FORCE MAJEURE: COVID AND THE CONSTRUCTION INDUSTRY

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Abstract

The Coronavirus pandemic (Covid-19) has raised questions surrounding the application of force majeure in the construction industry, the like of which have not been asked since the Second World War. This article attempts to decipher how the courts will answer these questions, in the face of massively underrepresented case law within the specific context of standard building forms, such as JCT agreements. This leads to the conclusion that while a legally sound application of the doctrine is available, it is likely to lead to a morally unsavoury conclusion. Furthermore, the reasons for this are explored in conjunction with the ways in which such a situation can be avoided in the future.

Introduction

This article aims to explore the ways in which construction contracts may be used to protect the interests of contractors who have not fulfilled their obligations during the Coronavirus pandemic (Covid-19). This will specifically focus on those who are party to standard form contracts. Within these agreements, clauses attempting to rely on the doctrine of force majeure will provide the bulk of discussion. These clauses are of great interest as they are rarely used but will likely become a fundamental part of the construction law landscape in the coming years.[2]

It will be argued that Covid-19 is capable of being, and will be considered by the courts to be, a force majeure event. However, this will be clearly distinguished from the issue of whether clauses attempting to avoid liability for failing to meet obligations, including force majeure, will be effective. It is hypothesised that this question will be far less predictable than is generally thought by academics. In addition, it will be shown that any judgment worthy of being widely applicable precedent will have to address whether contractual

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[2] Rachel Rothwell, Contract Disputes: Litigation pandemic? (June 2020) 117 (21) LS Gaz 1 6-19

obligations should be in competition with the protection of public health. In answering this question, the dissertation will analyse the role of moral motivations for not fulfilling contractual obligations within construction law and the ways in which such a concept could be added to the area. Finally, this work will outline the ways in which Covid-19 will affect the future of construction contracts, with particular regard for force majeure clauses.

1. Background

During the period of Covid-19, the construction industry has suffered a massive drop in production and widespread delays.[3] These difficulties have left parties on both sides of contracts seeking ways in which they can be protected against the effect of these consequences. The main source of concern, for contractors in particular, is the way in which the pandemic has impacted their ability to complete their contractual obligations.

Traditionally in English contract law, prior to *Taylor v Caldwell* in the late 19th century, failure to perform obligations rising from a contract resulted in strict liability for breach of contract.[4] After the landmark case, the concept of escaping from obligations was formed, eventually morphing into the doctrine of frustration. Frustration is available where it can be shown that it is impossible to carry out the contract as it was originally written.[5] There are two ways in which frustration can be claimed, the party must show that either: the contract has become impossible to perform; or that the terms have diverged so far from those originally stated that the agreement can no longer apply as was originally agreed. [6] The high bar in proving frustration reflects that it has the extreme effect of voiding the contract, excusing all parties from their obligations. This means the contract is never completed and a new agreement would have to be drafted to achieve the original terms.

An alternative to frustration is the French doctrine of force majeure. Force majeure is generally undefined in English Law. This is because it is only recognised in as far as two contracting parties include it in the terms of an agreement. The general purpose of the term in a contractual clause is to alter the obligations of a party in circumstances where an unforeseeable event outside of their control means they can no longer fulfil them as agreed. The main benefit of force majeure, when compared to frustration, is that it allows

[3] Nick Viljoen, An open and shut case, Construction sites in England [June 2020] 31(5), Construction Law Journal, 21-23
[4] Taylor v Caldwell (1863) 122 ER 309
[5] *Tsakiroglou* & Co Ltd v Noblee Thorl GmbH [1962] AC 93 [112]
[6] Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696 [396]

for the parties to continue their relationship rather than abandoning the contract completely. Functionally, this means that the party who cannot fulfil their obligations is not liable for a breach of contract.[7] This is particularly pertinent in the construction industry which heavily relies on familiarity and previous business relations. This means that the need to preserve working relations and goodwill by avoiding litigation is of enhanced importance.

Perhaps the most controversial issue pertaining to the construction industry surrounding force majeure is the closing of sites during the pandemic. This is because, unlike other sectors such as hospitality, the UK Government never ordered, or advised, that construction sites should close their gates. Yet, many did so for the purposes of preventing the virus from spreading. This came at a time where the country at large was told to ease the pressure on public transport and stay at home when they could. This is significant as when claiming force majeure, it could lead to an employer producing the rebuttal that sites only closed because the contractors decided to close them.[8] Not allowing force majeure to cover such events would mean that many contractors could be punished for essentially attempting to save lives.

2. The routes of force majeure

Force majeure owes its creation to French law where the term literally means 'greater force'. In the French Civil code force majeure is defined as: 'an event beyond the control of the debtor, which he could not foresee, prevent or avoid.'[9] The result of successfully claiming force majeure is that no damages are payable where an obligation has not been carried out by reason of such an event.[10]

In French law there are two types of obligations which an entity may be subjected to. The first of these are *obligations de moyens,* which are analogous with the reasonable man principle seen in English law whereby a party must do all that can be reasonably expected of them to meet their duties.[11] An example of this is the duties of a financial advisor to give the best advice they can, rather than a duty to make their client's money. In contrast,

[7] William Swadling, "Construction of Force Majeure Clauses" in Ewan McKendrick (ed), Force Majeure and Frustration of Contract (2nd edn, Lloyds's of London Press Ltd 1995)
[8] Rachel Rothwell, contract disputes: Litigation pandemic? (June 2020) 117 (21) LS Gaz 16-19
[9] French Civil Code Article 2016, 1218
[10] French Civil Code Article 2016, 1148
[11] John Bell, Sophie Boyron, Simon Whittaker, Principles of French Law (Oxford University Press 2008) 342.

obligations de resultat are not primarily concerned with intentions but with consequences.[12] The common example for this is the safe transportation of goods to a location. The second, stricter, form of obligation are those that force majeure applies to, allowing for non-performance to be excused.[13]

While comprehensively defining what force majeure is and which obligations it may apply to, the French system does not attempt to outline when an event will be considered to warrant an alteration of a party's obligations. Described best by Nicholas, the position in France prior to the definition in the Civil code, which still applies, is that the event must have been:

'(a) Irresistible, (b) unforeseeable, (c) external to the debtor, and must (d) have made performance impossible.'[14]

Despite giving an effective guide to the operation of the doctrine in France, these criteria illustrate why the French approach to force majeure does not naturally fit within the English legal system. This is because, where performance is considered impossible, the English common law would traditionally state that the contract has been frustrated. [15] This illustrates how the original concept of force majeure does not simply add to the English legal system but, by operation, steps on its toes.

3. Force majeure v Frustration?

Despite this non-cohesion between the two systems, force majeure has long been used in English contracts. In dealing with the conflict with frustration, English courts have supported the use of force majeure as an alternative to frustration where the event completely prevents performance. They have also made it clear that the application of force majeure is at the mercy of the drafting of the contract.[16]

The acceptance of force majeure clauses within the English system, which supports frustration, leads to questions of how the two can interact. For example, where the contract has a specified force majeure clause, there have been questions as to whether the parties

[12] Ibid
[13] Ibid
[14] Barry Nicholas, "Force Majeure in French Law" in Ewan McKendrick (ed), Force Majeure and Frustration of Contract (2nd edn, Lloyds's of London Press Ltd 1995)
[15] Ibid
[16] Tandrin Aviation Holdings Ltd v Aero Toy Store LLC [2010] All ER 111

have a choice as to whether the clause or frustration applies. [17] Intuitively, the inclusion of a force majeure clause would make it difficult to argue that the contract had been frustrated on the grounds of the events not being within the contemplation of the parties at the time of the agreement. This is because such situations are the exact purpose of a force majeure clause, meaning the events were within the contemplation of parties at the time of drafting.

There are those who oppose this view, such as McKendrick who, although accepting that functionally it will often be the case, disagrees with the implementation of a blanket rule whereby the inclusion of force majeure means the contract cannot be frustrated.[18] Much of this assertion is based around the *Metropolitan Water Board* case, which concerned whether a contract to build a reservoir could be frustrated due to delays caused by prohibition, despite there being a clause which expressly covered delays 'whatsoever and howsoever occasioned.'[19] While not specifically force majeure, the clause does represent the same issues in claiming a contract is frustrated, despite there being a clause which was created to deal with the unexpected. The House of Lords held that the effects of prohibition, and the character of these effects, were not sufficiently within the scope of what the parties could have contemplated when the contract was made.[20] The case shows that the existence of a clause dealing with unspecified unknowns does not mean a contract is not still subject to the doctrine of frustration.

It can however be argued that force majeure, as a widely used doctrine closely linked with connotations of godly intervention, is sufficiently impactful that it should be distinguished from the vague drafting of the clause regarding delays in *Metropolitan Water Board*. This is supported by Fuller's belief that, even without a definition in English law, the underlying principle of force majeure is widely understood.[21] That being said, it does seem too harsh to say that frustration is impossible where a force majeure clause is present. Perhaps a better turn of phrase would be where a force majeure clause can be effectively applied, there is no place for frustration.

4. Force majeure in the construction industry

[17] Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA [1977] 1 Lloyd's Rep. 133, 136
[18] Ewan McKendrick, Force Majeure and Frustration of Contract (2nd edn, Lloyds's of London Press Ltd 1995) 34
[19] Metropolitan Water Board v Dick, Kerr & Co. [1918] AC 119 [124]
[20] Ibid 140
[21] Geoffrey Fuller, Fuller: The Law & Practice of International Capital Markets (LexisNexis, 2012) 7.245

Standard forms

In order to provide a conclusive answer to how force majeure may apply to construction agreements, it is important to understand the contracts that govern them. The predictable format of the relationship between an employer and a contractor is such that it allows for standard forms to be widely used across the sector. These forms are popular as they should allow for parties to be sure they are well drafted and also provide stability to the project. From an academic viewpoint, they are useful as they allow for issues to be explored within a specific contract which then applies to large proportions of the sector.

In the UK, the most popular of these standard forms are those offered by the Joint Contracts Tribunal (JCT), the New Engineering Contracts (NEC) and the International Federation of Consulting Engineers (FIDIC). The JCT forms come in the form of the Standard Building Contracts with Quantities which are used for large or complex construction projects where detailed contract provisions are needed. These forms are designed for domestic use in the UK and are the most used form available. The most recent NEC forms take the shape of the NEC4 which was introduced in 2018. Previous iterations of the form have been used in high profile projects such as the London Olympics and the HS2 rail project. Unlike JCT forms, NEC4 is designed for international agreements. However, NEC4 is still primarily domestic often suffering on the international stage due to its "common law pedigree."[22]

The FIDIC equivalent to these offerings is the Red Book which was released in 2017. This product was also designed for international use, with FIDIC being an acronym for the French name for the entity. While the use of the form has been successful in foreign countries in projects such as the ITER nuclear project in France, the use of the form in common law systems such as England has been limited due to the high uptake in other existing options.[23] For this reason, only the domestically stronger alternatives will be considered in this work, with the JCT form being the focus.

The inclusion of force majeure in standard forms

When it comes to the topic of force majeure, it is only the JCT option that specifically refers to the doctrine. For example, force majeure is identified as a relevant event in clause 2.29

[22] Lukas Klee, International Construction Contract Law (Wiley, 2014) 310
[23] Ellis Baker, Ben Mellors, Scott Chalmers, Anthony Lavers, FIDIC Contracts: Law and Practice (Taylor & Francis, 2013) 1.65

which means that a contractor may be entitled to an amended completion date under clauses 2.27 and 2.28. In the context of the agreement, force majeure is one of 15 relevant events that would cause this result. Therefore, force majeure is far from the only method in which it is possible to seek remedies in the face of Covid-19 within a construction contract. This is important as it was highlighted in Brauer & Co that where an applicable, more specific, clause is present in the contract force majeure becomes secondary.[24] In addition to delays, clause 8.11 gives either party the right to terminate the contract if these delays continue beyond the 'relevant continuous period', the duration of which is decided in the contractual particulars (generally two months).

Despite these two important inclusions of the doctrine, the JCT forms offer no set-out definition of force majeure. This is no surprise to those who have noted that force majeure is generally a boiler-plate clause in English contractual law and therefore relies on vague wording to be widely applicable.[25] While this is clearly beneficial to allowing the clause to be applicable in a number of different scenarios, it does not aid the use of the clause when it is deemed to be active. This will be seen later in the work when force majeure itself will be engaged, but with unclear consequences. However, it is first important to understand whether Covid-19 is capable of being force majeure.

While the alternative format of NEC4 does not specifically refer to force majeure, reference to the idea of prevention within the reasons for delays in clause 19 is an analogous concept and should be viewed in the same vein.[26] Unlike force majeure in JCT forms, the inclusion of prevention in clause 60.1(19) allows for the contractor to claim back for an increase in costs.

Force majeure: vague but widely used

Force majeure was initially introduced within contracts that concerned ships transporting goods over long distances. The need for the clause was created by ship owners regularly facing liability for shipwrecks which were unavoidable.[27] This began to make an impact on the profits of the wealthy individuals who owned the ships. When it came to drafting early

[24] Brauer & Co (Great Britain) Ltd v James Clark (Bush Materials) Ltd [1952] 2 All ER 497, 501
[25] Ben Giaretta, COVID-19 Force majeure Notices Under English Law: What Comes Next? (2020) 13, New York State Bar Association, 47
[26] Build UK, Guidance on contractual issues caused by Coronavirus [April 2020] version 2, Guidance on contractual issues caused by Coronavirus (April 2020)
[27] Christoph Brunner, Force Majeure and Hardship Under General Contract Principles (Wolters Kluwer Law & Business, 2009) 123

force majeure clauses, there was great focus on the wording of the contract. This reflected the realistic possibility that the clause would be used, at some point, due to the carrying out of obligations at sea naturally being at the mercy of the elements.[28] In addition, drafting was simple, given that the risks of shipping were very tangible. In contrast, modern day force majeure clauses in construction contracts are drafted less comprehensively. This, in part, is due to the types of risk the clauses are attempting to exclude. In contrast to the very real dangers of shipping, modern day litigators want to cover every possible, even if unlikely, eventuality. This effect is compounded in the modern age of widely applicable standard forms, where vagueness is required to cater for the masses.

It would be paradoxical to suggest that a force majeure clause which is created for unforeseeable circumstances should also be precise in defining an event and identifying the consequences of that event. Moreover, such drafting would bring into question whether the party had in fact considered the event and its consequences, precluding them from relying on force majeure on the grounds that they should have mitigated against the risks.

Is Covid-19 a force majeure event?

In order to determine whether an event gives rise to the use of a force majeure clause, the process is generally split into two separate stages. The first of these stages is that the event must broadly be capable of being force majeure. This means that the event itself must fit within the definition of force majeure as it is written within the contract in question. Once this has been successfully shown, the court will move onto whether the event is sufficiently linked to the failure of the party to perform their obligations, to effectively activate the force majeure clause.

How do the courts define force majeure?

To state whether the Covid-19 pandemic will pass the initial test of being capable of being a force majeure event, it is first important to understand the definition of the doctrine in the context of standard contractual forms. However, as the vast majority of judgments and academic reading point out, force majeure has no definition in English law and therefore any meaning is taken from the contract itself. It is then the task of the court to interpret the contract to create a case specific definition of the doctrine. In the absence of case-specific facts and case law which is severely lacking due to the contemporary nature of the issue,

[28] Ibid

the court will have to be guided by analogous judgments from previous force majeure events to create a definition.

At their most simple, these definitions are directly taken from the contract, leaving little room for interpretation. For example, in *Scottish Power v BP Explorations*, Lord Justice Leggatt was able to lift the definition of force majeure, which focussed on the event being beyond the control of parties who had acted reasonably and prudently, directly from a clause in the contract.[29] Similarly, in *Great Elephant Corporation v Trafigura*, the inclusion of a definition of force majeure within the contract dictated the reasoning of Lord Justice Longmore and allowed for a simple application to the facts.[30]

In contrast, cases where force majeure is left undefined leave a far greater margin in which different approaches and opinions, as to whether a particular event should be considered force majeure, can be formed.[31] This can be seen in the case of *Lebeaupin v Crispin* where the contract stated that performance was 'subject to force majeure', with no further test or guiding details.[32] As a result of this, Justice McCardie had to create a definition. Despite attempting to draw on both French and English legal authorities in conjunction with the commentary surrounding them, McCardie never truly defined the term. Instead, it was held that even a diluted version of the French definition, which by his own words was not completely suitable, would be sufficient for the purposes of that particular judgment, which concerned war preventing performance.[33] A similar approach was taken in the supporting judgment of Justice Sankey in *Hackney Borough Council v Dore*.[34] When only presented with a clause stating 'caused by force majeure' in reference to an exception to a penalty for non-supply, Sankey applied the doctrine without feeling the need to lay down a definition.[35] Despite making it clear he did not approve of the use of French language in English contracts, his reasoning shows that the courts are capable of utilising even the most barren force majeure clauses.[36]

While it is still correct to say that the clearest and most convincing judgments are those where clauses give concrete definitions, the notion that there exists enough understanding of the concept of force majeure within commercial circles to allow the doctrine to operate

[29] Scottish Power UK PLC v BP Exploration operating Co Ltd [2015] EWHC 2658 (Comm) [19]
[30] Great Elephant Corporation v Trafigura Beheer BV [2013] EWCA Civ 905
[31] Richard Cockram, Manual of Construction Agreements (Jordans, 1998) 169
[32] Lebeaupin v Richard Crispin and Company [1920] 2 KB 714, 719
[33] Ibid
[34] Hackney Borough Council v Dorė [1922] 1 KB 431
[35] Ibid 437
[36] Ibid

without them, should be a welcome statement to those wishing to rely upon the standard forms where there are no definitions available. Due to the importance placed on the interpretation of the courts, it becomes valuable to view how other events have been viewed when there has not been a definition in the contract, or indeed where that definition does not cover the event that has caused disruption.

Approaches in previous cases

It is generally accepted that, even with no definition given in the contract, events such as natural disaster are valid force majeure on the basis that they are beyond any person and cannot be predicted or prevented. Similarly, there are events that are widely rejected as force majeure events. A famous example of this is the case of *Mastsoukis v Priestman* where it was stated that force majeure could not be extended to include 'bad weather, football matches and funerals'.[37]

While the quote itself is too specific to be utilised in wider circumstances, Justice Bailhache's reasoning does provide some more broad guidance. It was explained that the normality and predictability of these events were such that they must have been considered at the time when the contract was agreed.[38] When applying to future cases, this can be extracted in such a way that an event cannot be force majeure where the parties ought to have had considered an event of that kind when making the contract. It would seem reasonable to suggest that when a clause which is well known for including acts of god is made, parties would generally expect that to include naturally occurring pandemics.

When searching for specific case law, there is no example in English law of a global pandemic being accepted as force majeure. However, the reason for this, given the unprecedented nature of the event, is only lack of opportunity. Where there was opportunity abroad, such as the SARS epidemic in 2003, the Chinese courts did consider the event to amount to force majeure.[39] Moreover, in the English case of *Tandrin Aviation*, a pandemic was specifically referred to as being force majeure.[40] Though this was an obiter hypothetical that was limited to the direct impact of the death of a delivery pilot at the hands of a pandemic, it shows that the event itself is capable of being force majeure.[41] This would support the notion that Covid-19 may be considered force majeure.

[37] Matsoukis v Priestman & Co [1915] 1 KB 681, 687
[38] Ibid 689
[39] [2016] Zui Gao Fa Min Zai No. 220
[40] Tandrin Aviation Holdings Ltd v Aero Toy Store LLC [2010] All ER 111 [46]
[41] Ibid

It is accurate to conclude that, despite there being no truly applicable precedent, the English courts will view Covid-19 as capable of being a force majeure event.

Can contractors rely on force majeure clauses?

It is at this point where academics such as Galbraith, who focus of the event over the circumstance, may infer that force majeure will apply to the standard forms.[42] However, this ignores the causal link between the force majeure event and the failure of the party to perform their obligations.

This argument can be illustrated by the recent case of *2 Entertain Video Ltd v Sony* in which warehouse stock was damaged due to a fire set by arsonists in the London riots of 2011.[43] Sony claimed that the fire was caused by the rioters who were out of their control, meaning that the damage should be covered by the force majeure clause in their contract. While the court agreed that the riot was a force majeure event, Mrs Justice O'Farrell ultimately disagreed with the assumption that because the riots were unforeseeable, the damage was automatically covered. [44] Instead, the risk of rioting and the risk of breaking and entering at the warehouse were distinguished, with the latter being within their control, meaning it could not be force majeure.[45]

This shows that the party seeking to rely on force majeure must prove that the impact of the event was out of their control, rather than believing that the event at large being out of their control is sufficient to rely on the clause. This can be applied to the pandemic, as it shows that Covid-19 being a force majeure event does not mean that parties who have failed to fulfil their contracts can axiomatically rely upon a force majeure clause. Therefore, it must be investigated how, within the context of specific hinderances, the pandemic has affected the ability of either party to complete the contract as originally agreed.

5. Application of force majeure to challenges faced in the construction industry

[42] Ross Galbraith, Construction Law Guide to: Force Majeure, frustration and construction contracts (2020) 31 4 Cons Law 14
[43] 2 Entertain Video Ltd and others v Sony DADC Europe Ltd [2021] 1 All ER 527
[44] Ibid
[45] Ibid [207]

Challenges faced by the construction industry

While the construction industry has suffered some of the highest infection and death rates throughout the pandemic when compared to other sectors, infection has not been the most significant factor in preventing contractors from meeting their obligations.[46] In reality, the difficulties faced by the industry have primarily come in the form of: restrictions placed by the employer, blocked supply chains, new Standard Operating Procedures (SOPs) and site closures.

Restrictions placed by the employer

In some cases, it has been the employer who has imposed restrictions on the way sites are run, such as the number of workers allowed on sites. This may amount to a variation and therefore would negate the need to discuss whether any relevant event has caused delay. A variation, which is defined in clause 5.1 of the JCT agreement, is the general term for when the employer has imposed restrictions or made changes to the way in which work can be completed. This has been common in large projects, particularly those which involve the use of public money, such as the construction of the HS2 rail network. In application, clause 2.29.1 of the JCT form outlines that a variation of instructions will amount to a relevant event in the case of an extension in time, entitling the contractor to an extension with the same effect as a successful reliance on force majeure. Unlike force majeure, variations are expressly stated as a relevant event in clause 4.22.1 within the context of extra costs, entitling the contractor to be reimbursed. Similarly, under section 60.1 of the NEC forms, both increased costs and extensions in time, due to the instructions of the employer, will be covered by either a “change in project scope” or prevention of access to sites. The use of these provisions is significant, given that public spending accounts for some 40% of expenditure in the industry.[47]

However, in the private sector, where the bargaining position and decision making of each party is less clear and it may have been the contractor who took the decisions which caused delays, there are more likely to be long-term disagreements regarding the increase

[46] Office of National Statistics, Coronavirus (COVID-19) related deaths by occupation, England and Wales (January 2021) <https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/causesofdeath/bulletins/coronaviruscovid19relateddeathsbyoccupationenglandandwales/deathsregisteredbetween9marchand28december2020 > Accessed 24/02/21

[47] Cabinet Office, Government Construction Strategy (May 2011) 3. < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/61152/Government-Construction-Strategy_0.pdf > Accessed 08/10/20

in time and costs of works that will eventually lead to litigation. It is in these private contracts, with less official chains of communication, where the fine line between protecting the sanctity of contracts and protecting contractors against the difficulties presented by a global pandemic will be trod.

Standard Operating Procedures

New, Covid-specific, Site Operating Procedures were produced by the construction Leadership Council as an attempt to stop the spread of the virus, while allowing construction sites to remain open and functioning.[48] These procedures are aimed at reducing the amount of face-to-face work, encouraging the completion of tasks that can be done by individuals, improving hygiene, and reducing site meetings.[49] Inevitably, this has caused a reduction in productivity within the sector.

In seeking a remedy to the effects of SOPs, the strongest candidate for a relevant event is arguing that there has been a change in law which could result in claims for additional time and costs using clause 2.29.13 and Optional clause X2 of the JCT and NEC forms, respectively.

The main issue in evaluating a change of law as a relevant event is whether SOPs can be treated as such. A change in law is described as the exercise of a statutory power by either 'the United Kingdom Government or any Local or Public authority.'[50] There is no sector wide agreement on this question, with most experts differing to the judgment of the court. However, it is clear from the documents themselves that SOPs are not produced by the government, but rather are based on the guidance that is. The guidance being followed is that produced by the government regarding working safely during the pandemic.[51] This guidance has, throughout the pandemic, mirrored the SOPs. However, this guidance contains an explicit statement that it is non-statutory guidance. For this reason, it would seem unlikely that SOPs could be used to show that there has been a change in law.

In addition, force majeure would be activated by the government exercising statutory

[48] Construction Leadership Council, Construction sector- Site Operating Procedures Protecting Your Workforce During Coronavirus (Covid-19), Version 7 (7th January 2021)
[49] Ibid
[50] JCT standard form, 29.13
[51] GOV.UK guidance, "Construction and other outdoor work - Working safely during coronavirus (COVID-19)" < https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/construction-and-other-outdoor-work > Accessed on 13/11/20.

powers but would be superseded by the specific reference to changes in law.[52] This is an example of the specific inclusion of a category which has been argued to limit the use of force majeure in JCT forms, as it undermines the clause.[53]

Outside of government actions amounting to force majeure, the case of *Lindvig* found that an 'unexpected and exceptional restriction of output' of work could be force majeure. [54] This was accepted to include workers not being able to go about their normal business, as a result of the restriction of the number of workers on sites.[55] It could be argued that this applies to force majeure, given the distancing measures that have been put in place. However, the judgment was very specifically applied to the consequences of striking workers, rather than attempting to create a broad statement about the absence of workers.[56] Therefore, unless this principle was extracted at a higher level than was within the contemplation of Justice Roche when delivering his judgment, it is unlikely that his reasoning could be extended to deal with the restriction of workers caused by the SOPs.

As it appears there is no applicable relevant event within the definition of the standard forms which SOPs come under, it is worth exploring whether frustration may be pursued. In order to successfully claim this, SOPs would have had to change the contract in such a significant way as to radically alter the nature of the agreement.[57] While the context of any project will have changed, there is no credence to the view that the entirety of a contract could be frustrated on this basis. This magnifies the negative impact of the all-or-nothing approach that is required in frustration.

The final uncertainty remaining in the area of changes in law are the looming powers granted by the Coronavirus Act 2020. The most applicable of these powers to the construction industry is those that allow the government to close premises for the purposes of protecting against the virus or to aid the effective deployment of emergency resources.[58] The manifestation of these powers in the form of the mandatory closing of sites would likely result in a successful claim for an extension of time, where work could not be completed to schedule. Yet, these powers have not been exercised in the construction industry and seem unlikely to be used before working returns to a version of normality.

[52] C Czarnikow Ltd v Centrala Handlu Zagranicznego 'Rolimpex' [1978] 2 All ER 1043
[53] Sir Vivian Ramsey, Stephen Furst, Keating on Construction Contracts (Westaw, 2015) 20-118
[54] Lindvig v Forth Shipbuilding & Engineering Company Ltd [1921] 7 LIL Rep 253
[55] Ibid
[56] Ibid
[57] Patricia Robertson, Ben Lynch, Dr Deborah Horowitz, COVID-19 Force majeure and frustration: Key legal principles and industry implications, 170 NLJ 7885 [16]
[58] Coronavirus Act 2020 Schedule 22, Part 2, 6(1)

Notwithstanding the fact that the Government never exercised these powers over the construction industry, most sites for some period of time still closed their gates and therefore suffered delays, begging the question of whether they are protected in any way.

Site closure

During the early stages of the first lockdown, many construction sites closed, with contractors rightfully using the Government furlough scheme to pay the wages of employees. This meant projects were delayed and deadlines as originally agreed would not be met. This should lead to the question of why construction sites closed and whether these reasons will be protected by force majeure. Nick Viljoen suggests that when making the decision to close sites, contractors were motivated by two main factors: finances and the practicability of following the new SOPs.[59] In order to cover all bases, these two motives should be subjected to whether they could be considered force majeure. As well as these, perhaps the most common answer to the question of why construction sites closed is the 'big-picture' answer of Covid-19. These reasons should all be explored in their own right.

The pandemic

This then leads to the belief that, as Covid-19 is a force majeure event, force majeure is the reason that construction sites closed. However, this line of reasoning ignored the legal issue of causation, which is far more complex. The simplest form of a causation test is the but-for test, which has been used in numerous force majeure cases.[60] This means that the contract would have been completed as described if it were not for the force majeure event.[61] This may be applied to site closures in the form of:

But-for […] construction sites would have remained open.

When applying this strictly, the answer should be that, in the absence of any government order to do so or a variation in instructions, sites closed because contractors decided to close them. However, there are those, such as Lucy Garret, who argue that due to the number of issues that contribute to delays, the application of the but-for test should be

[59] Nick Viljoen, An open and shut case, Construction sites in England [June 2020] 31(5), Construction Law Journal, 21-23
[60] Seadrill Ghana Operations Ltd v Tullow Ghana Ltd [2018] EWGC 1640 (Comm) [74]
[61] Christoph Brunner, Force Majeure and Hardship Under General Contract Principles (Wolters Kluwer Law & Business 2009) 340

relaxed when applied to force majeure.[62]

Garret claims that, within the context of clause 2.26 of the JCT forms, judgments will apply a relaxed version of the but-for test.[63] This is based on the following logic presented in the *Classic Maritime* case.[64] The case concerned the application of a force majeure clause after the bursting of a dam in Brazil made a delivery of iron ore to Malaysia impossible.[65] The issue in the case was that the company attempting to rely upon the clause, Limbungan, had already missed a number of shipments and seemed unlikely to complete their obligations under the contract. Therefore, the question was whether the previous, and probable future, failings of the company meant that they could not rely on the force majeure clause. It was held that they could not, because a causation element had been added into the contract with the words ‘’resulting from.’[66] However, it is the judgment’s mentioning of the option available to the parties to choose whether to add such wording which is focused on, to make the argument that a strict but-for test should only be used when the parties choose to include one. As the JCT form does not impose such a test, it follows that force majeure should be judged by a relaxed but-for test.

While this argument may be effective concerning concurrent delays, it could be questioned whether the delays caused by Covid-19 are concurrent with a contractor’s decision to close sites. For example, in *City Inn Ltd v Shepherd*, the court was reluctant to hold that there was effective force majeure where one of two concurrent delays had been within the control of one party.[67] The solution to this issue is best described by Tom Wrzesien, who refuses to perceive as concurrent a culpable delay (which a decision to close sites would be) and an excusable delay (which the effects of the pandemic would likely be), given their differing nature.[68] This is supported in *Seadrill* where a cause of delay within the control of the parties was not considered to be concurrent with a force majeure event.[69] Furthermore, the fact that the decision to close a site would have been retrospective to the effects of the pandemic makes it difficult to claim it is a concurrent cause when typically, the effects of both would be felt at the same time.

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[62] Lucy Garret, “COVID-19 and force majeure: Construction contracts”, (Keating Chambers with Practical Law Construction, 21st July 2020) <https://uk.practicallaw.thomsonreuters.com/Document/I2dca54cbcbc211eabea4f0dc9fb69570/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true> Accessed 29/11/20

[63] Ibid

[64] Classic Maritime Inc v Limbungan Makmur sdn bhd [2019] 4 All ER 1145

[65] Ibid

[66] Ibid [45]

[67] City Inn Ltd v Shepherd Construction Ltd [2010] CSIH 68

[68] Tom Wrzesien, Concurrent delay – a map through a minefield (2005) 16 10 Cons Law 20

[69] Seadrill Ghana Operations Ltd v Tullow Ghana Ltd [2018] EWGC 1640 (Comm) [78]

In summary, it seems logical that Garret's approach of a relaxed causation test would be perfectly reasonable in situations such as *Classic Maritime* where there is a pre-existing hindrance to performance, which has been made impossible due to the pandemic. However, the retrospective choice to close sites without a specific reason breaks the chain of causation between the pandemic and the site closing. This means that it is unlikely that such a scenario would fall within the remit of the force majeure clauses included in the JCT and NEC forms.

Finances

It is well established that finances alone are not a force majeure event.[70] This is primarily because, as outlined in *C.S Wilson*, it is not an unrealistic expectation that the contractor may have to carry out what has been agreed at a higher price.[71] However, it was also noted in the supporting judgment of Viscount Haldane that a party must either be bound to complete their obligations in all of their agreements equally, or to none.[72] This can be applied to site closures in the sense that if the contractor is not financially able to fulfil all of their duties, perhaps they are entitled to close. Yet, the judgment in *Intertradex* seems to speak to a divvying-up of resources in order to satisfy a part of each obligation.[73] This is an uncertain issue that has the capability to leave the courts in disagreement. However, the *Intertradex* judgment would likely be limited to cases where the contractor is financially incapable of fulfilling all obligations, not where it is an inconvenience. Therefore, in the majority of cases, the judgment in *C.S Wilson* will suffice.

Practicability

The hassle and inconvenience of following SOPs will realistically have contributed to many sites closing, with employers able to support staff through the use of the furlough scheme, without having to consider the ramifications of doing so. Notwithstanding this, the scheme provides no support for the business itself and therefore they may still be liable for breach of contract. This is supported by a wealth of case law which, although mainly obiter, makes it clear that inconvenience will not be accepted as force majeure.[74] Therefore, it would appear that any sites that closed, using this reasoning, will not be protected from liability.

[70] The Concadoro, on appeal from H.B.M. Supreme Court for Egypt (In Prize) [1916] 2 AC 199 [Privy Council]
[71] Tennants (Lancashire) v C.S. Wilson [1917] AC 495, 510
[72] Ibid
[73] Intertradex SA v Leisieur-Tourteax SARL [1978] 2 Lloyd's Rep 109
[74] Tennants (Lancashire) v C.S. Wilson [1917] AC 495

In all, it therefore seems that the decision to close sites by the contractor is unlikely to be considered force majeure. This means that contractors will have to deal with the consequences of doing so, possibly leading to the financial burden they were hoping to avoid.

Blocked supply chains

The final issue that has plagued the construction industry is the blocking of supply chains. This has mainly been caused by the implications of the pandemic higher up the supply chain, particularly with the limitations that have been placed on the importation of goods from other countries. The standard forms are silent on supply chain failure. However, where it has been impossible for work to be completed on time because the effects of the pandemic have meant the delivery of required resources has been impossible, there will be force majeure. Such situations are the quintessential purpose of force majeure and require the smallest stretching of the raw form of Covid-19 as a force majeure event. This is because the hindrance is a natural result of the pandemic and does not involve the actions/decisions of any parties. The result of successfully claiming force majeure would be an extension of time, likely to the point at which it will be possible to obtain the required goods to continue work.

Notwithstanding the conclusion that a blocked supply chain will be force majeure, it must be satisfied that the supply chain is in fact 'blocked'. While this may seem trivial, it is important that it be clarified that it is impossible to get supplies, not simply impossible at the original price. This is a pertinent issue, as mere financial inconvenience would likely suffer the same criticisms as sites closing due to financial inconvenience, making reliance on force majeure far less likely to be effective [see 6.4.2]. This is most strongly supported by Lord Finlay in *C.S Wilson* where it was suggested that excusing parties from duties, even when they become commercially impossible, is a dangerous step to take.[75] In the same sense, there is no force majeure when it is possible to source materials from a different supplier.[76] This emphasises that, in order to claim that blocked supply chains have caused force majeure, the bar is likely to be as high as impossibility.

As an additional point, it is advisable that the contractor investigates why they have not received goods, much like an employer would question why a project is delayed. The

[75] Ibid 495, 510
[76] Hoecheong Products Co Ltd v Cargill Hong Kong Ltd [1995] 1 WLR 404

consequences an unnecessary delay could be a breach of the contractual agreement between the supplier and the contractor. However, this would likely be subject to any force majeure clause within that agreement. Furthermore, without the details of such an agreement being known, it is extremely difficult to make a prediction as to whether any such claim exists.

Overall, it therefore seems that truly blocked supply chains are likely to result in successful reliance on force majeure clauses. In contrast, it appears that contractors will find difficulties in claiming any relevant event has been activated for either SOPs or the closing of construction sites.

Formalities/technicalities

Even after it has been established whether force majeure will protect contractors, it should be noted that there are several procedures that must be followed by a party who wishes to rely on force majeure within the standard forms. It is the duty of the party relying on force majeure to bring themselves in line with these requirements, as not doing so is likely to negatively impact their chances of a successful reliance.[77] An example of this can be found in *Big Field v Solar Solutions* where the High Court placed great emphasis on the process involved in successfully relying on force majeure, highlighting the steps laid down in the Engineering, Procurement and Construction contracts that the claim concerned.[78] This also applies to the standard form agreements which set down their own process for the steps that must be taken before, during and after a force majeure event has hindered a party from fulfilling their obligations.

Notice

One example of where the JCT forms do this is clause 2.27 where it is stated that a contractor seeking an amended completion date must give notice of delay 'whenever it becomes reasonably apparent.' This again is an uncertain area as it is unclear when a delay becomes 'reasonably apparent'. In the context of Covid-19, the first case was reported in December 2019, but it was not until 23 January that the virus entered the United Kingdom and not until 11 March that it was declared to be a pandemic. Somewhere within this time frame, the pandemic went from being a vague news story from China to an

[77] Channel Island Ferries Limited v Sealink UK Limited [1988] 1 Lloyds Rep 323, 327
[78] GPP Big Fields LLP v Solar EPC Solutions SL [2018] EWHC 2866 (Comm) [104.1]

event that would almost certainly have some effect on the completion date of projects. Due to the uncertainty as to when notice should have been given, it can be expected that a wide lens, guided by reasonableness, will be used to verify that a contractor informed an employer of delay early enough. This would likely involve evidence of communication between parties as to when the pandemic was first mentioned.

Mitigation

Another duty of parties that has been consistently found in the courts is to mitigate against the consequences caused of the force majeure event.[79] Clause 28.6.1 of the JCT form states that a contractor must 'use his best endeavours to prevent delay'. In the face of a lack of materials, this may mean altering work schedules to complete as large a portion of the works as possible before supplies arrive. Though given no definition, best endeavours would likely be transferred into a reasonableness test.

The end of force majeure

The final contract specific issue within construction, which is well considered by Ben Giaretta, is when and how force majeure ends.[80] Alhough making his point prior to the possibility of vaccinations, many of the interpretations regarding the phased lifting of restrictions and the different points at which parties may believe the contract can resume still apply. Further issues arise when the possibility of a recurring force majeure is considered.[81] Unlike an earthquake or flooding, Covid-19 has presented a sense of the unknown as to when it will be over. This has been reflected in the significant easing of restrictions for a substantial amount of time, only for them to be re-introduced for a longer period at a later date. For the parties in construction contracts, the temporary resumption of normal performance, while very enticing, could result in both parties losing their right to terminate the contract under 8.11 of the JCT forms.[82] However, this would primarily depend on the length of the relevant continuous period of delay required to activate the clause specified by the written particulars. This is generally in the region of two months but should be checked in each individual case. With the difficulties this has presented to contractors, they can only hope to be dealt with leniently. This is desirable, given the unforeseeable way

[79] Seadrill Ghana Operations Ltd v Tullow Ghana Ltd [2018] EWGC 1640 (Comm) [29]
[80] Ben Giaretta, COVID-19 Force majeure Notices Under English Law: What Comes Next? (Summer 2020) 13, New York State Bar Association, 47
[81] Ibid
[82] David Chappell, The JCT Intermediate Building Contracts 2005 (Blackwell Publishing 2005) 272

in which restrictions have come and go.

6. Morality in force majeure

Viljoen's previously mentioned work is functional, closely analysing the practical reasons for the difficulties sites face and how they have responded. However, his work ignores the motive of contractors doing the 'right' thing by closing sites, reducing the stress and congestion on public transport, as well as preventing the potential breeding grounds for the virus that construction sites could have become.

There was no government order, or advice, to close gates. While this allowed industry to continue, it also denied the sector the protection that comes with following government advice in the form of relevant events or force majeure. This was further exacerbated by the furlough scheme being available to contractors to support workers that were employed, creating a false sense of security in the decision to close sites. When added to the constant reminders of how people should be doing their utmost to avoid unnecessary interactions with others, the government irresponsibly created the perfect storm in which contractors were guilted into taking the decision to close sites, but without the security that the government have told them to do so. Unsurprisingly, the leaders in closing sites were government-run projects which, due to their size and legal teams, took the necessary steps to ensure they will not end up in a litigation scenario after the pandemic. Unfortunately for smaller companies who did have the resources to take these steps, it will likely be found that the causes of the delays were controllable and therefore not force majeure.

It seems there is universal acceptance that Covid-19 is capable of being a force majeure event, but it also seems there is no single remedy which can be confidently relied upon. Similarly, nobody suggest that contractors were acting wrongly when prioritising halting the spread of the virus, but they may be at risk of being sued for breach of contract without a reliable defence. This begs the question of whether there is any way in which doing the right thing may be protected in contracts.

Fundamentally, the standard forms provide no relief, with little reason to have anticipated that such a clause could be needed. Moreover, in searching for the use of public good and health, the case law is dominated by cases concerning the duties of public bodies. This is due to the duty of care that public bodies inherit from their roles. The application of this to a private contract is a difficult case to make with little supporting precedent. Yet, morally, it seems unjust for an action which is blatantly in the public good to result in a successful

claim for breach of contract. While it is far from accurate to suggest that morality comes above all else within the English legal system, Lord Justice Stirling's claim that the court should 'endeavour to promote virtue and morality still holds true as a purpose of justice. [83] Although it may be too extreme to join Saint Augustine's battle against unjust law, it is worth exploring whether there is a more just way in which the legal system can deal with the effects of the pandemic on the construction industry.[84]

Statute to the rescue

The most constitutional method in changing the law, even when referring to a lack of ethical representation in the area of force majeure, is the use of parliament's statutory powers.[85] This a drastic measure but the wide-reaching effects of the pandemic may mean that only legislative intervention can provide the unilateral solution that the courts may have difficulty in reaching.

If a legislative solution were to be pursued, it is vital that it is understood that it could not apply to Covid-19 because, much like the Unfair Contract Terms Act 1977 (UCTA), it would not apply to contracts made prior to its passing in Parliament.[86] Such a term would likely have to refer to the promotion of public health, which would be implied into a contract by statute. This would be a bold step by the legislator and may be viewed as too radically interfering with the rights and freedom of parties to come to an agreement on the terms of a contract.

However, it could be argued that such a freedom seldom exists in English contract law in the modern age of the Consumer Rights Act 2015 and the Unfair Contract Terms Act 1977. Furthermore, these statutes were enacted on the basis of far less serious consequences than the reality of life and death that the pandemic has created. This can lead to the conclusion that the ability of a company to take active steps to avoid loss of life in favour of fulfilling contractual obligations is worthy of parliamentary intervention. However, as explained by Dori Kimel, previous situations where the political powers that be have seen fit to intervene in contractual freedom have been in aid of the implementation of wider social, legal and economic policies.[87] While it is socially appealing to encourage acting in the

[83] Constantindi v Constantindi and Lance [1905] P 253, 278
[84] Don Welch, Law and Morality (Fortress Press, 1987) 154
[85] Regina v Lyons and others [2003] 1 AC 976 [28]
[86] Lord Justice Maurice Kay, Blackstone's Civil Practice 2013: The commentary (OUP Publishing, 2012) 1526
[87] Dori Kimel, From Promise to Contract (Bloomsbury Academy, 2003) 121

public interest, the legal and economic aspect of changing the law is not appealing. Furthermore, Kimel suggests that the liberally created freedom of contract has transformed to something more important than morality.[88] When applied to any potential implied term, it seems unlikely the government would be willing to engage in a debate which pits morality against politics.

This is arguably reflected in Parliament's non-interest in the topic. Since the beginning of February 2020, force majeure has been mentioned fewer than a dozen times in the House of Commons and never in respect of the construction industry. In the same period, discrimination has been mentioned 523 times, Brexit a staggering 2000 times (approximately) and Coronation Street 22 times.[89] This illustrates that, when compared to burning injustice in society, political hot potatoes and soap operas, force majeure carries no political significance. This leads to the conclusion that any White Paper regarding force majeure would only be produced in response to a judicial decision that so greatly offends the political elite as to move their hand.

It should not be taken from this that such a change in law is a perfect solution, which the politicians are refusing to implement. For example, there is an ever-present risk of opening the floodgates. This would surround the concern that parties could use any implied term to escape from unfavourable agreements. Furthermore, proving whether a party is genuinely trying to protect public health/life when not fulfilling their obligations could only be judged from their perspective. This kind of subjective test has well-documented limitations in terms of enforceability and a lack of accountability for unreasonable thinking.[90] In addition to the issues surrounding enforceability, there would likely be consequences to the industry itself if such legislation were passed. The negative impact upon the ability of parties to rely upon their contracts to protect their interests could lead to risk aversity in the sector, leading to economic downturn.

For these reasons it seems unlikely, and possibly even undesirable, for a term which means there is no liability for breach of contract when attempting to prioritise the public good to be implied into contracts.

Compromise

[88] Ibid 119
[89] Parliamentary Reports, Hansard < https://hansard.parliament.uk/search/Contributions > Accessed 03/04/21
[90] Extrasure Travel Insurance Ltd v Scattergood [2003] 1 BCLC 598

Perhaps the closest alternative that already exists within contractual law is the officious bystander principle, derived from *Southern Foundries Ltd v Shirlaw.*[91] The principle suggests that a term can be implied into a contract if, at the time of the contract being made, when asked by an officious bystander whether they would like to include an additional term they would reply "oh, of course!"[92] This has been explained by Lord Hoffman to cover events that it is likely the draftsman would have included the term had the consequences of doing so been thought out.[93] It has since been stated that the true takeaway from Lord Hoffman's judgment should have been that the process of suggesting a new term must come after the application of the original terms, which must be the main focus of the contract.[94]

Applying this to the pandemic, it is plausible to state that an employer would have accepted that the clause should cover the contractor wanting to do their public duty and ultimately save lives when the contract was made. However, it is as believable that an employer would take the view that a clause intended to cover the contractor choosing, with no legal obligation, to stop works for months at a time is not acceptable. Not only is this too contentious an issue for the courts to confidently say that an employer would have agreed to it, but is also very difficult to prove, given that such a conclusion would only be required where the views of parties are so far apart to lead to litigation.

Impact of potential judgments

If litigation is indeed required, the issue will quickly become how any judgment would impact upon future cases. It would seem reasonable to assume that any judgment would be based on the facts of a specific scenario, rather than an overriding concept. This raises the question of how precedent would be set and how any such precedent would not be distinguished from other cases, based on the advice available on a given day. If this cannot be achieved, the goal becomes finding a clear, overarching set of principles that would provide guidelines for future cases.

In the exercise of attempting to find a solution which is legally sound and widely applicable, it is perhaps possible to adapt the way in which the court will approach the issues previously outlined. In the absence of academic or judicial guidance, creative solutions are

[91] Southern Foundries Ltd v Shirlaw [1940] AC 701
[92] Ibid
[93] Attorney General of Belize and others v Belize Telecom Ltd and another [2009] 1 WLR 1988 [29]
[94] Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another [2016] AC 742 [67]

required. For example, the implementation of a 'sting' element to the test for force majeure, similar to that in defamation law, could be beneficial. In practice, this would mean the focus of proceedings would be on the exact consequences of the event on the party attempting to rely on force majeure, not pandering to the context of the case. In terms of current case law, the judgment in *2 Entertain* is the closest to this reasoning, clearly answering a question of cause and effect, distinguishing from the force majeure event.[95] Yet even Justice O'Farrell's excellent judgment unnecessarily details the larger event, which is essentially irrelevant.

For the parties who believe their construction contracts have been affected by Covid, this line of reasoning may affect cases where sites closed. The proposed approach would focus any judgment toward the question, 'Why did the site close?' with a strict but-for test, rather than starting at whether the pandemic caused sites to close. This would create a more scientific process for determining whether force majeure applies, rather than the vague acceptance that the pandemic can be the blame for all things. It is likely that such a shift in thinking would lead to the conclusion that the site closed because the contractor took the decision to close it. This choice element goes against the basic principle that a force majeure event must be beyond the control of the party seeking to rely upon the clause, meaning it cannot be relied upon. Alhough it would appear the courts would come to the same conclusion even without this change, it simplifies the way in which the judgment is viewed. The issue with this approach is how it could be implemented and by whom.

This harsh conclusion as to how judgments should transpire does not naturally fit with the previously mentioned search for morality. However, without external intervention, it is the way the courts will have to approach the effects of the pandemic.

7. The future of force majeure in construction contracts

Despite the conclusion that their force majeure clauses are unlikely to be helpful, it would be too harsh to conclude that standard forms are ineffective. This is because rather than representing a poorly drafted contract, the lack of force majeure applicability depicts the difficulties that have been imposed upon the construction industry by the way in which regulations and advice have been given.

The main foreseeable weakness of the forms is their vagueness [see chapter 1]. While the

[95] 2 Entertain Video Ltd and others v Sony DADC Europe Ltd [2021] 1 All ER 527

courts have historically shown a willingness to reject force majeure on account of vague wording in cases such as British Electrical v Patley, this has been done with little to no consistency.[96]

Therefore, given the unexpected nature of the use of force majeure, it would seem harsh to conclude that the standard forms have not been successful, given that they will likely be effective in situations where supply chains have been halted or labour has been unavailable.

Force majeure clauses will have to change

While the standard forms are not to blame for the difficulties in claiming force majeure will present to the construction industry, it is a credible view that if the wording of the clauses in future editions of the contract were not adapted, they would be almost unilaterally insufficient.[97] This is due to the unforeseeable element of a force majeure clause no longer being satisfied when it comes to Covid-19. The pandemic has fundamentally changed the landscape within which contracts have been made across the world. It would therefore seem that in the future there would need to be a specific clause referring to Covid-19 and the effects that it could cause**.**

In a more theoretical sense, this could include the insertion of a clause that suggests an element of duty to the public, similar to those theorised in chapter 7.1. This would allow for the overriding of the contract to do the 'right' thing for society at large. This would negate some of the morality issues that the current editions make no attempt to avoid. It would also allow the contracting parties to remain in control of their obligations, unlike a legislative solution. While employers may not be keen on a clause which allows a contractor to choose not to complete a contract, the bar could be set extremely high, even to a point where it requires the saving of human life, which would apply to Covid-19 and other serious events, but little else.

Changes in the industry

In a wider sense it may also be that producers of standard forms, and contract makers in general, will review some of the seemingly less significant boilerplate clauses found

[96] British Electrical and Associated Industries (Cardiff) Limited v Patley Pressings Limited [19532] 1 WLF 280
[97] Ross Galbraith, Construction Law Guide to: Force Majeure, frustration and construction contracts (2020) 31 4 Cons Law 14

throughout contract law. It could also be said that the wider industry may begin to seek out methods within which workers are able to socially distance and work independently. Failing this, it could at least be expected that safeguards would be put in place to ensure general hygiene is encouraged. Both of these changes would likely increase the costs of future contracts, but the reality of longer than a year of affected works will likely persuade parties to put their hands in their pockets.

8. Final remarks

It is fair to conclude that Covid-19 will be considered a force majeure event. However, it is also vital that this is distinguished from a force majeure clause being successfully relied upon in standard form contracts. The reasons for the non-completion of contractual obligations should be tracked back to their cause, not immediately analysed with the force majeure event in mind. Following this structure, it is only in cases of blocked supply chains that it appears likely that the force majeure clauses within the JCT agreements will be applicable in granting time extensions, potentially leading to a mutual right to terminate.

This includes circumstances where the contractor decided to close sites in an attempt to prioritise the greater good. In terms of solutions to this morally unpleasing conclusion, without having political gravity it appears that there is no realistic way to incorporate morality into construction for current contracts. However, there remains the possibility that the standard forms may be reformed to better meet these goals of just laws, without compromising the needs of the system for future events.

It has also been observed as to how certain government decisions and actions could have been handled in a better way, to ensure that construction companies were not led down a dark tunnel without a light, only to be told that it was, in fact, their own decision to do so.