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CLIENT ALERT

Contractual Disruption Update - English Court Finds That a Warehouse Fire Following a Riot Is Not a Force Majeure Event

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In our previous alert An English Law Perspective on COVID-19 and Contractual Disruption concerning force majeure events we noted that "*beyond reasonable control*" can mean that a business is expected to run itself well. In a recent case,[1][1] the English High Court has issued a timely reminder that parties will not be able to rely upon force majeure clauses if they have not taken reasonable steps to guard against the particular event or circumstance in question.

Facts of the Case

Sony had agreed to provide logistics services to the claimants (three commercial entities within the BBC, a British public service broadcaster), including storage and distribution facilities at a warehouse it owned in North London. At the relevant time, the warehouse contained stock (Blu-ray discs, DVDs and CDs) with a sales value of around £40 million.

During the London riots of August 2011, a group of young men gained entry to the warehouse by breaking through a fire door. Having looted some of the goods, they started a fire by throwing two petrol bombs inside the building. The warehouse burned for ten days, causing the total destruction of the building and everything inside. The claimants sought damages from Sony for the loss of their goods.

Sony Not Excused by Force Majeure Clause

Sony contested the claim on various grounds, including that the riot that led to the destruction of the warehouse and its contents was a force majeure event. They relied upon the following clause in their agreement with the claimants:

> *Neither party shall be liable for its failure or delay in performing any of its obligations hereunder if such failure or delay is caused by circumstances beyond the reasonable control of the party affected including but not limited to industrial action (at either party), fire, flood, wars, armed conflict, terrorist act, riot, civil commotion, malicious damage, explosion, unavailability of fuel, pandemic or governmental or other regulatory action.*[2][2]

Sony argued that the riot and the fire were unforeseeable and could not have been prevented by reasonable measures. On that basis Sony asserted that it should be excused from liability.

The Court disagreed: it found that Sony had failed to put in place reasonable security measures and fire precautions. The riots were unforeseen but the risk of intruders or arson was certainly foreseeable. Although Sony were not in breach of any particular rules or regulations governing the storage of goods, they had not met the standards suggested in the relevant building code that provides guidance on the security of warehouse buildings.

Turning to the particulars, the Court commented that the fire exit door should have been "*more robust … with multi-locking points offering a higher resistance to forcible access*."[3] The Court noted that on the night of the riot the fire exit door offered "*almost no resistance to the short attack by youths armed with no more than a few garden implements*."[4]

Similarly, the Court judged that reasonable fire precautions (the installation of sprinklers, for example), probably would have suppressed the fire and significantly reduced any damage to the warehouse and its stock.

For these reasons the loss of the stock was caused by Sony's failures and the fire did not, therefore, amount to a force majeure event.

Practical Takeaways

Force majeure clauses only provide relief in exceptional circumstances. Particularly where, as in this case, the clause refers to matters "*beyond the reasonable control*" of the parties, not complying with best practice and relevant guidance – even if it isn't mandatory to do so – will very likely block any attempt to rely upon a force majeure clause.

More specifically, as restrictions are starting to be eased in many countries, it would be sensible to consider what contingency plans can be put in place now to reduce the effects of a second lockdown if the so-called "second wave" does strike later in the year. Such a possibility has been so widely trailed in the press that it is undoubtedly foreseeable such that the Court will expect competent businesses to be making what arrangements they can in the meantime.

This case provides another telling reminder – force majeure clauses will be upheld only in exceptional circumstances and will not provide parties with a basis for not having taken all reasonable steps to guard against the kind of circumstances in issue.

Other Materials

If you would like to read or listen to other material we have recently published on the issue of force majeure, you may find the below of interest:

Crowell & Moring Webinar: Tools for Turbulent Times: Force Majeure and Frustration

Crowell & Moring Alert: English Contractual and Common Law Remedies for COVID-19 Business Interruption

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[1] *2 Entertain Video Limited & Ors v Sony DADC Europe Limited* [2020] EWHC 972 (TCC).

[2] *Id.*, [25].

[3] *Id.*, [108].

[4] *Id.*

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