Charting Your Way in Uncertain Times: Force Majeure, Frustration and the Coronavirus Pandemic

Almost overnight the global effort to fight the coronavirus has forced companies around the world and across all sectors to take drastic measures to shut their businesses, offices, premises, worksites and yards for an, as yet, indeterminate period of time. Companies are facing many difficult questions about business continuity and their workforce in this fast-developing emergency, including their ability to perform existing contractual obligations under their commercial contracts.
A critical question will be whether businesses can call on contractual force majeure and other provisions to excuse performance and if not whether they can rely on the doctrine of frustration to discharge their contracts thus avoiding liability for damages. This article considers the position under English law.

Force majeure and other contractual provisions
Many parties to English law commercial contracts will have included a force majeure clause, which is an important protection if a party is affected by events outside its control that prevent or delay performance of a contract. The purpose of a force majeure clause is generally to excuse a party from its obligation to perform the contract for the duration of the force majeure event with the result that a party may avoid financial consequences for failure to perform.

Unlike many civil law systems, English law does not define force majeure, or impose it automatically on commercial contracts. To claim force majeure under an English law contract, the right to do so must be set out in the contract, and will mean whatever it is defined as in the contract. A clause may define events broadly as those beyond a party's control or limit these to a specific list of trigger events. Therefore, whether a party can call on the force majeure clause will be both fact sensitive and highly dependant on the wording used in the relevant contract to define events giving rise to force majeure.

The party seeking to rely on the clause will bear the burden of proof that the force majeure event relied on has prevented or delayed its performance. Furthermore, as held in recent English cases, the party seeking relief will need to show that the force majeure event was the only effective cause of default and, depending on the wording of the clause, that it was willing and able to perform the contract "but for" the force majeure event.

The clause will also set out a party's remedies if a force majeure event has occurred, and usually expressly set out an obligation on the affected party to take reasonable steps to mitigate the effect on its performance. A party unable to perform due to a force majeure event will generally be entitled to suspend performance or an extension of time until the

situation has returned to normal. If the delay caused by the force majeure event is prolonged, this may entitle either party to terminate the contract and the contract will usually provide for the financial consequences upon termination. Parties will need to ensure that they adhere to notice provisions, which may include strict time limits and be expressed as a condition precedent, failing which a party may lose the right to rely on the event as a force majeure.

While typical examples of force majeure may be natural disasters, wars, and epidemics, whether the coronavirus pandemic is a force majeure will depend on the precise wording of the relevant clause. The consequences of coronavirus may extend long after business resumes because of its impact on labour, subcontractors, suppliers and the availability of materials. Whether these further cases come within the force majeure definition will depend upon the contractual wording and need to be considered in context at the relevant time.

As to economic consequences, if the contract becomes uneconomic to perform, a force majeure clause will generally not be engaged but this may be covered by other express provisions. Some contracts also contain an express frustration clause bringing the contract to an end in specific circumstances, change in law provisions, or mechanisms addressing operations in difficult economic circumstances, which may be of assistance.

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Frustration under common law

Absent contractual protections, the common law concept of frustration discharging future performance of the contract may be a fall-back position. However, the law of frustration is kept within narrow limits under English law, is difficult to prove and rarely used.

The law on frustration applies if an unforeseen event occurs after the contract, which renders performance of a party's contractual obligations (commercially or physically) impossible or radically different to those undertaken at the time the contract was entered into. The frustrating event must not have been caused by the fault of either of the parties.

The threshold for establishing frustration is high. It will depend on the precise wording used in the relevant contract, the factual matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract, so far as these can be ascribed mutually and the test is an objective one.

Examples where frustration has been successfully invoked in commercial contracts have included destruction or unavailability of the subject matter of the contract, supervening illegality or change in the law, a delay so abnormal as to be outside the parties' contemplation at the time of contract, frustration of a common purpose such as the cancellation of an event, government regulations preventing or limiting building operations during wartime, as well as death, illness and incapacity in personal contracts. But the law on frustration will not assist parties to escape a bad deal or obligations that the frustrating event has merely rendered more difficult, onerous, expensive or uneconomic or a delay that the parties could reasonably have foreseen.

However, if parties do have a force majeure clause in their contract, the common view is that it is difficult to rely on common law frustration, since the courts will seek to give effect to the allocation of risk agreed to and contemplated by the parties as reflected in the force majeure clause.

The occurrence of a frustrating event will bring the contract to an end automatically, without any act or election by the party seeking to rely on it. The parties are both discharged from future performance of the contract at the time of the frustration, and will not be liable for non-performance, but may still have existing obligations incurred prior to that point. Where a contract has been partly performed, the ability to recover monies, expenses incurred and payment for goods and services supplied prior to the discharge is dealt with under statute, except for certain charterparty, insurance and sale of goods contracts. The position at common law is however more restricted.

Practical readiness

Parties will need to give prompt consideration to the level of protection available under their existing contracts and ensure that they are ready to make or respond to force majeure or other claims at the appropriate time, so that these valuable rights are not lost or waived.

Practical steps may include obtaining legal advice on the availability and scope of contractual protection, assessing the impact on performance on a case-by-case basis, evaluating any mitigation measures to be taken, as well as ongoing monitoring and record keeping.

When entering into new contracts, parties should now consider whether they need specific protections covering the coronavirus pandemic as foreseeable events will generally not be a force majeure, and would also not give rise to a frustration.
Source: By Helen Conybeare Williams, Counsel, London disputes team of Haynes and Boone, LLP., Arranged on Behalf of Hellenic Shipping News Worldwide