

Glenn Kangisser, Maren Strandevold in LexisNexis: Force Majeure and Reasonable Endeavours

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PRACTICES Litigation, Energy, Power and Natural Resources, Energy Litigation, Offshore Oil and Gas, Offshore Oil and Gas Dispute Resolution, Oil and Gas, Oil and Gas Litigation, Oilfield Services

Seadrill Ghana Offshore Ltd v Tullow Ghana Ltd [2018] EWHC 1640 (Comm), [2018] All ER (D) 74 (Jul)

What are the practical implications of this case?

The judge's findings on force majeure are a reminder of the importance of causation. It will be rare for a force majeure clause not to require that the force majeure event must have an impact on the performance of the contract. Moreover, the judgment highlights that it is not sufficient that the force majeure event is a concurrent cause—it must be the sole operative cause, unless there are express words to the contrary in the force majeure clause.

With regards to reasonable endeavours, the judge's reasoning was less conventional, and introduced the idea that in determining reasonableness in the context of a requirement on the parties to act using reasonable endeavours, both parties' interest in the contract must be considered. While the test for reasonable endeavours has not been expressed in this manner before, it seems that this is not a drastic departure from the existing case law. The judge stated that:

'As a matter of language, "reasonable endeavours" is a phrase which enables account to be taken of all matters which bear upon the question whether it is reasonable to expect a party to take certain steps to avoid or circumvent a force majeure.'

This is undoubtedly correct. While many cases have focused on whether a party is entitled to consider its own commercial or economic interest when exercising 'reasonable endeavours', the cases do not say that this is the only factor to be taken into consideration. In this case, the judge specified another factor that should have, on the facts of this particular case, been taken into consideration when determining the reasonableness of Tullow's (ie the defendant's) actions. It will be interesting to see if this will impact on how cases on reasonable endeavours will be argued in the future, and whether parties will allege a failure to exercise reasonable endeavours based on a failure to consider the commercial interest of other parties to the transaction.

Finally, the case highlights the importance of the parties giving detailed consideration to risk allocation when negotiating their contracts. Mr Justice Teare specifically noted in the opening line of his judgment that 'drilling for oil is a risky business'. In this case, the risk of a turn in the market, the failure to obtain government or joint venture approval lay exclusively at Tullow's door, and it could not use the force majeure clause to escape what it retrospectively considered to be a bad bargain. (There was a separate dispute between Tullow and one of its joint venture partners, Kosmos Energy, subject to ICC arbitration proceedings, as to whether Kosmos was liable to pay for certain costs in connection with the 'West Leo' drilling contract.) Drilling contracts, unlike contracts in most other sectors, include rights for the operator to terminate the contract for their convenience

precisely for the circumstances which arose here, and that is ultimately how this contract was brought to an end. ...

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