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PH COVID-19 Client Alert Series: Force Majeure and the Doctrine of Frustration in Light of COVID-19

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Businesses globally are facing a myriad of concerns as a result of the COVID-19 pandemic. One such concern is the impact the outbreak will have on the performance of commercial contracts.

In this alert, we consider whether, and to what extent, force majeure provisions in English law governed commercial contracts or the English common law doctrine of frustration might be relied upon in this context.

Force Majeure

Generally speaking, a force majeure clause will excuse one or more parties from the performance of a contract (whether in whole or in part) as a result of events which occur beyond the party's reasonable control.

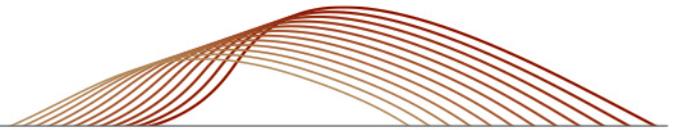
"Force majeure" is not defined in English statute or case law, and the concept will not be implied into a contract (unlike in many European civil law jurisdictions). As such, the scope of a force majeure provision, and whether it covers a pandemic such as COVID-19, will ultimately depend on the wording of the particular clause agreed between the parties.

There are generally two questions which businesses should be asking themselves in this respect:

1. **Scope:** Is the COVID-19 pandemic covered by the relevant force majeure provision, either specifically (e.g., "pandemic", "epidemic", or "infectious disease") or generally (e.g., events outside of a party's reasonable control)?
2. **Effect:** Does the relevant clause apply only to a complete prevention of the performance of the contract, or does it kick-in if that performance is merely disrupted or otherwise hindered? What are the rights of the parties if a force majeure has occurred?

It is worth bearing in mind that an increase in a party's costs in order to perform the contract may not be enough to trigger a force majeure provision and, typically, a party will be required to take all reasonable steps to mitigate against the relevant event before receiving the benefit of the provision.

For example, if, as a result of COVID-19, there are employee shortages or issues with suppliers due to self-isolation guidelines, the affected business should nevertheless explore alternative sources available to them, even if at an increased cost.



The consequences of a valid force majeure event typically include an extension of time to perform the relevant obligations or a suspension of the obligation to perform. Some force majeure provisions may permit termination of the contract (in whole or in part), but this will depend on the relevant provision and the nature of the event.

Frustration

The doctrine of frustration is an English common law concept which applies where a significant change of circumstances renders performance of a contract radically different from the obligations that were originally undertaken. As with force majeure, the relevant event must have been outside the control and fault of the parties.

The frustration of a contract will result in the entire contract coming to an end. However, a court will not frustrate a contract merely because performance of the contract has become more burdensome or if such performance will result in higher costs to a party than originally anticipated. There needs to have been an unforeseen event which renders performance of the contract impossible or results in the underlying obligation becoming radically different.

In the context of COVID-19, an example of a frustrating event might include a scenario where a Government enforced lock-down renders the delivery of goods by a supplier illegal. Here, the imposition of restrictions by the Government has meant that performance of the contract is impossible for reason of illegality. This may differ from a scenario where those same restrictions cause a staff shortage resulting in a serious impact on the performance of the contract without rendering it impossible, or otherwise radically different.

The courts are typically reluctant to invoke the doctrine of frustration and will not normally do so where the parties have agreed to an express force majeure provision in their contract. The option of frustrating a contract is, therefore, only an option in the absence of a force majeure provision and is, in any event, a high bar to reach.

Conclusions

These are significantly challenging times. The impact of COVID-19 pandemic is being felt keenly by businesses globally and will continue to do so for an indeterminate amount of time.

It is highly likely that we will see more and more businesses seeking to rely on force majeure provisions and, to a lesser extent, the doctrine of frustration. Ultimately, whether or not those provisions can be invoked will depend on their specific terms.

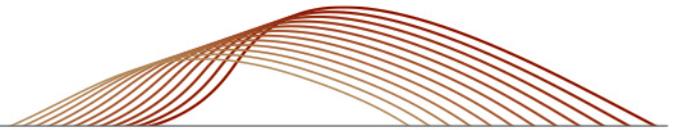
Actions

Clients should undertake a systematic review of their contracts so that they can react accordingly. Clients should also consider whether it would be prudent to engage with any counterparties who are impacted by the COVID-19 pandemic with a view to reaching agreement on a possible renegotiation or postponement of obligations.

As well as considering their own ability to rely on force majeure provisions, clients should assess the risk that key suppliers may not be able to supply the goods or services in question and seek to rely on force majeure or frustration themselves.

To the extent clients have any questions regarding COVID-19, force majeure clauses, or the doctrine of frustration, they are encouraged to contact their Paul Hastings lawyers to discuss.

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