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DISPUTE RESOLUTION **ALERT**

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Navigating commercial risk during uncertain times in Africa: When the law is Foreign

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In Africa, a significant number of international commercial contracts are governed by English law. When concluding cross-border or international commercial transactions most parties do not give much attention to the governing law clause or for that matter, the dispute resolution clause. It's only when trouble strikes and advice is sought from lawyers on performance obligations that attention is given to the law governing the interpretation of contractual provisions such as *force majeure*.

What one generally finds is that choosing English law to govern a contractual relationship has no direct or indirect link to the subject-matter of the contract (i.e. there is usually no performance obligation in England) or nationality of the parties to the contract. Parties generally for historical reasons (i.e. well known, well-developed and reputable legal system) choose English law to govern the performance obligations.

In these uncertain times it's important to ensure that a thorough risk analysis is done of your contractual rights and obligations of cross-border and international commercial agreements, including understanding what the particular selected governing law requires to legitimately invoke certain contractual provisions (i.e. force majeure, hardship or exclusion provision) and in the absence of such clauses how the governing law may come to your aid. An important consideration for contracting parties when attending to a risk analysis of their contractual obligations, options and remedies is whether an arbitral tribunal or a court will uphold a defence of *force majeure* (i.e. inability/impossibility of performance) against a claim for damages or loss by the counterparty for breach of contract where the party invoking *force majeure* was already in serious financial distress prior to the *force majeure* event (i.e. COVID-19). In particular where the counterparty had a reasonable suspicion that the party now claiming *force majeure* will be unable to perform under the contract or to meet such future obligations as they fall due.

The English case of *Classic Maritime Inc v Limbungan Makmur SDN BHD and Lion Diversified Holdings BHD* [2019] EWCA Civ 1102 sets-out how the English courts have approached cases where the inability to perform was not upheld as a defence based on the fact that the party who raised the inability was not willing and able to perform its obligations prior to the *force majeure* event. The facts in the case of *Classic Maritime* are briefly the following:

- the parties concluded a long-term contract of affreightment for the shipment of iron ore pellets from Brazil to Malaysia, which contract was governed by English law.
- On 5 November 2015, in the industrial complex where the iron ore was mined in Brazil, the tailings dam burst and as a result of the bursting of the dam the production of iron ore was halted. All means of the charterer sourcing iron ore were destroyed and it was prevented from any possible performance of the contract

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The English Court of Appeal held that the charterer was unable to rely on the *force majeure* clause, even though objectively viewed performance under the contract was wholly impossible due to the dam burst.

of affreightment. Consequently, it rendered the shipping of iron ore pellets from Brazil to Malaysia impossible between November 2015 and June 2016.

- The contract contained a *force majeure* clause which excluded liability for loss or damage "*resulting from*" a series of specified events and included an event applicable to the dam-burst (i.e. "*directly affect the performance of either party*").
- The charterer raised impossibility of performance in reliance on the clause in the contract of affreightment, which dispute concerned five shipments which should have taken place between July 2015 and June 2016.
- Prior to the incident in Brazil the charterer to the contract was in financial difficulty and missed several shipments of iron ore.

The English Court of Appeal held that the charterer was unable to rely on the *force majeure* clause, even though objectively viewed, performance under the contract was wholly impossible due to the dam burst. In using the "*But For*" test the court in assessing the facts held that "*but for*" the dam burst, the charterer would anyway not have performed under the contract. The charterer under the contract of affreightment would not have been ready and willing to provide cargoes for shipment even if the dam-burst had not occurred. By virtue thereof the court held that the charterer was in breach of an

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absolute duty to provide the cargoes, but that nevertheless the ship owner was not entitled to recover substantial damages because this would put it in a better financial position than it would have been in if the charterer had been ready and willing to provide cargoes.

For businesses operating in Africa, with various international commercial agreements it is important to do a proper risk analysis on one's rights and obligations, with proper consideration given to the governing law and the dispute resolution provision. In doing that proper regard must be given to the trigger events for a dispute and the nature of the dispute resolution clause, in particular whether such clause provides for alternative dispute resolution methods such as conciliation, mediation or arbitration. An important point for African businesses to note is that whether the performance obligations under your cross-border contracts or multinational contracts are governed by English law, South African law, Kenyan law or any other, international dispute resolution experts in Africa – no matter their location on the continent – can seamlessly provide risk advice and deal with any international dispute effectively, efficiently and on a cost-effective basis.

Jackwell Feris and Mukelwe Mthembu

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Chasing evidence overseas for a local arbitration. A fool's errand?

What is important for parties in arbitrations to bear in mind here is that many jurisdictions have legislation and process to assist foreign parties in securing witness testimony.

As a general principle a court in one country has no authority to make orders effective in another country, either at all or at least absent compliance with legislation and process in that other country. That stands to reason and is bound up in concepts of sovereignty and jurisdiction.

A practical example of that general principle is where a party to an arbitration is faced with a reluctant witness resident outside the country operating as the seat of the arbitration. What is important for parties in arbitrations to bear in mind here is that many jurisdictions have legislation and process to assist foreign parties in securing witness testimony. The English Court of Appeal was called upon to deal with this issue recently in *A and B v C, D and E* [2020] EWCA Civ 409 when a party to a New York based arbitration required precisely this kind of assistance. The arbitration concerned a deal facilitated by a third-party negotiator and the negotiator's evidence was needed.

The negotiator, resident in England, was reluctant to testify and the English courts were asked to compel the witness to testify in terms of section 44(2)(a) of the English Arbitration Act which details the court's powers in support of arbitral proceedings and specifically "*the taking of the evidence of witnesses*".

The Court of Appeal found that section 44 of that Act should be read with section 2(3), which makes section 44 applicable even if the seat of the arbitration is outside of England, Wales and Northern Ireland. On that basis the court came to the assistance of the applicant. Importantly, section 2(3) is subject to the court's discretion to refuse to assist if in its opinion, the fact that the seat of the arbitration is foreign makes such assistance inappropriate.

Section 14(1)(a)(iv) of the South African Arbitration Act of 1965 empowers an arbitrator to appoint a commissioner to take the evidence of any person in South Africa or abroad. But that assumes a cooperative witness. Our courts may order evidence of a foreign witness to be given by commission but those orders must be dealt with in the foreign country and within that country's courts' discretion according to its laws. The International Arbitration Act of 2017 adopts a similar approach in line with the Model Law on International Commercial Arbitration (1985).

The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters was signed on 18 March 1970. It allows for the transmission of letters of request from one signatory state (where the evidence of a particular witness is needed) to another signatory state (where the witness resides) outside of diplomatic channels. The Convention was ratified by South Africa in 1997 but has not been incorporated into South African domestic law and is not available to South African litigants as a result. This Convention was on the agenda of the South African Law Reform Commission as far back as 2004 but we appear no closer to an incorporation of the Convention into our law.

So ultimately, we are reliant on the law of the country in which the witness resides. That law may or may not assist and the extent of that assistance will certainly vary. It is often assumed that a recalcitrant witness overseas is an automatic cul-de-sac but that is not necessarily so. At the very least, it is worth an enquiry to a lawyer in that jurisdiction.

Tim Fletcher and Thabiso Matsane

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