

INSIGHTS

Risky Business, Voldemort and Force Majeure: The Tale of the West Leo Rig

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With apologies to movie fans everywhere, this briefing has nothing to do with Tom Cruise's 1983 comedy or the Harry Potter films. Rather, it actually concerns the recent English High Court decision in [Seadrill Ghana Operations Limited -v- Tullow Ghana Limited \[2018\] EWHC 1640](#).

The case relates to an agreement for the hire of 'West Leo' (an ultra-deep-water semi-submersible oil rig) and its ultimate termination by Tullow Ghana Limited for force majeure.

The broad backdrop to that termination involves a confluence of issues including a territorial sea dispute between Ghana and Cote d'Ivoire, the failure of an FPSO turret, an expected government approval to drill not eventuating, and – almost inevitably - the overall fall in oil price. The latter issue is of course a starker reality the energy sector more generally has reluctantly adjusted to, and even the current oil price hike has been met with muted relief for fear of a pending correction. The wider facts of this case are of less material importance for the purposes of this briefing.

The key points arising from the decision are:

1. Force majeure is a creature of contract. As with any other contractual provision, whether a party is able to rely on the force majeure clause (and so be released from performing its obligations) is a question of contractual construction and application of the factual evidence.
2. Force majeure clauses often require a causal link between the force majeure event and the prevention or delay in the performance of an obligation. Such questions of causation are to be resolved by reference to common sense. Any other factors that, of themselves, did not constitute force majeure events but nonetheless played an intervening role must be taken into account.
3. Although not a point on which this case turned, whilst an obligation on the parties to use "reasonable endeavours" to overcome or avoid the adverse impacts of force majeure permits the parties to consider their own commercial interests, it also requires them to consider the interests of their counter-parties. The fact that a possible avenue of mitigation is contrary to one party's commercial interests or is burdensome and/or inconvenient is insufficient, without more, to classify it as unreasonable in the context of a force majeure clause. The burden of proving that nothing could reasonably have been

done to avoid or circumvent the force majeure event lies with the party relying on, and seeking to invoke, the force majeure clause.

The judgment also contains a number of pertinent reminders for legal practitioners involved in English High Court proceedings. First, that more should be done to ensure that disclosure is restricted to what is reasonably necessary to determine a dispute fairly. Second, that the parties' legal counsel should avoid including unnecessary documents in the trial bundle (the judgment notes that the trial bundle comprised 111 lever arch files, and that the documents actually referred to in the examination of the factual witnesses amounted to less than one file). Third, that contemporaneous documents may be given more evidential weight than witness testimony where there is a divergence between them. Fourth, and finally, that a precedence clause giving one part of the contract priority over another is to be upheld.

The case turned on the wording of the force majeure clause in question and the factual background. So whilst Teare J's opening statement that *"Drilling for oil is a risky business"* is undoubtedly true, it was ultimately irrelevant so far as it related to the determination of this particular dispute. Far more relevant is how the parties have agreed to provide for the risks, and that is a matter of proper contractual construction.

To avoid entirely disappointing anyone who has read to the end of this briefing because of the Harry Potter reference, Teare J does mention Lord Voldemort and his *"evil and destructive"* character in the judgment in connection with references to *"Project Voldemort"* in the evidence. This seemingly marks the first time that the Dark Lord has infiltrated the English judiciary, at least outside of copyright cases concerning the novels themselves.