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CLIENT ALERT

An English Law Perspective on COVID-19 and Contractual Disruption

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As everyone is aware, the recent COVID-19 outbreak has been declared a global pandemic by the World Health Organization and business disruption is accelerating around the world.

Following on from Crowell & Moring's bulletin discussing U.S. and Chinese law, Coronavirus Outbreak: Time to Review Force Majeure Provisions in International Commercial Contracts, we here provide guidance for businesses facing disruption from an English law perspective. This guidance is important both for those businesses operating in England, and also the many international organisations which elect for English law to govern their contracts.

English Common Law

The common law is not very sympathetic to claims that external shocks have undermined contractual performance. Without specific contractual language, an affected business is likely only to be able to rely on the doctrine of frustration. That doctrine will relieve a party from performance where it has become impossible. For the present circumstances, that might include for example an event cancellation, so a business simply has no event at which to perform anymore.

However, a critical weakness for reliance on this doctrine is that it only excuses performance for total impossibility or illegality. Businesses should further bear in mind:

- If, owing to current government and business measures, your contract has become more expensive to perform, even significantly so, the common law is unlikely to come to your aid: *Tsakiroglou v Noblee Thorl* [1962] AC 93.
- If your supply chain has been disrupted, but there is a more expensive alternative available, frustration is unlikely to help you: *The Furness Bridge* [1977] 2 Lloyd's Rep 367.
- If you have entered into contracts since news of COVID-19 became public, you may not be able to rely on frustration about them: *Flying Music Company Ltd v Theater Entertainment SA and others* [2017] EWHC 3192 (QB).

Contractual Force Majeure and Emergency Clauses

Force majeure is a concept inherent to civil law jurisdictions. However, the language is often borrowed for clauses in commercial contracts even in contracts governed by the law of common law countries.

Such clauses will ordinarily define specific classes of events which trigger their terms, such as acts of terrorism, war, natural disasters, and, key for the present: pandemics.

Triggering language typically involves the criterion that the event is "*beyond the reasonable control*" of the party, the consequences of which could not be foreseen or avoided. The clause may require the event makes performance impossible, or more relaxed triggers of economic hardship are possible.

There will usually be a requirement to invoke the clause by notice, detailing the force majeure event and a procedure to try to deal with it.

Powerfully, and particularly for the smooth correction of business relations, the clause may declare remedies other than simply cancellation of performance without penalty, which as discussed above is all the common law will offer; for example: suspension, time extension, or relief from certain financial obligations if the event becomes chronic over a designated period.

In England, a force majeure clause is still a creature of its particular contract and language (*Tandrin Aviation Holdings Ltd v Aero Toy Store Llc & Anor* [2010] EWHC 40 (Comm) [43]). One-size-fits-all advice is therefore impossible. However, some general guidance likely to apply widely is that:

> *the fact that a contract has become expensive to perform, even dramatically more expensive, is not a ground to relieve a party on the grounds of force majeure or frustration.*
>
> *Thames Valley Power Ltd v Total Gas & Power Ltd* [2005] EWHC 2208 (Comm) [50] (See also *Tennants Lancashire Limited v Wilson CS & Co Ltd* (1917) AC 495, 510)

Also note that "*beyond reasonable control*" can mean a business is expected to run itself well: *Great Elephant Corp v Trafigura Beheer BV (The Crudesky)* [2013] EWCA Civ 905. If you are forced to litigate about such a clause, you could be expected to justify your planning for crisis events.

Invoking Force Majeure Clauses and Responding

Whether invoking or responding to a notice, naturally one should check the governing law.

Where the contract is under English law it is critical that the language of your particular force majeure clause be carefully reviewed: the potential for a successful invocation, and the likely outcome of it, are variable.

Importantly, time limitations may apply to invoke a notice. Time is therefore of the essence in the present circumstances.

If you receive such a notice, you should take your own view on whether the COVID-19 outbreak and surrounding events qualify. You should also consider requiring the invoker to provide details of the exact circumstances allegedly interfering with its performance and regular updates, so that the parties can more effectively plan together.

This crisis is also unique in recent times. Around the world, not only businesses but the courts themselves are affected. The English courts are expected to shortly suspend operations. An update page is available here. Much of the EU court apparatus is already suspended, as are national courts throughout the continent. As well as governing law terms, dispute resolution jurisdiction clauses have a raised profile in considering your actions in today's environment.

In such circumstances, it is prudent to consider negotiated outcomes to avoid delay and uncertainty, including amendments to contracts. That includes parties that would otherwise be responsive to notices considering being proactive, and reaching out to their business partners and consumers. If nothing else, goodwill may come of that, as we all look to get through these uncertain times.

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