Is the Coronavirus (COVID-19) Outbreak a Force Majeure Event'

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Updated March 12, 2020.
This is a question being asked by many companies. Is the severity of this event such that it enables companies to temporarily (or permanently) be excused from performance of their contractual obligations?

As is often the case with legal questions, it depends. The term “force majeure” does not have a recognised meaning under English law. The courts will look how the parties have defined the term “force majeure” and will next consider the wording of the relevant contractual clause agreed by the parties to determine its effect.

Is there a Force Majeure event?

The first question is what is defined as a force majeure event in the contract. Typically, it will be defined as any circumstance not within a party’s control. In our experience, many contracts will include a specific and “closed” list of events which are said to constitute force majeure, for example, Acts of God, terrorism, war etc. In recent years, following the outbreak of SARS and MERS, we have advised clients to include specific reference to epidemics and pandemics in their force majeure clauses.

It seems clear that the spread of the COVID-19 is an event outside of a party’s control and is therefore likely to come within the definition of force majeure if the parties have simply provided that force majeure is any event that is outside a party’s control. If, however, the parties have a limited and closed list then it will depend upon the events specified in the contract. If the contract includes pandemics, epidemics or quarantine then it will almost certainly be applicable given that the World Health Organisation on 11 March declared COVID-19 a pandemic and several countries have imposed quarantines in attempts to contain the spread of the virus.

However, it may also be possible that such circumstances will be caught by the force majeure clause if it applies to any act of any government or regulatory body where such bodies impose restrictions in response to the COVID-19 outbreak, such as travel bans or enforced quarantine zones or periods.

What is the effect on your contractual obligations?

Again, the specific wording of each clause must be considered on its own merits, but usually force majeure clauses require the party affected to be prevented from or delayed in performing its contractual obligations.

Sole effective cause

In *Seadrill Ghana Offshore v Tullow* [2018] EWHC 1640 (Comm)[1], Teare J confirmed that, in order for a party to rely on an event of force majeure, it must be the sole operative cause of the inability to perform. That means that if you are affected by COVID-19, but there is also some other reason why you cannot perform your obligations, then you cannot rely on the force majeure clause. For example, if you are a supplier who has become short staffed because of COVID-19, but you have also suffered a serious equipment malfunction and the two causes together delays you in delivering goods to your customer, you may well not be able to rely on force majeure.

Alternative methods of performance

Classic Maritime Inc v Limbungan Makmur SDN BHD [2018] EWHC 2389 (Comm)[2], another case decided by Teare J, confirmed that principle that if there are alternative methods of performance, then you must explore alternative modes of performance (provided the contract does not provide for a single mode of performance).

If a party is prevented from performing its obligations in a certain way because of the COVID-19, then alternative methods of performance should be considered. For example, if your company is shipping goods from an affected region to meet its contractual obligations, but has the option to ship from a non-affected region, then you may not be able to rely on a force majeure clause.

Reasonable endeavours

Some contracts may also specify that parties must use “reasonable endeavours” to overcome a force majeure event. What is “reasonable” will depend on the nature of the contract and the contractual obligation that is impacted by the force majeure event. In *Seadrill Ghana Limited v Tullow Ghana Limited* Teare J held that Tullow, as the party having to prove that it had used reasonable endeavours to overcome the force majeure event, had to weigh its own business interest against the business interest of Seadrill. In the case of clauses that do contain a requirement to use reasonable endeavours to overcome a force majeure event, it is important therefore that parties do not just consider their own business interests when deciding whether steps to overcome the force majeure are reasonable, they must also consider the impact on the other party to the contract.

As such, and particularly in circumstances where reliance on a force majeure event is likely to have a significant impact on the other party to the contract (for example by depriving it of the benefit of a long term contract or where its business will be disrupted by not receiving goods), it is important to consider what steps can be taken to limit the impact of COVID-19. For example, if traveling to and from affected regions, it is worth considering timing of travel so that employees travelling can self-isolate for the 14 days where that may be required. It should also be considered to what extent technology and remote working can be used in order to avoid travelling or to avoid the risk of interacting with someone who has travelled to an affected region.

Notice provisions

It is important to check the notice provisions of any force majeure clause to check whether a notice is required, when it is required and what information it must contain. This varies a great deal from contract to contract.

If a party has failed to give the required notice, the effect of this will depend on whether the notice provision in question is a “condition precedent” or not. If it is a condition precedent and notice has not been given, then the party will not be able to rely on the force majeure clause.

For a notice provision to be a condition precedent, it must be clear and precise as to the nature of the obligation that performance is conditional on the relevant event (see *Heritage Oil and Gas v Tullow Uganda* [2013] EWHC 1656 (Comm)). Typically, to be clear and precise it must specify what notice must be given and when. However, specifying a time limit is not in and of itself enough to turn a notice requirement into a condition precedent. In *Scottish Power UK Plc v BP Exploration Co Ltd* [2015] EWHC 2658 (Comm), Leggatt J held that a clause requiring a notice within 10 days of an event, with follow up notices after a further 5 days and 20 days was not a condition precedent. The judge held that there were no words in the contract to the effect that the consequences of failing to comply with the requirements in the clause was to preclude a claim for relief.

Risks of wrongfully declaring force majeure

It is worth noting that if a party declares force majeure but is not contractually entitled to do so, it may find that it is in breach of contract. Furthermore, if the declaration of force majeure amounts to evidence that the party in question no longer intends to perform the contract, this could amount to a repudiatory breach of contract and the other party may be entitled to claim damages as a result. It is therefore necessary to proceed with caution when relying on a force majeure clause.

Conclusions

Force majeure scenarios will always be very fact sensitive and highly dependent on the wording of the relevant contract. If in doubt, seek legal advice.

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[1] Haynes Boone acted for Seadrill Ghana Limited

[2] This case was appealed but on a different point