

**LEGAL UPDATE**

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**CASE UPDATE****SINGAPORE HIGH COURT CLARIFIES SCOPE OF *FORCE MAJEURE* AND TERMINATION CLAUSES*****Precise Development Pte Ltd v Holcim (Singapore) Pte Ltd* [2009] SGHC 256****Executive summary**

The Singapore High Court has ruled that a rise in prices of sand, caused by a ban on sand exports (the “sand ban”) by the Indonesian government in January 2007, did not constitute a *force majeure* event which would relieve a concrete supplier of its obligations to supply concrete to a construction company. The court also highlighted the importance of being clear and unequivocal when communicating one’s intention to terminate a contract.

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**Background**

By a contract dated 10 November 2006 (the “**Contract**”), the Plaintiff construction company engaged the Defendant, a supplier of concrete to the construction industry, to supply 90,000 cubic metres of Grade 30 concrete for a building project, at the price of \$65 per cubic metre (the “**Contract Price**”). The Contract contained the following clauses:

**“Clause 3**

*The Purchaser must provide sufficient advance notice in confirming each order. The Supplier shall be under no obligation to supply the concrete if the said supply has been disrupted by virtue of inclement weather, strikes, labour disputes, machinery breakdowns, riots, and shortage of material, Acts of God or any other factors arising through circumstances beyond the control of the Supplier.”*

...

**Clause 10**

*The Supplier reserves the right to terminate the Contract giving one month’s written notice to the Purchaser stating the reasons for the termination.”*

(respectively, the “**Force Majeure Clause**” and the “**Termination Clause**”).

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On 1 February 2007, the Defendant wrote to the Plaintiff to inform them that it was unable to supply concrete at the Contract Price due to shortage of sand caused by the sand ban (the “1 February 2007 letter”). It informed the Plaintiff that the Building & Construction Authority of Singapore (“BCA”) would be releasing sand from the national strategic stockpile and offered to sell the Plaintiff concrete at an increased price. The Plaintiff did not accept this offer.

After several rounds of negotiations, the Plaintiff issued an ultimatum to the Defendant – it offered to supply sand and aggregates (at its own expense) to the Defendant at pre-sand ban prices so that the Defendant could manufacture and supply concrete to the Plaintiff at the Contract Price. If the Defendant did not accept this offer, the Plaintiff would terminate the Contract and claim damages from the Defendant for failure to supply concrete.

The Defendant rejected the Plaintiff’s offer. It took the position that it was not required to supply concrete to the Plaintiff as the sand ban amounted to an abnormal situation which was covered by the Force Majeure Clause. The Defendant claimed that the sand ban constituted a *force majeure* event which discharged it from its obligation to supply the Plaintiff with concrete at the Contract Price.

The Defendant also claimed that it was entitled to terminate the Contract pursuant to the Termination Clause by giving one month’s written notice to the Plaintiff, and that such notice had been given to the Plaintiff by the 1 February 2007 letter.

### The High Court’s decision

The court rejected both arguments. It held that the Force Majeure Clause did not operate to discharge the Defendant from its obligation to supply concrete to the Plaintiff. The court also held that the Defendant had not exercised its right to terminate the Contract pursuant to the Termination Clause.

#### *Did the sand ban effectively discharge the Defendant from its obligation to supply concrete?*

The Force Majeure Clause would apply in the event of a disruption in the Defendant’s ability to supply the concrete. The court had to determine whether the sand ban resulted in a disruption of the Defendant’s ability to supply concrete to the Plaintiff. The Force Majeure Clause would operate only if the Defendant’s ability to supply concrete to the Plaintiff had been disrupted by the general shortage of sand.

In the court’s view, it did not make commercial sense to say that every disruption, no matter how minor or inconsequential, would be sufficient to trigger the Force Majeure Clause. To qualify as a “disruption” within the meaning of the Force Majeure Clause, an event which made it *difficult* for the Defendant to supply concrete to the Plaintiff must have occurred.

On the facts, such an event had not occurred.

Although there was a general shortage of sand, the BCA had set up a mechanism to release sand from the national strategic stockpile to all construction projects. As a main contractor,

the Plaintiff was entitled to apply for sand from the BCA stockpile, and supply its sand allotment to the Defendant to enable the latter to manufacture and supply concrete to the Plaintiff. Although the Plaintiff had expressed its willingness to assist the Defendant to apply for sand from the BCA, the Defendant took no steps to request the Plaintiff to do so.

In addition, the Plaintiff had offered to supply the Defendant with sand and aggregates (at its own expense) at pre-sand ban prices in return for the Defendant's supply of concrete at the Contract Price. This would have enabled the Defendant to supply concrete to the Plaintiff. In spite of this, the Plaintiff's offer was rejected by the Defendant.

Given the above circumstances, the Defendant could not then claim that the shortage of sand was an event beyond its control that disrupted its ability to supply concrete to the Plaintiff.

The court distinguished the case of *Holcim (Singapore) Pte Ltd v Kwan Yong Construction Pte Ltd* [2009] 2 SLR 193. In that case, a contract for the supply of concrete between the plaintiff manufacturer and the defendant buyer was held to be frustrated by the sand ban. It was found that sand was not available to the plaintiff manufacturer when the defendant buyer had refused to assist in obtaining sand from the BCA to enable the plaintiff manufacturer to manufacture concrete.

#### *The differences between the doctrines of force majeure and frustration*

The court also discussed the differences between the doctrines of *force majeure* and frustration. While most events that trigger a *force majeure* clause are similar to those which would also attract the operation of the common law doctrine of frustration, there were essential differences between both doctrines.

The doctrine of frustration applies by operation of law when a contractual obligation becomes incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Frustration has the effect of discharging the contract and releasing parties from their obligations.

In contrast, a *force majeure* clause derives its force solely from the intention of the contracting parties, and may provide for different kinds of relief apart from discharging the contract, such as suspension of obligations, extensions of time for performance or some other variation to the contract. The relief which such a clause provides is available regardless of whether the event which triggered it would have been sufficient to frustrate the contract.

#### *Did the Defendant exercise its right to terminate the Contract under the Termination Clause?*

The express mention of a one month's notice period was *not* a condition precedent to the invocation of the Termination Clause. As such, the Defendant's failure to expressly mention the one month notice period did not render the 1 February 2007 letter invalid as a letter of termination.

In the court's view, the Termination Clause entitled the Defendant to either: (i) terminate the Contract by *giving* one month's written notice to the Plaintiff stating the reasons for termination; or (ii) terminate the Contract one month *after* it had given notice to the Plaintiff stating the reasons for termination. This would enable the Plaintiff to have sufficient time to find an alternative supplier for the concrete.

What was required was some form of "unequivocal communication" from the Defendant to the Plaintiff that it intended to terminate the Contract. This requirement had not been satisfied.

By informing the Plaintiff that it was unable to supply the concrete at the Contract Price and then offering to sell the Plaintiff concrete at a higher price, the Defendant could have been construed as exercising its right to terminate the Contract pursuant to the Termination Clause or, exercising its right to suspend all further sales of concrete to the Plaintiff under the Force Majeure Clause.

This ambiguity frustrated the purpose of the Termination Clause and made it impossible for the Plaintiff to seek alternative suppliers. Therefore, the Defendant could not be said to have exercised its right to terminate the Contract under the Termination Clause.

#### Comment

This case starkly illustrates that a fluctuation in price will not in and of itself constitute a *force majeure* event which may result in parties being discharged from their contractual obligations. It also serves as a useful reminder that parties to a supply contract should carefully examine both the express terms of the contract as well as their own conduct when ascertaining the full extent of their contractual rights and obligations.

If you would like more information about this case or wish to discuss how it may potentially affect you or your business, please feel free to contact the litigation and dispute resolution lawyers in Drew & Napier LLC (please refer to the Directors' profiles on our [website](#)), or:

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*The content of this article does not constitute legal advice and should not be relied on as such. Specific advice should be sought about your specific circumstances.*

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