Contracts & COVID-19: A Brief Review of Key Cases From Singapore, the UK and the US

Tripp Haston
Bradley Arant Boult Cummings LLP

Roughly two years on from the COVID-19 pandemic, ("the pandemic") its global effects on the law continues. While there are differences across the globe on the extend of the pandemic's lingering efforts, this brief paper addresses efforts by affected parties to avoid contractual obligations or to recover lost profits and damages caused by the pandemic.

When the COVID-19 global pandemic ("the pandemic") hit in early 2020, it had dramatic effects on the global economy as well as individual businesses. Some business – such as legal practices – were better positioned to survive the impacts of the pandemic. These businesses relied less on in-person interaction to an extent few members of the global legal profession realized. Many assumed a part of daily required legal practice was an essential visit to the office, to the clerk's office or to the courtroom. Little did many know how non-essential those interactions were. We all learned – whether we liked it or not – to embrace videoconferencing technologies. We all learned that we could be productive and helpful to our clients without the requirement to constantly be in the office, the clerk's office, or the courtroom.

However, many other businesses that did depend on that intense, daily human interaction – restaurants, bars, sporting venues and retail shops – were all hit very hard by the pandemic. Many of these businesses sought to recover damages caused by the pandemic or avoid their obligations through their insurance policies. Often these offers wound up in courts as insurers politely declined their insureds entreaties to make them whole due to the pandemic. While results were varied, regardless of which court resolved the issue, most read insurance policies narrowly and found for the insurers if the words "pandemic" or "epidemic" where not listed as causes for the potential losses. Many insureds sought to enforce the "*force majure*" clauses of their contracts to recovery from their insurers or avoid their obligations under their performance contracts. Few courts recognized the pandemic as a "force majure" event.

The term force majeure, is generally defined as a "supervening cause or force." Examples of force majeure events include "war, terrorism, acts of government, strikes

and other labor disruptions, and natural disasters such as fires and severe storms." However, force majeure provisions are unique to each contract and when courts determined whether such a term applied to encompass the pandemic resulted in a fact-intensive inquiry.

Under the plain meaning rule, most courts that interpreted a force majeure clause containing the words "pandemic" or "epidemic", assuming the clause was part of a legally valid contract, concluded that the pandemic would fall under the scope of such clause. However, there was vast disagreement amongst courts as to whether the pandemic would be covered by a force majeure clause that did not employ these words. Historically, when writing contracts, drafters rarely included "pandemics" in the force majeure clause, simply because the average person drafting a contract would not have contemplated them as a possible threat at that time. Most contract suits pandemic revolved around force majeure clauses without the terms "pandemic" or "epidemic" included in the clause. Below are some key cases addressing whether the pandemic constituted a force majure event under specific contracts at issue.

UNITED STATES

***Regal Cinemas, Inc. v. Town of Culpeper* – USDC -WDVA (July 14, 2021)**

The Town of Culpeper sued Regal Cinemas after the movie theatre ceased operations because of the pandemic. Regal Cinemas argued that its performance was excused under its force majure clause of its contract due to the pandemic. The relevant force majeure clause in the lease executed between the parties only applied if "the Complex or other improvements on the Property, or any part thereof, are *damaged or destroyed* by fire, flood, natural causes, or other casualty[.]" The court began analyzing this clause by expressing the principle that "courts must construe contracts as written." After carefully reviewing the language in the force majeure clause, the court held that, because the clause only contemplated *physical* damage to the property, the pandemic could not excuse Regal Cinemas from its performance and therefore, ruled for the Town of Culpepper.

***JN Contemporary Art LLC v. Phillips Auctioneers LLC*, 507 F. Supp. 3d 490 (S.D.N.Y. 2020)**

Phillips terminated an agreement with JN Contemporary Art to auction a work of art due to New York Governor Andrew Cuomo's executive orders that effectively shut down all nonessential businesses. Instead of rescheduling the event, Phillips cited the force majeure provision in the contract as its basis for terminating the contract. This ultimately led to JN Contemporary Art suing for breach of contract.

The district court analyzed the language of the contract and determined that Phillips' performance under the contract was excused. The court agreed that force majeure provisions in contracts should not be given an expansive view. *Id.* at 500. However, in this case, it found that the pandemic should be considered a "natural disaster" under the clause. The force majeure clause at issue provided:

> *In the event the auction is postponed for circumstances beyond our or your reasonable control, including, without limitation, as a result of natural disaster, fire, flood, general strike, war, armed conflict, terrorist attack or nuclear or chemical contamination, we may terminate this Agreement with immediate effect.*

Id. At 496. Before analyzing the specific clause in this case, the court reaffirmed that these clauses "are not to be given expansive meaning[.]" *Id.* at 500. The court held generally that the pandemic fell under the category of an event beyond the reasonable control of the parties and then focused specifically on the language of the force majeure clause. *Id.* at 501.

The court reviewed both the Blacks Law and Oxford English dictionaries' definition of "natural disaster" to understand whether the pandemic satisfied the contract's force majeure clause. *Id.* at 501. The court found that the pandemic fit within both of the dictionaries' definitions and, even absent such definition, the pandemic would also fit in the force majeure clause based on the other named events that would excuse performance, which included major economic upheaval and climate disasters. *Id*. at 503. JN appealed the court's decision to the U.S. Court of Appeals for the Second Circuit, which affirmed the district court's decision. *See* 29 F.4th 118 (2d Cir. 2022)

Although this court concluded that the pandemic excused performance based on this specific force majeure clause, other force majeure clauses that are the subject of pending litigation are not as generous in the events they expressly cover. Therefore, although general trends can be ascertained from examining cases nationwide involving force majeure and the pandemic, there is no consensus or bright-line rule dictating how courts will rule. What can be derived, however, from the nationwide trend is that courts will focus their analysis on the words employed in the force majeure clause first and then, if necessary, resort to the factual circumstances surrounding the case and canons of contract interpretation for ambiguous language to decide whether a pandemic fits within the force majeure definition.

***Easom v. US Well Services, Inc.* 37 F.4th 238 (5th Cir. 2022)**

Like the *JN Contemporary Art LLC* court's decision, the US District Court for the Southern District of Texas decided that the definition of "natural disaster" under the federal Worker Adjustment and Retraining Notification Act (WARN Act) was broad enough to include the pandemic. The WARN Act generally requires most businesses with 100 or more employees to provide their employees with 60 days' notice of plant closings or mass layoffs. If an employer fails to comply with the WARN Act, it may be required to provide affected employees with back pay and benefits for each day of the violation and be subject to civil penalties. The District Court addressed the issue of whether an employer's decision to terminate its employees without 60-day notice violated the WARN Act, which provides an exception for mass layoffs because of a natural disaster. The court cited *Black's Law Dictionary*, which defines "disaster" as a "calamity" or "a catastrophic emergency." Considering these definitions, the District Court found that the WARN Act did not exclude the pandemic from this definition.

On appeal, however, the U.S. Court of Appeals for the Fifth Circuit reversed the District Court's decision. The Fifth Circuit determined that the pandemic did not satisfy the "natural disaster" exception to the WARN Act's notice requirement and thus may not exempt employers from providing the required notice of COVID-related layoffs. *Id* at 244. Because the WARN Act does not define "natural disaster," the Fifth Circuit turned to the statutory context of the term to determine legislative intent. *Id* at 243. The Fifth Circuit concluded that "the appearance of 'natural disaster' in a list with 'flood, earthquake, or drought' suggests that Congress intended to

limit 'natural disaster' to hydrological, geological, and meteorological events." *Id*. The Fifth Circuit further found that since Congress could have, but did not, include terms like "disease, pandemic, or virus in the statutory language of the WARN Act," it must have excluded those terms from the natural disaster exception deliberately. *Id.* The Fifth Circuit also deferred to the Department of Labor's interpretation of the WARN Act and held that to qualify for the natural disaster exception, an employer must "'demonstrate that its plant closing or mass layoff is a *direct result* of'" the alleged natural disaster. The Court equated "direct result" to "proximate causation," therefore imposing a proximate causation requirement on the natural disaster exception. *Id* at 246.

Other US Cases – "Physical Damage" Element for Business Interruption Coverage

In June 2022, the US Supreme Court declined to grant a writ of certiorari seeking review of a decision that denied coverage for losses caused by the pandemic's governmental shutdown orders. The Court declined a petition by Goodwill Industries of Central Oklahoma to review a decision by a panel of the 10th Circuit Court of Appeals that found there was no direct physical loss or damage to Goodwill's property and, therefore, the insurance policy at issue did not cover Goodwill's loss and that the policy's virus exclusion barred coverage.[1] All eleven U.S. Circuit Courts of Appeal have issued similar opinions, as have several state supreme courts including those of Iowa, Massachusetts and Wisconsin. By way of example, in June 2022 the Eight Circuit affirmed dismissal of claims filed by Planet Sub Holdings against State Auto Property & Casualty Insurance Co., finding there was no physical damage to the sandwich shops under either Missouri, Kansas or Oklahoma law.[2] Finally, the Eleventh Circuit Court of Appeals affirmed dismissal of business-interruption lawsuits in two cases, one filed by Dukes Clothing

[1] *Goodwill Industries of Central Oklahoma Inc. v. Philadelphia Indemnity Insurance Co.*, No. 21-1358, *petition for cert. filed*, (U.S. Apr. 14, 2022). See also *Sagome, Inc. v. The Cincinnati Ins. Co.* No. 21-1359 (10th Cir. January 3, 2023) (similarly finding no "physical loss or damage" caused by pandemic, so affirmed lower court's decision that policy's plain language did not include economic losses occasioned by pandemic).

[2] *Planet Sub Holdings, Inc. v. State Auto Property & Casualty Insurance Company, Inc.*, No. 21-2199 (8th Cir. June 6, 2022)

against Cincinnati Insurance Co. interpreting Alabama law[3] and the other filed by Restaurant Group Management against Zurich American Insurance Co. interpreting Georgia law.[4]

SINGAPORE

Ser Kim Koi v. GTMS Construction Pte Ltd [2022] SGHC

In *Ser Kim Koi v GTMS Construction Pte Ltd,* the Appellate Division of the Singapore High Court considered the meaning of "force majeure" in the Singapore Institute of Architects' ("SIA") standard form contract, concluding that the term did include the pandemic and the resulting effects.

The dispute arose in relation to a construction project involving three bungalows located in Singapore. Mr. Ser Kim Koi was the owner. GTMS Construction Pte Ltd was the main contractor, and Chan Sau Yan Associates was the appointed architect. The contract between GTMS and Mr. Ser Kim Koi was based on the SIA lump sum form contract.

The principal issue considered by the court was whether the architect had properly granted extensions of time in accordance with the SIA contract. Mr. Ser Kim Koi argued that he was entitled to liquidated damages because the architect had improperly granted the extensions of time in circumstances where the preconditions of the contract had not been met. Specifically, he maintained that some of the delays approved by the architect did not qualify as a *force majeure* event under the SIA contract. GTMS and the architect countered that the extensions of time were properly granted because the delay in the project was caused by the local power company's delay in the arrangement for the power connection and a new and unforeseen requirement for an overground distribution box to be installed.

Force majeure is one possible ground upon which an architect is permitted to grant extensions of time and is described in subsection 23(1)(a) of the SIA form contract. This subsection provides:

> *23(1) The Contract Period and the Date of Completion may be extended and re-calculated, subject to compliance by the Contractor with the requirements of the next following sub-clause, by such further periods and until such further dates as may*

[3] *Dukes Clothing, LLC. v. The Cincinnati Insurance Co.,* No. 21-11974 (11th Cir. June 6, 2022).

[4] *Rest. Grp. Mgmt. v. Zurich Am. Ins. Co***,** No. 21-12107 (11th Cir. Jun. 6, 2022).

> *reasonably reflect any delay in completion which, notwithstanding due diligence and the taking of all reasonable steps by the Contractor to avoid or reduce the same, has been caused by: (a) Force Majeure; … (f) Architect's instructions under Clauses 1.(4)(a), 1.(4)(b) or 1.(4)(c), 7.(1) (or otherwise in accordance with that clause), 11.(2) (where permitted under that clause) and 14 of these Conditions (but not Architect's direction under Clauses 1.(3) or 12.(5)(b), 12.(5)(c) or 12.(5)(d) of these Conditions); … (o) the grounds for extension mentioned in Clauses 1.(8), 3.(3), 7, 14, 29.3(a)(ii) and 29.3(b)(ii) of these Conditions; … (q) any other grounds for extension of time expressly mentioned in the Contract Documents*

The court determined that while Clause 23(1)(a) covers *"radical external events and circumstances that prevent the performance of the relevant obligations and which are due to circumstances beyond the parties' control"* and that many of the pandemic's effects could be considered to fall within this clause. However, the court ultimately found that the power company's requirement to install an overground box did *not* amount to a radical or external event that was beyond the contemplation or control of the parties or an unforeseeable event, and therefore, it was *not* a *force majeure* event within 23(1)(a) of the SIA form contract. The court held that the extensions of time were properly granted under other subsections of Article 23(1).

While the judgment makes clear that the text of the contract assumes primary importance in the court's interpretation of "*force majeure*," the court's commentary is significant in that it provides support to the argument that contracts that neither specify an event of pandemic nor define the term force majeure should be interpreted to cover the resulting effects of COVID-19. We may now see further litigation on this issue as the judgment may open the door to further COVID-19 litigation in Singapore. While it is too soon to determine whether the Court's decision will result in a flood of cases, parties in Singapore now have a decision to rely on when seeking to enforce their *force majeure* clauses based upon the pandemic's effects.[5]

QBE Insurance (Singapore) Pte Ltd & Another v Relax Beach Co. Ltd.

In this important decision, the Singapore High Court reached a different outcome than the *Ser Kim Koi v GTMS Construction Pte Ltd* court when it found QBE Insurance and MS First Capital Insurance liable to indemnify the owner of Le Meridien Phuket Beach Resort for losses occasioned by the pandemic after it closed on April 7, 2020, on order of the Thai authorities.

[5] For further information about this case, see https://www.elitigation.sg › 2022_SGHCA_34 › pdf

QBE and MS First Capital had agreed to provide insurance coverage for business interruption losses suffered by its properties, including Le Meridien Phuket, because of certain events set out in the policy. This included the resort's closure because of the outbreak of an infectious disease. After denying their claim under the applicable policy, Relax Beach sued the insurers alleging, among other things, that the requirements for making its claim had been satisfied as one of its hotel employees was a confirmed Covid-19 case. The insurers challenged this basis, arguing that there was no evidence that the Thai authorities had considered the confirmed Covid-19 case as the specific reason for the closure. Moreover, the insurers argued the resort had not told insurers of the infected employee or provide details of its losses, breaching its obligations under the policy. Those arguments were rejected by the Singapore High Court in its decision. The insurers are now appealing the ruling.[6]

United Kingdom

***The Financial Conduct Authority v Arch and Others* [2021]**

On January 15, 2021, the UK Supreme Court handed down the seminal decision of *The Financial Conduct Authority v Arch and Others* (commonly referred to as the "*FCA Test Case"*). The FCA Test Case involved some of the globe's largest insurers including Zurich, Hiscox, QBE and Royal & Sun Alliance.

In its decision, the Supreme Court unanimously dismissed Insurers' appeals and the practical effect of the decision meant that all the insuring clauses which were at issue on the appeal provided coverage for the business interruption caused by the pandemic. The Supreme Court took a narrower approach to identifying the insured peril or trigger in disease clauses, focusing on individual occurrences, but because it found that such individual occurrences could as a matter of law satisfy the test of causation (along with all other such occurrences) the conclusion that there was cover under the disease clauses was confirmed.

[6] For further information on this case, see https://www.straitstimes.com/business/property/phuket-resort-can-claim-insurance-payouts-for-covid-19-lockdown-losses-high-court

Unlike similar clauses at issue and addressed above from the US, these clauses all specifically mentioned "disease" and "prevention of access" as potential triggers for business interruption coverage. The Court decided broadly in favor of policyholders on "disease clauses" (clauses that provided cover for business interruption losses arising from disease within the geographical limit) but broadly against policyholders with "non-damage denial of access" clauses (NDDA clauses**)** (clauses that cover business interruption due to being closed down by a public authority in response to certain events within the geographical limit).[7]

***Corbin & King Ltd and Others v Axa Insurance UK PLC* [2022]**

Since the time of its decision, the UK Supreme Court has decided other cases related to the pandemic's effects on business interruption coverage. Most notably in March 2022, in *Corbin & King Ltd and Others v Axa Insurance UK PLC*, the Court found in favor of coverage for policyholders with NDDA clauses and distinguished the Court's *FCA Test Case* decision on that aspect. Specifically, the Court decided that, based on the wording of the policy and the Supreme Court's judgment in the test case, the pandemic was capable of being a danger within one mile of the premises in question, which caused the premises to be closed by a statutory body and suffer interruption. Therefore, the policy did provide coverage. This case has now allowed policyholders with NDDA clauses and hybrid clauses to claim that their business interruption insurance policy does provide cover for the losses suffered.[8]

[7] For further information on this case, see https://hsfnotes.com/insurance/2021/01/15/supreme-court-hands-down-judgment-in-fcas-covid-19-business-interruption-test-case/

[8] For further information on this case, see https://www.freeths.co.uk/2022/03/07/high-court-chips-away-at-fca-test-case-on-business-interruption-insurance/