

Covid-19 – What are your contractual rights?

Covid-19 is raising a number of legal issues in addition to a host of other problems. We set out below a practical analysis of the relevant law.

Force Majeure

As ‘force majeure’ is not defined in statute or case law, contractual clauses are interpreted by looking at their precise wording under the regular principles of contractual interpretation. Some contracts attempt to include “*force majeure conditions*” without going further but English courts have concluded these are too uncertain and found them void. It is important to understand that the English courts will not imply a force majeure clause.

The courts have also held that where a clause states that a force majeure event must “prevent” a party from performing its duties (or render it unable to do so), then it must be impossible for the parties to perform the duties – not just more costly or most difficult.

On the other hand, the courts have found that where a clause states that a force majeure event must “hinder”, “impede”, “impair” or “delay” a party in the performance of their duties, the performance only needs to be significantly more onerous.

Parties to a contract can claim force majeure even if the event was not unforeseeable, but a party cannot claim if the event was caused by their own negligence. It was also decided in a recent case that a force majeure clause will only apply if the force majeure event was the only cause of a party’s non-performance.

A party to a contract seeking to excuse non-performance under the contract by relying on a force majeure provision must demonstrate that:

- a force majeure event has happened and that the contract specified the particular impact of the breach
- the non-performance was a consequence of forces “beyond its control”
- there was nothing it could have done to avoid the event or minimise the impact

Where the force majeure event definition includes a list of specific events, followed by a catch-all phrase (such as “any other cause beyond the parties reasonable control”) the catch-all phrase will not be qualified by the list and will keep its wide meaning.

Force Majeure and Epidemics

Deciding if Covid-19 would trigger a force majeure clause in a contract will be determined on a case by case basis by looking at the wording of the contract. It is likely to be triggered if the definition of a force majeure event includes words such as “epidemics” or “diseases”.

If such wording is not included, parties may have to rely on more generic language in order to classify the Covid-19 outbreak as a force majeure event.

Examples might include “outbreak”, “crisis” or “government action”.

It may be worth noting that the China Council of the Promotion of International Trade (an international trade promotion agency in China) is currently issuing force majeure certificates to Chinese businesses struggling under the effects of the outbreak.

Frustration

As stated the courts will not imply a force majeure clause where one is not included in the contract, but the concept of frustration may apply.

Put simply, if after the formation of a contract an event occurs that makes it impossible to perform a fundamental obligation of the contract OR makes a fundamental obligation radically different to how it was imagined when the contract was entered into, then the contract will be frustrated and therefore automatically terminated.

Usually the threshold for proving frustration is higher than the standard required by force majeure clauses.

Some (non-exhaustive) examples of situations where a party cannot claim that a contract has been frustrated include:

- where the parties to the contract made a provision for the consequences of the event (for example, by including a force majeure clause)
- where the alleged frustrating event should have been foreseen by the parties
- where there are other ways of performing obligations

The 2019 case *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* shows how difficult it can be to prove frustration. In this case, the European Medicines Agency (the EMA) tried to convince the High Court that its 25 year commercial lease was frustrated as, after Brexit, they were required to move their headquarters from London to Amsterdam. The court held that it was foreseeable to both parties when the lease was agreed that EMA may need to leave the premises during the term and had included provisions allowing the tenant to assign or sub-let the lease during its term. Therefore, it was found that Brexit did not radically alter the EMA's performance of the contract as it still had the ability to assign or sub-let the lease. The parties, despite not foreseeing Brexit, had foreseen the possibility of the tenant wishing to leave the premises during the term AND had included provisions for this by including an assignment/sub-letting clause.

Covid-19

It is of course difficult to predict the possible impact of Covid-19, but the fact of an outbreak can longer be characterised as “unforeseen”. Under English and Welsh law, if a contract is silent on whether the force majeure event needs to be unforeseen, the court will be reluctant to impose the qualification.

The current outbreak may impact the performances of countless contracts, not rendering them impossible but more difficult or more expensive to perform. Under English and Welsh law, there is no implied right to renegotiate a contract – the right to renegotiate would need to be specifically drafted into the contract. Even if it was included, courts are very reluctant to hold parties to an “agreement to agree” as this is too uncertain as to be enforceable.

Practical tips

- review the wording of force majeure clauses, especially to the listing of non-exhaustive force majeure events and the consequences of triggering a force majeure. If you do not have a force majeure clause in your contract then consider including a suitably worded provision
- if a long list of force majeure events is included, consider now including wording such as “pandemic”, “epidemic”, “outbreak”, “crisis” or “government action”
- check if new force majeure clauses require that events are “unforeseeable”

19 March 2020

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