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IT'S NOT MY FAULT – ALLOCATE RISKS OR GAMBLE WITH LITIGATION

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Synopsis

The case of *Tullow Ghana Limited v Seadrill Ghana Operations Limited [2018] EWHC 1640 (Comm)* highlights the difficulties that a person may face if they do not comprehensively allocate foreseeable risks in their contracts.

Introduction

What is a contract? The most obvious answer is that a contract is an enforceable arrangement whereby parties agree to be subject to certain obligations and entitled to certain rights as between one another. Another answer, and one which is (potentially) more important, is that a contract is the means by which parties allocate risk.

Many contracts, although prescribing the relationship between two or more people, in fact form part of an extended web of arrangements. For example, I may agree to sell you a ship that hasn't yet been built. My ability to perform my side of the bargain depends upon a third party (one which I may have a separate contract with) building the ship and transferring title to the ship into my name.

However, what happens if the ship isn't built? What happens if title isn't transferred to me until much later than anticipated? What happens if the ship is destroyed en route to my depot? These are all risks that need to be prescribed for in the contract.

There are a number of ways in which I can do this. I may try to negotiate a term that places the risk on you; perhaps by excluding liability for my non-performance in the event of one of the above events occurring. I may try to pass the risk onto the third party; accepting liability for non-performance but negotiating a term with the third party whereby they indemnify me for anything I have to pay to you (that third party may similarly require an indemnity from, for example, the person providing the materials to build the ship).

Alternatively, I may negotiate a *force majeure* clause.

Force majeure clauses are commonly agreed in respect of situations that are outside of the control of both parties, and where the parties agree that the fair result is a "drop hands" arrangement. If war unexpectedly breaks out and the ship that is currently in transit to me is requisitioned by the government, there is little than anybody could do to prevent it from happening. I am in breach of my contract with you by providing a ship for you to sell, but many people would agree that I should not be held liable for the consequences of such an event, especially if I have also suffered loss as a result (I may already have paid the third party, for example). A *force majeure* clause may enable me to terminate the contract I have with you without my having to pay damages.

The scope, and any pre-requisites to termination, are a matter of negotiation between the parties and a matter of contractual interpretation.

The Facts

The recent case of *Tullow Ghana Limited v Seadrill Ghana Operations Limited [2018] EWHC 1640 (Comm)* arose out of oil rig drilling off the coast of Ghana and the Ivory Coast.

In that case, Tullow had contracted with Seadrill to provide Seadrill with drilling programmes, and Seadrill would provide a 6th generation ultra deepwater semi-submersible rig, called West Leo. Tullow intended to use West Leo on two projects, known as TEN and Greater Jubilee Plan respectively.

A *force majeure* clause was agreed in the contract, which described one of the *force majeure* events as "*a drilling moratorium imposed by the government*".

On 25th April 2015, such an event occurred. A dispute had arisen between Ghana and the Ivory Coast regarding the offshore boundary between the two countries. The Ivory Coast claimed the border was further east than Ghana maintained, which would result in the TEN project falling within the Ivory Coast's territory. The tribunal arbitrating the dispute made a Provisional Measures Order ("PMO") ordering that "*Ghana shall take all necessary steps to ensure that no new drilling either by Ghana or under its control takes place in the disputed area*". The Ghanaian government told Tullow that they could not commence any new drilling, though they were permitted to complete any wells that had already been started.

As it happens, although the PMO could have affected Tullow's ability to drill on the TEN project, its impact was minimal. Most of the drilling had already commenced (using West Leo) by the time of the PMO, and in fact only one well was prevented from being drilled. Tullow amended the drilling schedule accordingly.

The Greater Jubilee Plan was not, however, affected by the PMO, and it was anticipated that West Leo would be used on that project once the Ghanaian government gave that project the green light.

However, in February 2016 a technical fault was found on a Floating Production Storage and Offloading unit ("FPSO") that was being used in the Greater Jubilee Plan area. As a result, the Ghanaian government subsequently refused to give permission for the Greater Jubilee Plan.

Tullow claimed that there was therefore no further work for them to do after October 2016, and (relying on the *force majeure* clause) ceased to pay the hire fee for West Leo. Seadrill said that this was not a *force majeure* event, and therefore that there were entitled to be paid the full amount due under the contract; $277.4 million.

The Judgment

Mr Justice Teare found that Seadrill were entitled to the full amount due under the contract (though the $277.4 million figure was overstated, as it included VAT that Seadrill were not entitled to).

In making his judgment, Mr Justice Teare found the following:

1. That the PMO was a "drilling moratorium" within the meaning of the *force majeure* clause, and that the *force majeure* event took place on 4th May 2015, when the Ghanaian government wrote to Tullow.

2. That it could be assumed that Tullow were claiming that they were unable to fulfil their obligation to provide a drilling programme as a result of the PMO (this point was not made in submissions by Tullow's counsel, but was nevertheless considered by the Judge).

3. That both the PMO and the government failing to approve the Greater Jubilee Plan were effective causes of Tullow's inability to provide a drilling programme.

4. That Tullow were not prevented from drilling on the Greater Jubilee Plan by the PMO, and therefore they could not rely on the *force majeure* clause, notwithstanding that the PMO prevented it from using West Leo to drill one well on the TEN project.

This was consistent with the approach in *Intertradex v Lesieur [1978] 2 Lloyd's Reports 509* where it was held that, where two causes operated to prevent a seller from shipping goods, a *force majeure* notice had to be given in respect of each of them; a decision which is regarded as one which establishes the proposition that a *force majeure* event must be the sole cause of the failure to perform an obligation.

Comment

This case shows the importance of two things in particular when drafting an agreement:

1. That a full appraisal of the potential risks is undertaken by the parties; and

2. That the risks are duly allocated in the contract.

We do not know whether the risk of the Ghanaian government not approving the Greater Jubilee Plan was foreseen at the time that the contract is being negotiated. Nothing was made explicit in the contract. If it was not considered, then it is plainly something that ought to have been, as it was a foreseeable risk. Of course, had Tullow suggested this as a *force majeure* event, it may have been rejected by Seadrill in any event; we do not know.

However, by not making clear where the risk of such an event occurring lay, it left Tullow in a quandary; with no drilling projects in the offing, do they keep paying for West Leo in circumstances where it would not be used (the default position), or do they try and get out of the contract? Despite their best efforts, they were unable to find a basis for avoiding their obligation to pay Seadrill.

This is not to say that all events can be foreseen, or can be dealt with in a contract. Some events are unforeseeable or so remote that it would make little sense to provide for them in the contract. However, there is often a tendency to leap into a contractual arrangement without considering what things may go wrong, or may impede performance of your obligations. As a result, when something doesn't go to plan a party is left in the position of trying to shoehorn their situation into the wording of a contract that was drafted without that situation in mind. The other party, naturally, often does not agree with that endeavour. It is that conflict which leads to expensive (yet avoidable) litigation.

The benefit of instructing a lawyer to assist in drafting and negotiating a contract is that they spend significant amounts of time thinking about risks that may affect their clients, and (so far as possible) guarding their clients against risk. This enables you to enter into a contractual arrangement that is tailored to your situation, and properly allocates foreseeable risks. This, in turn, may help to avoid expensive disputes in the future.

If you would like help in drafting contractual agreements, please do not hesitate to contact us by email at info@nicholaswoolf.com, or by telephone at +44(0)20 7242 6018.

25th July 2018

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