MAY THE FORCE BE WITH YOU…
Force Majeure is likely to be triggered in Coronavirus Disputes

With the impact of the coronavirus pandemic now having a firm grip on global supply chains, businesses are focusing on their contracts to look at ways of deferring or excusing performance of contractual obligations. Throughout the world, business is facing unprecedented challenges, whether from a lack of labour supply due to local quarantine regulations to restrictions on the movement of raw materials.

The question now for many businesses is how to defer or remove contractual obligations that are causing pain the current crisis. That question leads to another: "does force majeure apply and can I use it?"

What is Force Majeure?
In civil law jurisdictions, it is a legal principle that can be applied in the right circumstances. In common law jurisdictions, it is a creature of contract. English and Scots law follow this approach. The precise wording of a force majeure clause in a contract is therefore crucial and whether the clause relieves a party of a contractual obligation depends on whether that clause adequately provides for the situation.

Force majeure clauses essentially alter parties' obligations and/or liabilities under a contract when an extraordinary event or circumstance beyond their control prevents one or all of them from fulfilling their contractual obligations. The clause may allow the affected party to be excused from performance of the contract in whole or in part; excused from delay in performance; or be entitled to terminate the contract.

Two issues need to be considered in deciding whether the force majeure clause can be relied on. Firstly, whether the nature of the event falls within the definition of a 'force majeure" event and, secondly, the extent of the obstruction it causes to contractual performance.

The contract will define what constitutes a force majeure event. This may be a generic definition or a list of defined events. If a party wishes to avail itself of one of the "defined events" it will have to confirm that the definition in the contract covers the situation that has arisen. Normally, a particular event or restriction will have to be identified. It will not be enough to rely on general disruption.

Many clauses require that performance is "prevented" or made "impossible" by the event. That means what it says, not just that it is costing the party more to perform the contract or that it is more difficult. Some force majeure clauses will refer to performance being "hindered" or "impeded" in some way, thus making it easier to seek solace in the clause.

It is essential that heed is paid to any notice provisions in the force majeure clause and that these are adhered to, otherwise it may not be possible to rely on the relevant provisions.

If successful, a party may find that it is relieved of its obligations in their entirety, or that performance of its obligations is suspended for a period of time. Much depends on the wording of the relevant clause in the contract.

Will Coronavirus/COVID-19 Disruption Be Covered By Force Majeure?

The fact that the World Health Organisation (WHO) has declared the outbreak of COVID-19 to be a Public Health Emergency of International Concern and it is treating COVID-19 as a pandemic gives weighty support to such a claim. A business making a claim under a force majeure clause will still have to establish a causal link between the impact on the performance of its contractual obligations and the pandemic.

Where a contract sets out fairly broad criteria, such as events being "beyond the parties' reasonable control", determination of this will depend on the facts and interpretation of the contract. In the current unprecedented times, it is likely that courts will be generous in their interpretation of force majeure clauses where parties have faced genuine difficulties.

There is no doubt, therefore, that force majeure will become a major force in the battles that will surely come over contracts that have been hit by the Coronavirus.

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