

1 INTRODUCTION

- 1.1 The outbreak of the coronavirus, Covid-19, is an ongoing epidemic that poses significant issues for organisations. Restrictions have resulted in the cancellation of many public events and are causing disruption to supply chains. Many businesses and not for profit organisations have been forced to suspend operations or find alternative means of working.
- 1.2 This note summarises how the current situation affects contractual and legal issues in England and Wales.

2 CONTRACTUAL POSITION

- 2.1 By default, an English law contract will contain legally binding obligations on both parties, and those obligations will still be binding despite any intervening circumstances including the Covid-19 outbreak.
- 2.2 Some contracts will include termination clauses, which might help in this situation.
- 2.3 By default, any failure to fulfil contractual obligations could lead to a claim for damages to be paid to the innocent party.
- 2.4 There are two key exceptions to the rule: the operation of any force majeure clause in a contract; and the common law concept of frustration.

3 FORCE MAJEURE

- 3.1 A 'force majeure' clause in a commercial contract will seek to excuse one or both parties from performing their obligations if defined events occur that are outside of the parties' control. It's called 'force majeure' (French for a 'superior force'), but it might also be called 'unexpected events' or similar – there is no one definition that applies to all contracts. A force majeure clause will normally govern circumstances that are not within a contracting party's reasonable control, but its actual effect will depend on the proper construction of the precise wording used.
- 3.2 An example force majeure clause might read:

Neither party shall be in breach of this agreement nor liable for delay in performing, or failure to perform, any of its obligations under this agreement if such delay or failure result from events, circumstances or causes beyond its reasonable control. In such circumstances the affected party shall be entitled to a reasonable extension of the time for performing such obligations. If the period of delay or non-performance continues for [NUMBER] weeks, the party not affected may terminate this agreement by giving [NUMBER] days' written notice to the affected party.

- 3.3 Whether the force majeure clause will excuse a party from fulfilling its obligations will depend on the exact wording used. Key factors to consider include:
 - Is the Covid-19 epidemic specifically covered as a force majeure event in the contract?
 - If the Covid-19 epidemic is not specifically covered as a force majeure event, is it the type of event that would fall under any general force majeure wording?
 - A government decision or administrative action in response to the Covid-19 epidemic may also prevent performance that might be covered by general force majeure wording.
 - Does the contract exclude events that could have reasonably been provided against, avoided or overcome? The word "reasonably" will need to be considered objectively.
 - The party that is seeking to rely on force majeure must usually establish that the force majeure event has prevented or hindered it from performance of the contract. This is mostly a factual question but, again, will also turn on the exact wording of the clause. Generally, force majeure

clauses are not so generous as to offer relief where services or goods will simply be more expensive to perform or obtain.

- What mitigation duties apply? The party that is claiming force majeure relief is usually under a duty to show that it has taken reasonable steps to mitigate or avoid the effects of the force majeure event.
 - What notice requirements apply? Check whether prompt notification is a contractual condition for relief.
- 3.4 In most contracts, establishing force majeure will lead to relief from performance, thereby avoiding the risk of a default termination, and an extension of time to target dates. Commonly, parties bear their own costs arising from any force majeure delay but there are exceptions where compensation may be payable after a certain duration or certain costs are payable from one party to another. Extended periods of force majeure can lead to a right for one or more parties to terminate the contract.
- 3.5 In some contracts, decisions or actions taken by governments and public authorities in response to the epidemic may trigger compensation, because wording has been included to deal with the impact of new laws and regulations.

4 FRUSTRATION

- 4.1 In the absence of a force majeure clause, parties might have recourse to the common law doctrine of frustration. This provides that a party is discharged from its contractual obligations if a change in circumstances makes it physically or commercially impossible to perform the contract, or would render performance radically different. This sets a high bar and the courts have confirmed that the circumstances where it can be invoked are narrow.
- 4.2 The change in circumstances must be due to an outside event or change of situation that occurs without the fault of the party seeking to rely on it. The following events have been previously held to frustrate commercial contracts:
- Subsequent changes in the law.
 - The cancellation of an expected event.
 - Destruction, by fire or other cause, of the subject matter of the contract.
 - Requisitioning of the subject matter of the contract by the government.
 - Incapacity or death of a person obliged to perform personal services.
 - Delay sufficiently long to frustrate the commercial adventure of the parties.
- 4.3 Mere inconvenience, hardship, or financial loss involved in performing the contract, or delay which is within the commercial risks undertaken by the parties, is insufficient to amount to frustration.
- 4.4 Where the event was foreseen (or foreseeable) by the parties, but there is no express provision as to its effect, the courts will consider whether the parties intended their silence to mean that the contract should continue (with one or other of them assuming the risks associated with the event), or whether the parties intended that they should be discharged from their obligations by law. However, the default position is that a foreseen event is not a frustrating event.
- 4.5 Undoubtedly, the bar will be reached in some situations arising from Covid-19, for example, where the contract requires performance in a region that is subject to a state-imposed lockdown but, in many other instances, parties will need to refer to the contractual force majeure clauses.
- 4.6 If frustration applies, the consequences are set out in the Law Reform (Frustrated Contracts) Act 1943. Except where otherwise agreed by the parties, the 1943 Act permits recovery of monies that were paid under the contract before it was discharged, subject to an allowance (at the court's discretion) for expenses incurred by the other party.

5 STANDARD TERMS AND CONDITIONS

- 5.1 In standard form terms of business, a force majeure clause will be governed by section 3(2) of Unfair Contract Terms Act 1977 (UCTA).
- 5.2 A party cannot rely on any term to exclude or restrict liability for its own breach of contract, or claim to be entitled to walk away from the contract or to deliver a contractual performance substantially different from that which was reasonably expected, unless such a term satisfies the reasonableness test under UCTA.
- 5.3 The clause would therefore need to be reasonable to remain valid. When one party seeks to classify events, which are in fact within its control, as *force majeure* events, this could potentially be unreasonable.

6 CONSUMER CONTRACTS

- 6.1 Any attempts to excuse delay on the trader's part must take into account the consumer's statutory rights as to time for delivery or performance.
- 6.2 A contract is likely to include provisions that govern when goods, digital content and services must be delivered. Clauses excluding liability for delay may be regarded as fair and enforceable if they only relate to force majeure events, the trader promises to minimise any delay, and the consumer is given the right to cancel the contract.

7 INSURANCE ISSUES

- 7.1 An organisation that suffers a loss as a result of disruption arising from Covid-19 should review its insurance to determine if it has cover. Insurance commonly has strict provisions requiring notification to insurers of actual or potential claims within a particular timeframe, together with duties to mitigate loss and to consult with insurers before taking action, and therefore it is key to identify these issues early.
- 7.2 Businesses therefore need to review their policy wording carefully. Business interruption policies can provide broader cover, often as an extension, for interruption caused by non-physical events, and bespoke contingency cover or events insurance is also available which provides insurance for losses arising from the cancellation, abandonment, postponement or interruption of particular events. If this type of cover is in place, the policy holders will need to consider carefully the triggers for cover, in particular, whether cover is provided for losses that result from an outbreak of an epidemic or whether these losses are expressly excluded.