

THE LIMITS OF FORCE MAJEURE

In *Seadrill Ghana Operations Limited v. Tullow Ghana Limited* [2018] EWHC 1640 (Comm) Mr. Justice Teare granted the claimant judgment for sums in excess of US\$250 million claimed in respect of standby and “termination for convenience” invoices under a five year contract entered into in November 2012. The contract was for the provision by the claimant of the services of the deepwater drilling unit “West Leo” to the defendant for work offshore Ghana.

In seeking to resist the claim, the defendant argued that it had been entitled to invoke a clause which provided that it could terminate the contract in the event that a “force majeure condition” prevailed for 60 days. The contract provided that a “drilling moratorium imposed by the government” was a force majeure occurrence. The Judge accepted that there had been such a moratorium imposed by the government of Ghana arising out of a provisional measures order (the “ITLOS Order”) made by the International Tribunal for the Law of the Sea in a maritime boundary dispute between Ghana and Côte d’Ivoire.

The ITLOS Order prevented the defendant from drilling new wells in part of the TEN field, a concession offshore Ghana of which it was the operator. However, the ITLOS Order did not prevent the defendant from completing wells in the TEN field which had already been spudded or from drilling in the neighbouring Jubilee field, of which it was also the operator. The Judge held that, assuming that the moratorium had prevented the defendant from fulfilling a term of the contract, the effective cause of its failure to perform was not force majeure within the meaning of the contract because there was another cause operating, i.e. the failure of the government of Ghana to approve a plan for drilling in greater Jubilee.

The Judge further held that, if there was relevant causation, the defence in any event failed because the defendant was unable to show that it had exercised its reasonable endeavours to avoid or circumvent the claimed force majeure. It could have done so by giving instructions for the completion of wells in TEN which had already been spudded or for work on wells in Jubilee for which no further government permission was required.

The defendant's case raised two main issues of principle, both of which were decided in favour of the claimant. First, whether force majeure could be relied on where the alleged force majeure occurrence was not the sole effective cause preventing performance. The Judge held, with reference to *Intertradex v. Lesieur- Tourteaux* [1978] 2 Lloyd's Rep. 509, that it could not. Second, whether it was sufficient for the defendant, in order to satisfy its reasonable endeavours obligation, to show that an alternative method of performance, not affected by force majeure, was not in its commercial interest. The Judge held, with reference to a number of authorities, including *Reardon Smith Line v. Ministry of Agriculture, Fisheries and Food* [1963] AC 691 and *Brauer & Co v James Clark (Brush Materials) Ltd* [1952] 2 Lloyd's Rep. 147, that the defendant could not avoid its obligations on the grounds of expense or expected lack of profit.

Richard Jacobs QC (now Mr. Justice Jacobs), John Snider and Gemma Morgan (Quadrant Chambers) appeared on behalf of Seadrill Ghana Limited instructed by Glenn Kangisser, Amanda Larrington and Maren Strandevold of Haynes and Boone CDG, LLP.