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UPDATE

COVID-19: The potential implications for Jersey law contracts

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The outbreak of COVID-19 and the phenomenal rate of its spread has given rise to a unique crisis. It provokes a wide range of commercial and contractual issues for businesses in Jersey and beyond. And no business can count on avoiding its effects.

The interpretation and construction of 'force majeure' clauses in Jersey law contracts is only one of these but a potentially very important one. Poorly advised businesses may find themselves taken advantage of. Prudent commercial parties will seek to take pre-emptive measures (where possible, pre-dispute) to protect their position and reduce disruption to their business imperatives.

Factors such as human resourcing, supply chain breaks and economic uncertainty among others, will see many commercial parties understandably considering the affect that the COVID-19 pandemic is to have on pre-existing commercial contracts or contracts currently in contemplation. Some will seek to be released from present contractual obligations; others may be anxious to know if a counter-party is able to escape from its ongoing contractual obligations. Meanwhile others, attempting to minimise the disruption incurred, will want to know how they should tailor commercial contracts to reduce contractual uncertainty and mitigate exposure to loss in a new reality.

Force Majeure

A key feature of a commercial contract which determines whether the contract remains enforceable despite the occurrence of an unforeseen, unintended event, and consequently how risk of contractual frustration is apportioned, is the species of clause known as 'force majeure'. A 'force majeure' clause defines circumstances beyond the control of the contracting parties which may render contractual performance too difficult or impossible to perform. Where an event (or series of events) triggers a 'force majeure' clause, the party invoking the clause may suspend, defer, or be released from its duties to perform contractual obligations without liability. Typically a 'force majeure' clause will provide a list of specific events outside of the contracting parties' control which, on occurrence, would excuse or delay the invoking party's performance, or permit the cancellation of the contract. Events like war, terrorist attacks, famine, earthquakes, floods, strikes, fire, epidemics, and government action are often included as 'force majeure' events which can excuse contractual performance. Sometimes a 'force majeure' clause will also include 'catch-all' language broadly excusing performance based on significant events outside of the parties' control.

Most commercial contracts will contain such a clause but interpretation will vary and depend on the law of the jurisdiction under which the contract is governed. The law of Jersey does not include a freestanding, codification of the meaning of 'force majeure' (even though some of Jersey's shipping and fishing legislation refers to the occurrence of a 'force majeure'). This means that the meaning of 'force majeure' will vary from contract to contract dependent on how the clause is drafted and the context in which the contractual bargain was struck. The most significant treatment the Jersey courts have given to 'force majeure' is set out in the 1981 judgment of Mobil Sales & Supply Corp v. Transoil (Jersey) Ltd. In that case, the Royal Court ruled that 'where such a clause is included in a contract it must be construed with due regard to the nature and general terms of the contract and in particular with regard to the precise terms of

the clause'. The customary law principle of 'la convention fait les loi des parties' (loosely, the contract is the law between the parties) demands that the Jersey courts do not interfere and interpose additional provisions, beyond the contemplation of the parties at engagement, into a contract, nevertheless, this does not definitely mean the lack of an express reference to the type of event in question means that a 'force majeure' will not be construed to have occurred.

In the current circumstances of the COVID-19 pandemic, contracting parties will need to consider, perhaps more closely than ever in recent times, the terminology used within a 'force majeure' clause to gain an understanding of when and if the clause has been triggered. It shall be important to consider whether a 'force majeure' clause explicitly refers to the outbreak of a pandemic, epidemic or disease, governmental action or national/island crisis or emergency. There may be a wide class of potential events (including secondary events, such as travel bans and public service closures) which may suffice to trigger a 'force majeure' clause. The express wording used for the clause and the mutual understanding of the parties on contracting, as well as the wider circumstances to which the parties are subjected may become critical considerations. Even where the outbreak of a pandemic is expressly included in the wording of a 'force majeure' clause, the party seeking to rely on it will be required to prove a causal link between the pandemic and its inability to perform the specific contractual obligation in contemplation. It will also be important to consider whether a party is required to give a period of notice before relying on a 'force majeure'. Nevertheless, if it is not possible to rely on the 'force majeure', it may yet be possible to prove that a contract has been vitiated (or frustrated) in some other fundamental way.

Dealing with Frustration

A contract is said to be frustrated on the occurrence of an event outside the control of the contractual parties (such that no fault can be attributed or apportioned), for which the contract in question makes no sufficient provision, and which is so significant that it completely changes the nature of the contractual rights and obligations from what the contracting parties might have reasonably contemplated at the point of initially contracting. This is based on the premise that it would be unjust in such circumstances to hold the parties to the terms of the contract.

The Jersey court has rarely been asked been to consider contractual frustration but has made clear that a contract is only considered to have been frustrated in circumstances where its performance is impossible, not merely onerous i.e. if a contractual quality of goods is not available, then the seller should supply goods that are available even if they are of a higher quality and value (*Hotel de France (Jersey) Ltd v. Chartered Institute of Bankers*). This means to say that, in the first instance, the parties must explore alternative means of performance. This might mean that in order to avoid frustration, a contract which involves holding a meeting in a particular place might be constructed to allow for the meeting to be held elsewhere or remotely; or alternatively, that the timeframe for the supply of a particular service might be extended owing to extraordinary circumstances. Whether the COVID-19 pandemic would qualify as an act of frustration will turn on the inability of the contracting party to perform the specific contractual obligation in contemplation.

What should Jersey businesses do?

In summary, the COVID-19 pandemic is provoking a wide range of commercial and contractual issues for businesses in Jersey and beyond. The interpretation and construction of 'force majeure' clauses in Jersey law contracts is only one of these, but a potentially very important one. Getting good advice is critical to avoid being taken advantage of by counter-parties eager to protect their own position or even to profit from these exceptional circumstances. We urge commercial parties to be prudent and seek to take pre-emptive measures (where possible, pre-dispute) to protect their position and reduce disruption to their business. We're advising businesses to review service contracts, assess their needs and take advice where appropriate. Jersey's law of contract is sufficiently robust to enable clarity. If you have concerns, please get in touch.

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