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THE LEGAL IMPLICATIONS FOR CONTRACTS OF COVID-19

Following the outbreak of coronavirus disease (subsequently labelled "COVID-19") in Wuhan, China in December 2019, the disease has already had an enormous economic and societal impact on countries across the world. On 11 March 2020, the World Health Organisation recognised the situation as a "*pandemic*". At the time of writing, more than 350,000 cases of the disease have been reported in more than 190 different countries and territories.

Across the world, businesses in many different sectors have been dealing with commercial difficulties that have arisen as a result of interruptions of supply chains, disruption to the workforce, travel restrictions, and a range of broader challenges in performing their contractual duties.

It is anticipated that the ongoing situation will lead many businesses to consider the law and the wording of their contracts regarding the concepts of 'Force Majeure' and 'Frustration'. Indeed, in February 2020, it was reported that the Chinese Government had issued a record number of so-called 'Force Majeure Certificates' to Chinese companies purporting to exclude those companies' contractual liability for non-performance caused by the coronavirus situation.

This mailing examines force majeure clauses and the doctrine of frustration in English law.

FORCE MAJEURE CLAUSES

There is no general doctrine of 'force majeure' in English law (in the same manner that it exists in civil law jurisdictions). However, the English courts will recognise and uphold express 'force majeure clauses' contained in commercial contracts that purport to excuse performance of a contractual duty if performance is rendered impossible by various acts.

In *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] EWHC 40 (Comm), the Commercial Court held that "*whether a force majeure clause in a contract is triggered depends on the proper construction of the wording of that clause; 'force majeure' is not a term of art*".

Many force majeure clauses (particularly boilerplate clauses) contain a general excuse for non-performance which is "*a result of any circumstance beyond [a party's] reasonable control*"

before then going on to identify some common specific events or categories of events which will be deemed to be beyond reasonable control.

Common categories of acts or events often designated as 'force majeure events' in commercial contracts are 'acts of God', prohibitions or other measures on the part of a governmental authority, and defaults of suppliers or subcontractors. However, as explained above, whether a particular event can be considered a force majeure event in any given circumstances requires scrutiny of the wording used in the contract. Does the clause expressly exclude a "*pandemic*" or viral outbreak? If not, does the present situation fit into any of the other categories set out in the clause?

A party seeking to rely on a force majeure clause must show:

(a) that an event provided for in the force majeure clause has occurred, and thus the clause is engaged;
(b) that he has been prevented, hindered, or delayed from performing the contract because of that event;
(c) that his non-performance was due to events and circumstances beyond his control;
(d) that there were no reasonable steps he could take or could have taken to avoid or mitigate the event or its consequences.

Furthermore, force majeure clauses will often contain specific notification provisions (including as to the timing and manner of notification). These should be complied with in order to avoid any subsequent dispute as to whether an invocation of a force majeure clause was valid.

Parties will usually be required to demonstrate that they have considered if there are alternative means of performance or other ways in which the effects of non-performance could be mitigated.

THE DOCTRINE OF FRUSTRATION

'Frustration' is a doctrine that operates at English common law. A contract is said to be "*frustrated*" when it cannot be performed because of supervening circumstances that render performance "*radically and essentially different*" from that which was undertaken in the contract (see *Davis Contractors v Fareham UDC* [1956] AC 696). The frustration of a contract leads to its automatic termination.

However, there is a high threshold to be cleared in order to establish frustration. In *The Sea Angel* [2007] EWCA Civ 547, the Court of Appeal held that there had to be an effective "*break in identity between the contract as provided for and contemplated and its performance in the new circumstances*". Therefore, there must be an examination of the parties' contemplations as to risk at the time of contract formation, as well as an examination of the nature of the supervening event.

The English courts have consistently shown that an event that merely increases the cost of performing a contract, or an event that merely makes performance more onerous, will not amount to frustration. The contract must have become incapable of performance (i.e. impossible), although the fact that an event makes the contemplated route of performing a

contractual duty impossible will not necessarily lead to a conclusion of frustration where there is an alternative route available.

If a contract is frustrated then sums due under the contract will cease to be due and losses will lie where they fall. As a matter of English legislation (the Law Reform (Frustrated Contracts) Act 1943), the English court has discretion to allow a non-paying party to retain paid or payable sums up to the value of any sums expended in performing the contract to date. The English court also has discretion to require a party that has received a valuable benefit under the contract to make a suitable payment for that benefit.

GOING FORWARDS

It is vital that the response of commercial entities to the ongoing coronavirus situation includes a close review of the precise circumstances in which their contractual force majeure clauses can be invoked (either by them or against them), as well as any notification provisions that may be included.

Furthermore, commercial entities should be mindful of the need, whilst the crisis is ongoing, to collect evidence of how particular measures (such as travel restrictions or other governmental actions) are affecting the business and/or causing losses. It is necessary to consider whether the coronavirus situation (or any of the measures that have been adopted in response to it) have rendered performance of a contractual duty either impossible (not just more difficult/expensive) or "*radically and essentially different*" to what was originally envisaged.