out in clause 19.1 (ie without the requirement that Completion is forecast to be delayed by more than 13 weeks), is also a compensation event under clause 60.1(19), and it is because of the protection afforded to the Contractor of such matter being a compensation event, that he does not need the right to terminate. It is the occurrence of the event itself that is the compensation event and not the Project Manager's instructions to deal with it. The Project Manager's instruction might also be a compensation event because he may deal with it by for example changing the Works Information or stopping the works, which instructions would amount to compensation events.[37] It is important to note that initially the event may have been notified as a compensation event under clause 60, and only recognised as a *force*

35 NEC3 Guidance Notes: note 28.
36 NEC3 Guidance Notes: note 28.
37 Thomas: note 33.

majeure event when the Project Manager and the Contractor considered how to deal with it.[38]

Conclusions

Contracting is a risky business and traditionally English law has looked with little sympathy upon the contractor. The approach has been that he undertakes an absolute obligation to complete. If the works prove very difficult to complete – or even impossible – then that is the risk which he has run. Consistently with this, *force majeure* clauses have tended not to be common or have been given little scope, and they are construed conservatively. The JCT forms epitomise this approach.

At the other extreme is the civil law and the international project approach. This has taken a much more liberal approach to notions of impossibility. This may, in part, be because large international projects frequently give rise to problems that it is simply not reasonable to expect even a large contractor to foresee or pay for. Without some give and take – and given the multinational cast typical of such ventures – it may be that it would be impossible ever to get tenders for such work, or for the work to be completed without the contractor becoming insolvent.

The NEC contracts appear, in this (and other) respects, to be steering a course away from the orthodoxy that has characterised English construction contracts. Whilst these contracts may not have gone the whole continental hog, they certainly are more open to notions of *force majeure* than has been usual in this country.

The parties are, in the end, the masters of their contractual fate. It may be that they will wish increasingly to provide for exceptional events as an excuse for non-performance. It remains to be seen how the courts will construe such clauses.

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38 NEC3 Guidance Notes: note 28.

'The object of the Society
is to promote the study and understanding of
construction law amongst all those involved
in the construction industry'

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