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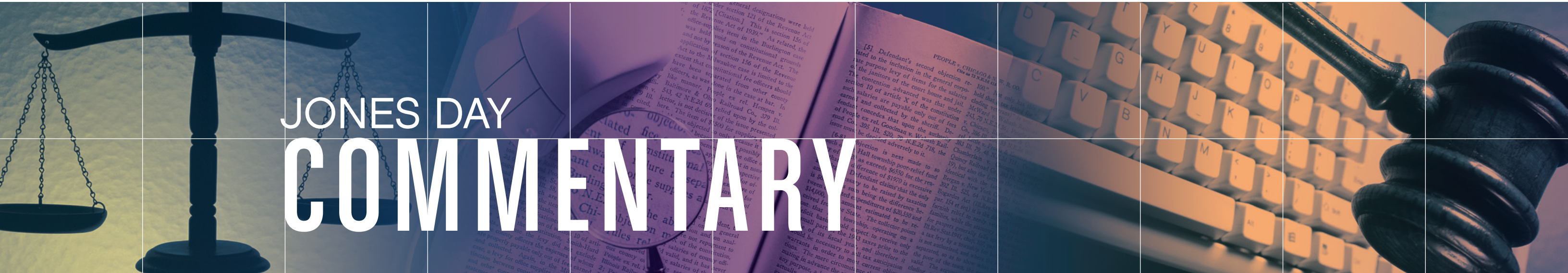

FORCE MAJEURE IN TROUBLED TIMES: THE EXAMPLE OF LIBYA

> Uncertainty continues to prevail over Libya's oil and gas industry, with each side in the developing civil war claiming to be in control of the country's oil fields, pipelines, and ports.[1]

It is likely that this report, published on March 2, 2011, will remain pertinent for some time to come. Foreign companies that are involved in Libyan projects and transactions must follow the news closely and react quickly to events, notwithstanding the prevailing uncertainty. The upheaval in Libya—along with those elsewhere in the Middle East and North Africa—raises issues of *force majeure* that must be addressed promptly, in accordance with rights and obligations stipulated by contracts and applicable laws. These events also offer reminders and lessons to be taken into account when negotiating international contracts in these areas and elsewhere in the world.

This *Commentary* reviews the elements of *force majeure* in the context of these troubled times in the Middle East and North Africa and considers specific issues that may arise for parties to contracts whose performance is affected by *force majeure*.[2]

CONTRACTUAL *FORCE MAJEURE* PROVISIONS

Force majeure is a legal concept that derives from Roman law (*vis maior cui resisti non potest*) and is present in many civil law systems. Under French law, for example, a party may be excused from performance of a contractual obligation by an unforeseeable and irresistible external event that makes performance of that obligation impossible. Common law doctrines

1 Eric Watkins, "Gadhafi threatens revenge as Libya's output plunges," *Oil & Gas Journal*, March 2, 2011. *Available at* http://www.ogj.com/index/article-display/2824727392/articles/oil-gas-journal/general-interest-2/economics-markets/20100/march-2011/gadhafi-threatens.html (last visited March 15, 2011).

2 This *Commentary* does not specifically address the issue of *force majeure* as it may arise in disputes over the liability of a state in relation to investments made in that state.

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of frustration of contract and impracticability are analogous (but not identical) to *force majeure*.

The principle of *force majeure* is included in the UNIDROIT Principles of International Commercial Contracts, Article 7.1.7(1) of which provides:

> Nonperformance by a party is excused if that party proves that the nonperformance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

Article 360 of the Libyan Civil Code states the principle of *force majeure* as follows:

> An obligation is extinguished if the debtor establishes that his performance has become impossible by reason of causes beyond his control.[3]

Libyan jurisprudence has interpreted this principle strictly: To qualify as *force majeure*, an event must be beyond the control of the parties, it must have been unforeseeable at the time the agreement was entered into, and it must render the performance of the obligation absolutely impossible.[4]

Parties to international projects and transactions very often include *force majeure* clauses in their contracts, rather than simply rely upon general principles that may apply under the governing law (and that may be deemed to be too strict). Such clauses may be specifically negotiated in considerable detail,[5] and they may take into account the specific nature of the transaction. For example, the *force majeure* clause in a contract for the sale of liquefied natural gas (LNG) between a state enterprise in a North African country (the seller) and a European energy company (the buyer) referred to classic examples of *force majeure and* to potential accidents related to the production and transport of natural gas, as follows (in English translation):

> The contracting parties shall for a certain period of time be totally or partially excused from their obligations.
>
> - in cases of *force majeure* or *cas fortuits*, such as, in particular: fire, flood, atmospheric disturbances, storm, tornado, earthquake, washing away of soil, landslide, lightning, epidemic, war, riots, civil war, insurrection, actions of public enemies, government action, strikes, lockout, with the burden upon the party relying upon it to supply proof of the *force majeure* nature of such event; and in the following circumstances,
> - serious accident affecting the exploitation of the natural gas deposit, the transport by pipeline in [seller's country], the handling, the liquefaction, the storage, the loading operations, the transport by LNG carriers, the discharge, the storage, the regasification, the transport by the principal pipeline(s) from the regasification facility and intended for the transport of the Natural Gas that is the subject of the present contract, such that their consequences cannot be remedied through the implementation of reasonable means at a reasonable cost.

In recent years, exploration and production sharing agreements (EPSAs) concluded between the National Oil Corporation (NOC) of Libya and foreign oil companies have included *force majeure* clauses.[6] A Libyan EPSA, signed in 2008, that

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3 This provision is similar to the *force majeure* principles of other Arab states, such as Egypt. Compare Article 287 of the Civil Code of the United Arab Emirates, which provides: "If a person proves that the loss arose out of an extraneous cause in which he played no part such as natural disaster, unavoidable accident, *force majeure*, act of a third party, or act of the person suffering loss, he shall not be bound to make it good in the absence of a legal provision or agreement to the contrary."

4 *See* First Award on *force majeure* in *National Oil Corp. (Libya) v. Libyan Sun Oil Co. (U.S.)*, ICC Case No. 4462 (1985), published in *Yearbook Commercial Arbitration*, Vol. XVI, p. 55, at 57 (1991).

5 Indeed, a 27-page *force majeure* clause has been reported: Marcel Fortaine & Filip De Ly, *Drafting International Contracts*, pp. 401-402 (Martinus Nijhoff, 2009).

6 For a study of a new generation of EPSAs entered into by NOC since 2005, see the two-part article by Pascal de Vareilles-Sommières and Anwar de Fekini, "*Les nouveaux contrats internationaux d'exploration et de partage de production pétrolière en Libye – Problèmes choisis*," *Journal du droit international (Clunet)*, No. 1, January 2008, and No. 1, January 2009. *See*, in particular, their discussion of the *force majeure* and changed circumstances clause in ¶ 44 of the second article. *See also* the older EPSA, signed in 1980, that was at issue in the ICC arbitration between NOC and Sun Oil in Case No. 4462, *supra*, note 3.

was at issue in an ICC arbitration where Jones Day represented one of the parties excused the performance of obligations in the event of *force majeure* in the following terms:

> Any failure or delay on the part of a Party in the performance of its obligations or duties hereunder shall be excused to the extent attributable to force majeure. Force majeure shall include, without limitation: Acts of God; insurrection; riots; war; and any unforeseen circumstances and acts beyond the control of such Party which render the performance of its obligations impossible.

Alternatively, parties may conclude a contract that is based upon a model form that includes a *force majeure* clause.[7] In the construction sector, certain widely used forms of contract published by the *Fédération Internationale des Ingénieurs-Conseils* (FIDIC)[8] define "Force Majeure" as "an exceptional event or circumstance:

(a) which is beyond a 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."[9]

Such "Force Majeure" may include (but is not limited to) "rebellion, terrorism, revolution, military or usurped power or civil war," as well as "riot, commotion, disorder, strike or lockout by persons other than the Contractor's personnel and other employees of the Contractor and Sub-contractors."

Events and circumstances in certain areas of Libya may well qualify as *force majeure* under contractual provisions such as those quoted above. The question then is whether *force majeure* conditions have actually prevented a party from performing any of its obligations under its contract and, if so, whether nonperformance of such obligation is excused by *force majeure*. The contract may refer generally to "obligations or duties" without exception, as in the Libyan EPSA quoted above. In contrast, the FIDIC forms (in common with many other contractual *force majeure* clauses) expressly exclude payment obligations from the benefit of their "Force Majeure" provisions.[10]

Hence, *force majeure* is not a magic wand that can simply be waved at any contract obligation that becomes more onerous. The contract's definition of *force majeure* and the scope of the excuse from performance that it offers must be carefully analyzed. In addition, parties generally have an obligation to mitigate the effects of *force majeure*. For example, Sub-Clause 19.3 of the FIDIC forms stipulates:

> Each Party shall at all times use all reasonable endeavours to minimise any delay in the performance of the Contract as a result of Force Majeure.

NOTICE OF *FORCE MAJEURE*

In the event that *force majeure* has prevented (or will prevent) a party from performing an obligation, the relevant contract generally requires that party to give notice of the event and its effect to its counterparty. The contract may simply require notice within a "reasonable" time, or it may stipulate a specific deadline for the notice. The Libyan EPSA requires notice within 30 days "after the date of occurrence of the force majeure event," while the FIDIC forms state that "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." The *force majeure* clause itself may stipulate requirements for the form of the notice (*e.g.*, "in writing"), in addition to any general

7 Model *force majeure* clauses are also available: *e.g.*, *ICC Force Majeure Clause 2003 - ICC Hardship Clause 2003* (ICC Publication No. 650).
8 The principal FIDIC forms include the "Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer" (1st ed. 1999) (the "Red Book"); the "Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant, and for Building and Engineering Works, Designed by the Contractor" (1st ed. 1999) (the "Yellow Book"); and the "Conditions of Contract for EPC/Turnkey Projects" (1st ed. 1999) (the "Silver Book"). Clause 19, "Force Majeure," is virtually identical in each of these forms.
9 Sub-Clause 19.1 of the Red, Yellow, and Silver Books.
10 Sub-Clause 19.2 of the Red, Yellow, and Silver Books.

requirements for notices that may be found elsewhere in the contract. A party's failure to give notice in accordance with relevant contractual requirements may bar that party from relying upon the *force majeure* (at least prior to an eventual compliant notice) and/or may allow the counterparty to claim damages arising from the late or absent notice.

Force majeure itself may prevent a company from complying with its obligation to give proper and timely notice of *force majeure*. In Libya this month, as in Tunisia and Egypt earlier this year, communications have been disrupted: Courier services have been interrupted, the internet has been blocked, and travel has been disrupted. Under these circumstances, giving a notice of *force majeure* to NOC in accordance with the Libyan EPSA (which provides for notices to be sent to a post office box address in Tripoli) may be difficult or impossible. Bearing in mind that a party claiming the benefit of *force majeure* to excuse nonperformance of a contractual obligation bears the burden of proving *force majeure*, it would be important to document all efforts—both successful and unsuccessful—to give notice.

A company that is active in Libya may not only find itself in a position where its contractual performance is prevented by *force majeure*. The company may also receive notice of *force majeure* from its counterparty. It is important in that event to verify compliance with notice provisions and other elements of the relevant *force majeure* clause.

CONSEQUENCES OF *FORCE MAJEURE*

The consequences of *force majeure* depend upon the relevant circumstances and the applicable contractual provisions. Often, *force majeure* will delay the performance of an obligation. In that event, the party whose performance has been delayed may be entitled to an extension of time for performance. The contract may specify the extension to which a party is entitled (*e.g.*, one day of extension for each day that performance is delayed), which may or may not yield an equitable result for either party. Alternatively, it may be left to the parties agree upon the extension, if any, that is appropriate. In the case of a construction contract, the contractor may be entitled only to an extension of the time for performance if the "critical path" schedule is affected. To the extent that the effects of *force majeure* are absorbed by the float in the schedule, the contractor may not be entitled to an extension at all.[11]

A contract may include provisions aimed at ensuring performance in case of *force majeure*. For example, an alternative obligation clause may provide for "replacement" pipeline gas in place of LNG delivery. Some long-term oil and gas supply contracts provide for *force majeure* restoration quantities.

In many cases, the events giving rise to *force majeure* impose additional costs upon the parties. For example, Tekfen Construction and Installation Co., Inc., a Turkish company involved in the construction of Al Khufra-Tazerbo Water Conveyance System (part of the Great Man-Made River Project) in Libya, has reported that it evacuated more than 1,000 of its employees from five construction sites in the Kufra Region some 1,000 km south of the Mediterranean coast. The employees—nationals of Turkey, Thailand, Egypt, Vietnam, Pakistan, and the Philippines—were transferred overland to Benghazi. Some 650 of those employees were then transferred by ship to Marmaris, Turkey. The non-Turkish nationals were housed in Marmaris while arrangements for travel to their home countries were made.[12] Assuming that Tekfen is able to resume work on the project, the remobilization of its construction personnel on site will, of course, generate additional—and no doubt significant—costs.

The FIDIC forms provide that a contractor who incurs additional costs as a result of *force majeure* is entitled to the reimbursement of certain costs, in accordance with the contract's claim procedure.[13] The contractor will be obliged, *inter alia*, to prove that the costs for which it claims

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11 This point raises a question that is much debated in construction law (and is outside the scope of the present *Commentary*): "Who owns the float?" *See*, *e.g.*, P.K. Keane & A.F. Caletka, *Delay Analysis in Construction Contracts*, § 5.2.5 (Wiley-Blackwell, 2008).

12 Tekfen posted information about this evacuation on its web site: http://www.tekfen.com.tr/english (last visited March 3, 2011).

13 The contractor is not entitled to claim reimbursement for costs arising from "natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity." In addition, apart from costs arising from "war, hostilities … invasion, [and] act of foreign enemies," the costs that are eligible for reimbursement under this provision must have been incurred in the country where the permanent works are being executed. *See* Sub-Clause 19.4(b) of the Red, Yellow, and Silver Books.

compensation arose from the *force majeure* events and not some other cause.

In the absence of such express contractual provisions, the recovery of costs arising from *force majeure* is unlikely.[14] For instance, the Iran–United States Claims Tribunal, judging disputes between Iranian and American parties in the aftermath of the Islamic Revolution of 1978–1979, found itself obliged to determine the rights and liabilities of certain parties in light of the termination of their contracts as a result of *force majeure* conditions. The Tribunal summarized its approach in such cases as follows:

> The governing rule is that the loss must 'lie where it falls.' The apportionment of the loss is subject generally to the Tribunal's equitable discretion, using the contract as a framework and reference point.[15]

If *force majeure* conditions prevent performance or delay it for an extended period of time, the contract may be terminated. The conditions upon which this occurs may depend upon the specific terms of the relevant contract. For example, the Libyan EPSA provides that the parties "shall meet as soon as possible after notification of force majeure with a view to agree on mitigating the effects thereof." If the parties fail to reach an agreement and the *force majeure* conditions continue for a period of two years after the *force majeure* notice, the contract shall terminate. The FIDIC forms give either party the option to terminate the contract 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 … or for multiple periods which total more than 140 days due to the same notified Force Majeure…."[16]

The rationale for these termination clauses is that the essential purpose of the contract will at some point be frustrated if the contracted work cannot be undertaken for an extended period. The terms of the contract will also stipulate how the work will be wound up in the case of such a termination, and what costs of demobilization, etc., can be recovered.

SUBCONTRACTORS AND SUPPLIERS

A major project will normally involve more—perhaps many more—than two parties and one contract. In particular, there may be numerous subcontractors and suppliers. Some of them may be in the country where the project is being performed, providing construction materials, for example, while others are located outside the country, designing, manufacturing, and supplying equipment for the main contractor. The relevant contracts may provide for the situation where *force majeure* conditions in the country where the project is located (*e.g.*, Libya) give the main contractor the right to order suspension of work by a subcontractor that is located outside that country (*e.g.*, Germany) and not directly hindered by the *force majeure* conditions.[17] The subcontractor will, however, resist an arrangement that causes it to bear the cost of the distant turmoil, as the equipment that it has manufactured may not be suited for an alternative project.

Where there is a string of sales contracts (*e.g.*, for oil or gas), upstream *force majeure* events may affect downstream contracts. If the *force majeure* clauses in the downstream contracts cover specific sources of supply, such clauses may be triggered by the closing of production facilities in, for example, Libya.

APPLICABLE LAW

In addition to considering contractual provisions regarding *force majeure*, a party should also examine relevant

14 Such costs may not be covered by insurance, either: Standard form cover for loss or damage due to strike, riot, and civil commotion commonly *excludes* loss or damage occasioned by civil war, or even civil commotion assuming the proportion of a popular rising or rebellion. Judging by news reports from Libya, civil commotion has indeed crossed that line in some areas.

15 *Queens Office Tower Associates* v. *Iran National Airlines Corp.*, Award No. 37-172-1 (Apr. 15, 1983), at 14-15, *reprinted in* 2 Iran–U.S. C.T.R. 247, 254. This and related cases are discussed in George Aldrich, *The Jurisprudence of the Iran–United States Claims Tribunal*, pp. 317-320 (Clarendon Press–Oxford, 1996).

16 Sub-Clause 19.6 of the Red, Yellow, and Silver Books.

17 FIDIC has published the "Test Edition" of "Conditions of Subcontract for Construction for Building and Engineering Works Designed by the Employer" (2009), intended for use in conjunction with the Red Book. Clause 19 of that Subcontract provides: "The provisions of Main Contract Clause 19 [*Force Majeure*] shall apply to the Subcontract."

principles of the applicable law. (The applicable law will normally be stipulated in the contract itself.) Unless the contract provides expressly that its *force majeure* clause supplants the analogous provisions of the applicable law, the contract is likely to be interpreted as supplementing the law on this issue. Thus, general principles of *force majeure* or frustration of contracts, as the case may be under the applicable law, may be important.[18] If the relevant contract is for the sale of goods,[19] the Convention on Contracts for the International Sale of Goods (CISG) may apply.[20] If so, the principles of *force majeure* are applicable pursuant to CISG Article 79.

Moreover, the contract may state expressly that the applicable law supplements contractual provisions. For example, the FIDIC forms provide for remedies under the law governing the contract under circumstances that may not fall within the scope of the *force majeure* clause.[21] In concrete terms, this means that there may be a basis under the applicable law for terminating the contract that is not available under the terms of the contract.

DISPUTES

There is no certainty, of course, that a company's counterparty will accept a notice of *force majeure*. The counterparty may contest the existence of *force majeure* conditions and assert that the company's nonperformance or delay in performing a particular obligation constitutes a breach of contract. In some instances, the counterparty may make a call upon the performance security that the party invoking *force majeure* had provided. A prudent contractor will have arranged insurance coverage against the improper calling of performance securities.[22]

The occurrence of *force majeure* conditions thus increases the likelihood of disputes between contract partners. It is not surprising that a party will attempt to shift the burden of delays and additional costs arising from the turmoil to another party. This situation highlights the importance of the dispute resolution provisions of the relevant contract. Jones Day, with extensive experience in international dispute procedures, including those in which *force majeure* is an issue, generally recommends to its clients that they agree upon international arbitration in a country that is neutral vis-à-vis the parties and is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[23]

Indeed, the Libyan EPSA provides for the resolution of disputes by arbitration in Paris under the Rules of Arbitration of the International Chamber of Commerce (ICC). Similarly, the FIDIC forms provide for arbitration under the ICC Rules, unless otherwise agreed by the parties.[24] However, some Libyan state-owned entities and public authorities will not agree to arbitration or will demand that the place of arbitration be in Libya. A foreign party that acceded to a demand that the Libyan courts have exclusive jurisdiction over disputes may now regret that decision, if unsettled conditions in the country interfere with the operation of the courts and access to local counsel.

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18 The arbitral tribunal in the NOC/Sun Oil case interpreted the *force majeure* clause in the parties' contract and found no expression of an intent "to waive an essential rule of Libyan common law according to which force majeure is only established when the event evoked by the defaulting party created an impossibility to perform whether on a temporary or a permanent basis." First Award in ICC Case No. 4462, at p. 59, *supra*, note 3.

19 The goods may be sophisticated industrial machinery or equipment, special building materials, or simply food.

20 The CISG applies to contracts for the sale of goods (with certain exceptions) "between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State" (Art. 1). The parties to an international sales contract may exclude the application of the CISG (Art. 6), and many parties to such contracts do so.

21 Sub-Clause 19.7 of the Red, Yellow, and Silver Books.

22 *See* Nael Bunni, *The FIDIC Forms of Contract*, p. 284 (Blackwell, 3rd ed., 2005).

23 Note, however, that Libya is not a party to the New York Convention, so enforcement of an eventual arbitral award in Libya would not benefit from the provisions of that treaty. Foreign arbitration awards can be enforced in Libya only in accordance with the rules for enforcement of foreign judgments.

24 Sub-Clause 20.6 of the Red, Yellow, and Silver Books. Prior to arbitration, there are provisions for the submission of disputes to a dispute adjudication board.

CONCLUSION

One can only hope that the troubled times in Libya come to an end soon, with an outcome that opens the way to democracy and respect for human rights, but companies active there and elsewhere in the region must be prepared for continuing *force majeure* conditions. They should accordingly give careful attention to the *force majeure* provisions in existing contracts, as well as contracts under negotiation. As this brief *Commentary* has shown, such clauses should define *force majeure*, taking into account the specific nature of the contract; they should stipulate the actions to be taken in the event of *force majeure* (such as giving notice and mitigating the effects of *force majeure*); and they should address the consequences of *force majeure*, including possible extension of time for performance, recovery of certain costs, and the eventual termination of the contract.[25]

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25 *See, e.g.*, Fontaine & De Ly, "*Force Majeure* Clauses in International Contracts," *op. cit*., pp. 401-451; Ewan McKendrick, "*Force Majeure* Clauses: The Gap between Doctrine and Practice," in *Contract Terms*, pp. 233-251 (A. Burrows & E. Peel, eds., 2007).

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