

The Force Majeure Clause: Terror and Politics in Sport

Date: September 2003

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This article looks at the concept of force majeure in relation to sport events – and the role of the force majeure clause in sports contracts – in the light of past and present political events.

The issue of force majeure in sports contracts has recently become of increased significance, particularly in the wake of the cataclysmic events of 11 September 2001. In this article, we examine a range of political and terrorist-related events and circumstances that have disrupted or threatened to disrupt sporting fixtures in recent times. The purpose of the piece is to analyse the concept of force majeure in the light of those events and circumstances. As well as helping to clarify the circumstances in which it may be possible to claim force majeure, this analysis will highlight points to be taken into account when drafting a force majeure clause.

The force majeure clause

The standard force majeure clause operates by specifying that a party or parties to an agreement:

- (a) shall not be in breach or be liable for any delay in performance or non-performance of any of its contractual obligations;
- (b) where such delay or non-performance is caused by any reason or act beyond the (reasonable) control of the party/parties.¹

The reasoning behind including the force majeure clause in contracts is clear enough. A party should not be liable for failing to fulfil any or all of its contractual obligations where such failure is due to factors beyond its control. Most contracts will specify examples of possible events of force majeure: fires, floods, storms, landslides, lightning, earthquakes, acts of government or state, war, civil commotion, insurrections, riots etc. In fact, the term “force majeure” does not have a strict legal

¹ Although force majeure and frustration are often mentioned in the same breath, they are distinct doctrines. In general, a frustrating event makes a contract impossible to perform and leads to its termination. A force majeure event, on the other hand, can frustrate a contract but it may equally only *delay* the parties' ability to fulfil their contractual obligations. There is a further distinction: whereas frustration is a common law doctrine, force majeure has no strict legal meaning. Force majeure must therefore be provided for contractually.

meaning under English law so it is always necessary to include a definition and always advisable to include a non-exhaustive list of relevant examples.

As to the application of force majeure, one important question is whether delay in performance or non-performance due to financial impracticability will constitute force majeure, as it is usually drafted. The House of Lords addressed this question in Tennants (Lancashire) Limited v G.S. Wilson & Co. Limited ([1917] AC 495). The answer appears to be that (unless specifically included in the contract) impracticability due to financial loss will be insufficient to prevent performance by the party claiming force majeure. Lord Finlay observed *“that ‘prevention’ in [a force majeure] clause must refer to physical or legal prevention and not economic unprofitableness”*.

Sports contracts

Before getting stuck into the pith and marrow, it will be helpful to briefly survey some of the different types of contracts that relate to sport. One class of contracts, usually referred to as “participation agreements”, governs the relationships between sports governing bodies (including regional, national and international) and the teams or individuals that take part in the relevant sport. Furthermore, where the sport is a team sport you will also have contracts between the individual team/squad members and the team or club itself. Another class of contracts comprises sponsors’ agreements with teams, individual players and governing bodies. On top of that, broadcasters and other rights purchasers/licensees may also be involved, contracting with teams and governing bodies. As we delve into the issue of force majeure it will help to be aware of which of these types of contracts may be affected.

Terrorism and the public interest

Interestingly, despite the huge amount of press coverage and public concern that terrorism attracts, one does not usually find it specifically referred to in a force majeure clause. Where such a clause does not specify terrorism or terrorist acts as an example of force majeure, commentators note that they may fall within a definition of “acts of war” or “warlike operations”. However, Atkinson J in Clan Line Steamers Limited v Liverpool & London War Risks Insurance Association ([1943] 1 KB 209) defined a warlike operation as being one which *“form[s] part of ... acts of belligerency”*. While September 11, for example, was the trigger event of the “War on Terror” and IRA terrorist activity could arguably be construed as having constituted an ongoing war against the British government, it might be difficult to argue that an isolated incident is an act of war. It is usually therefore advisable to specifically provide for acts of terrorism in a force majeure clause.

How does one account for the fact that terrorism is not generally provided for in force majeure clauses? There are a number of contributory factors. Firstly, while there have been significant and tragic terrorist attacks on sporting events – some of which we will touch on shortly – those attacks have never been sustained or frequent enough to compel those involved in contract negotiation to make specific provision for them in force majeure clauses. Coupled with that fact is the tendency among contract draftsmen to include in their contracts “boilerplate” clauses, such as the force majeure clause,

with little or no reworking. This tendency means that many such clauses are used time and time again without regard to the specific set of circumstances in which the contract is made. Finally, “terrorism” is a term which is notoriously difficult to define² and, of course, lawyers have been trained to keep such terms out of contracts as far as possible.

It is, if anything, more important to provide for terrorist acts in force majeure clauses in contracts relating to sporting events than in most other sorts of commercial contracts. This point may require a little explanation. One of the features of sports events, and of sports teams and sporting individuals, is that they tend to attract public interest. This may be obvious but is worth explicitly stating because it is this feature that makes such events particularly attractive to those, such as sponsors, who wish to exploit that public interest. Sponsors are not alone however in looking to exploit the public interest that sport tends to generate.

At the Olympic Games in Munich in 1972, Palestinian terrorists stormed the Israeli Olympic Village, killing two Israeli athletes and taking nine more hostage. The subsequent standoff led to a gun battle during which all the hostages, together with five of the terrorists, were killed. It was of course no accident that the Olympic Games were chosen by the terrorists. They wanted to create the biggest possible shockwave and exploited the public interest in the Games in order to do it. Similar motivations lay behind the bomb threats made by the IRA in relation to the 1997 Grand National at Aintree. Coded warnings were received less than an hour before the race was due to start, causing it to be postponed to the Monday. Despite the fact that, on that occasion, there was no actual bomb, the terrorists caused considerable disruption and achieved their aim of publicising their cause.

Politics

The sporting boycott of South Africa in protest at apartheid in the 1970s and 1980s provides a key example of the political impact that sport can have. By the dawn of the 1980s the country had become a sporting pariah and there is little doubt that the boycott was instrumental in bringing an end to the apartheid regime. Later on, we will look at another important example of the interrelation of politics and sport: the US boycott of the Moscow Olympics in 1980.

There are, of course, more recent instances of politics impacting on sport. The furore over whether England should play their World Cup match in Harare against Zimbabwe (who are currently touring England) reached its zenith in March of this year. The British government did not want the team to play the match as they believed it would lend succour to President Mugabe’s regime. However, they were unwilling to demand that the team withdraw from the game and they were also unwilling to reimburse the England and Wales Cricket Board (ECB) for the fines and/or damages that were likely to become payable to the International Cricket Council (ICC). The ECB therefore made the initial decision to press ahead with the game.

² In fact, the key reason that there is no United Nations convention on terrorism is that the UN Member States cannot agree on a definition.

The players, however, had concerns about the game and these were – initially at least – moral concerns. But whatever view one takes of Mugabe's Zimbabwe or, for example, of South Africa under the grip of apartheid, the fact remains that disapproval alone will not be enough (however strong and however justified) to constitute force majeure, certainly insofar as it is conventionally defined. This is why the ECB was under no illusion that damages or fines would be payable if they withdrew from the Zimbabwe game on purely political grounds.

As it turned out, their eventual withdrawal was stated to be on safety grounds: death threats were made against the England players and their families, a point we will return to shortly. All the same, the ICC technical committee awarded the four World Cup points on offer to Zimbabwe. On top of that, after the tournament ended the ICC withheld from the ECB £2.33 million of their £5.75 million World Cup fee in anticipation that the rights payments due to them would, in turn, be withheld. The ECB believes it has a strong case legally and is likely to take action through the courts to recover the rest of its fee. Any such legal action will almost certainly focus on whether or not withdrawal was as a result of force majeure. A key issue will be the extent to which England's reasons for withdrawing were based on the threat to the players' security.

Safety

When a group calling themselves the Sons and Daughters of Zimbabwe issued a death threat against the England players, political and moral concerns about playing the Harare match immediately turned to concerns over safety. While the death threat was dismissed by senior South African police sources, the ECB took it very seriously. ECB chairman Tim Lamb claimed that the letter constituted a force majeure event. There is certainly an arguable case for that and it will be interesting to see the results of any legal action taken by the ECB. Whether Australia's decision to go ahead with their game in Bulawayo on February 24 2003 (a game which passed without major incident) may damage England's chances of claiming force majeure remains to be seen. My own view is that it is of little relevance because, unlike the Australians, the England players received specific threats.

Of course, there have been numerous other instances of security concerns impacting on sporting events. On 8 May 2002, during the New Zealand team's cricket tour of Pakistan, a bomb exploded outside the Karachi hotel in which the team was staying. Although the players and management escaped unhurt, 14 people were killed and the tour was swiftly abandoned. Was the abandonment of the tour due to force majeure? It probably was although the position is very far from clear cut. One of the factors in favour of concluding that the Karachi bomb should be viewed as a force majeure event is its immediacy, i.e. the fact that it occurred during the tour as opposed to before it. Another factor is that Westerners appeared to have been the target of the attack: 11 of those killed were French.

Moving onto another example, consider the Ryder Cup matches scheduled for 2001 that were postponed for a year due to the events of September 11 of that year. Was the rescheduling due to force majeure? According to the official Ryder Cup statement the 2001 matches were "*postponed out of necessity following the enormity of the tragedy in the United States*", which strongly suggests the organisers believed that force majeure was the cause. In relation to the Karachi bombing, we noted

above that its immediacy was a factor that supported the view that it was a force majeure event. The September 11 attacks occurred 17 days before the Ryder Cup was scheduled to start. In spite of that, due to the overwhelming nature of the atrocities, the 17 day gap would probably not be enough to deny a claim that the attacks caused the postponement of the Cup, and that they constituted force majeure events.

Government intervention

Many force majeure clauses specifically mention, as an instance of force majeure, government intervention. Despite the British government's reluctance to intervene over England's match in Zimbabwe, it is not always the case that governments are so reticent. At the ICC Executive Board Meeting in Cape Town in March 2002, the members put pressure on the Board of Control for Cricket in India (BCCI) in relation to their repeated refusal to play Pakistan. There was some debate about the draft ICC contract and in particular the BCCI's desire, given the volatility of the situation with regard to Kashmir, to have provision made in the contract for government clearance for the team to play. Jagmohan Dalmiya, the BCCI president, apparently managed to persuade the other board members of the need to include a force majeure clause in the draft contract to cover the situation where the Indian government withholds permission for the team to play. So, where the BCCI is denied permission, they should be able to claim force majeure and avoid incurring fines that would otherwise be payable for breach of contract.

This is an important point. For, while the Indian government could refuse permission for the team to play Pakistan on grounds of risk to the players, they could also refuse simply for political reasons. Whatever the Indian government's reasons for refusing permission for the team to play Pakistan, the BCCI would still be prevented from fulfilling the contract due to circumstances beyond its control. In a case such as that envisaged by the BCCI, where the government denies the team permission to play certain matches or to play in a certain place, there is no need to balance certain factors as we did when considering New Zealand's withdrawal from Pakistan and the postponement of the Ryder Cup. In such a set of circumstances, the government's decision will usually be a straightforward case of force majeure.

Such clear cut cases of government intervention are uncommon. Sometimes, it may even be difficult to tell whether the decision to pull out of a game or contest has ultimately been made by the government or by the sporting body. Take as an example the decision that the United States would boycott the 1980 Olympic Games in Moscow in protest at the invasion of Afghanistan by the then Soviet Union. The common conception is that President Carter himself took the decision. Admittedly, he put intense pressure on the United States Olympics Committee (USOC) to boycott the Games, threatening to withdraw funding and to revoke the organisation's special tax status. In the end, however, the decision was taken by USOC. As Carter was to comment at the 1996 Games in Atlanta:

"It should be remembered that in the United States and other free countries, the national Olympic committees were independent of government control Olympic committees made the final decision about whether to send athletes to Moscow."

Contract considerations and insurance

In the drafting of a contract relating to a sporting event, especially where that event is high profile or high value, it will always be worth considering the contents of the force majeure clause carefully. It may be worth including a specific reference to acts of terrorism or other types of events in relation to which there is a particular concern. The bottom line, however, is that the purpose of a force majeure clause is to cover those acts which the parties are not expecting to happen. If the occurrence of a force majeure event is anything more than a distant possibility, it will often be worth considering insurance cover. In the aftermath of September 11 this can sometimes prove impossible or prohibitively expensive. By way of example, Australian swimmers who wanted to compete in the World Cup and US Open in November 2001 were asked to sign disclaimers protecting Australian Swimming Incorporated (ASI) from being sued in the event of injury or death to the swimmers due to terrorist attacks or acts of war. ASI was forced to take this step because they were unable to secure insurance. Similar problems have been haunting the Olympics in its search for insurance cover in the event of cancellation. As International Olympics Committee President Jacques Rogge recently commented: *"The international political situation and the danger of terrorism means the insurance market is reticent against taking this kind of risk"*.

While terrorism and the unstable state of world politics is perhaps as much of a risk to sport now as it has ever been, we should be wary of wrapping ourselves and our sportsmen and women in cotton wool. Australian swimming coach Otto Sonnlitner summed it up well enough: *"We can only hope everything goes okay. What do you do? Do you sit home, twiddle your thumbs and say I'm not going anywhere?"*

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