Covid-19 and Other Unforeseeable Events: How They Affect Commercial Contracts

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Introduction

Impact of Covid-19: An Overview

Recent COVID-19 outbreaks in China and elsewhere have halted business activities and caused a significant global economic downturn. This eventuality has influenced parties to focus on their core business activities, which has caused a more robust economy. Economic and commercial markets around the globe face severe challenges because of it. Depending on the perspective one takes, all agreements concluded thereon, the World Health Organization announced declared Covid-19 on March 11, 2020 could not qualify as force majeure since it was foreseeable that the virus would spread (Dominika Sulak-Seyfried & Bijak-Haiduk, 2020). According to the second opinion, although the pandemic was formally declared only on March 11, 2020, the pandemic and government measures in Europe could not have been anticipated before February 2020, given the speed at which the virus spread and the consequences thereof, those were foreseeable for contracts concluding after February 2020 (Berger & Behn, 2020).

Reassessing the impact of Covid-19 on Contractual Obligations

In addition to the general public, businesses across the globe have also been ravaged by the unforeseeable impacts of the Coronavirus pandemic (Schwartz, 2020). The effect is felt across the entire economy, whether in the manufacturing sector, the construction industry, finance sector, and so on, and this issue indirectly has serious legal implications. Obviously, Commercial contracts are a target of COVID-19, since most suppliers, contractors, or even known contracts for personal services will likely find it difficult to meet their contractual obligations. When one party is only able to perform some of its contracts, a court will determine whether the force majeure clause requires that one particular contract rendering it impossible, or whether it is sufficient to say that the party is having difficulty fulfilling all its existing contracts (Goldsmith et al., 2020).

The Law

In a study conducted by Ogwu (2020) imminent contractual issues in the COVID-19 era the legal implications, a breach of contract occurs when a party fails to fulfil its contractual obligations, which is inherently unfair to the counterparty because the breach gives rise to liabilities under the general rule of contract law. Commercial contracts often include force majeure clauses, but under English and Welsh law, there is no separate concept of force majeure. Consequently, these clauses are creatures of their contracting documents, and the scope and effect of the clause will depend on its wording.

A frustrated contract cannot automatically terminate after it has accrued rights and obligations. There are however numerous state laws and common laws that govern the discharge for frustration (Giancaspro, 2017). A force majeure clause allows the wrongful termination of a contract to be excused or delay performance when an event occurs that is beyond the reasonable control of the party who claims it. A common law doctrine of frustration along with the force majeure Clause form two major defences. Identifying the following defences, in the writer's opinion, would exonerate the non-performing party from his obligations and absolve him of liability. Let's examine each of them in turn.

Force majeure, is there one?

Force majeure refers to an unforeseeable and unexpected event that invalidates the intention of the parties concerned (Globe Spinning Mills (Nig) Plc v. Reliance Textile Industries Ltd., 2017). According to the contract, any event or circumstance that might trigger the force majeure clause must fall within those conditions. If one wants the agreement to be enforceable, it is important that the list is exhaustive in force majeure clause. This means courts will look first at the terms used in the agreement. In cases where the parties made a claim that was not within their control, the courts presume that the parties intended to seek relief, as anything else could result in an unjust outcome.

The effect of a force majeure event

Force Majeure is a contractual obligation. Consequently, whether this clause will apply in a given situation, and the consequences will depend on how the parties formulated their contract. Again, as in any other civil case, the party wishing to invoke the clause bears the burden of proving that significant events have occurred, which is reflected in the contract as force majeure. It must also prove that it had the intended effect on the performance of the contract. To successfully set the force majeure clause, the party invoking it must first determine if the circumstances of his position come within the language of the clause.

To examine whether the events inside those defined in the contract as the application of the clause. COVID-19, for example, could have been classified as a "pandemic" under the contract's definition. However, it is possible that the interruption was caused by more events such as a mandatory quarantine, travel restrictions, economic downtime, and so on. A more thorough force majeure clause would foresee and expressly specify certain events. Force majeure events have two possible outcomes, depending on the wording of your contract:

- Reciprocal suspension - obligations resume when the specified event ends; or
- Force termination as an eventuality.

Covid-19 may be a factor in determining whether an event falls within the ambit of "beyond reasonable control." Interpretation and fact specificity are required to make this determination.

What else is required to be shown?

A party wishing to invoke the Covid-19 force majeure clause must further demonstrate the following:

- the incapacity or delay in performance was caused by a force majeure occurrence;
- there failure to execute was caused by factors beyond their control; and

- hey could not have taken any reasonable efforts to avoid or minimise the incident or its repercussions.

Performance and enforcement.

In order to invoke a force majeure provision, the party must demonstrate that its inability was caused by an unforeseeable event. It is important that the following issues be taken into account:

- First, determining if COVID-19 constitutes a force majeure event, force majeure is a phrase derived from French law rather than a formal term in English law.
- Second, the occurrence of a force majeure event can be used as an excuse to break the contract if it is established that there was no way for either party to fulfill their obligations.

Force majeure is a term that means there's been some sort of extraordinary event which has prevented reasonable parties from fulfilling their obligations. A party might rely on this clause if they have taken steps to avoid or mitigate any negative consequences because of the force majeure condition and will likely need convincing evidence for such reliance by law courts because relying on these sorts of events usually aren’t considered negligence! It is always important to review the terms of any agreement you are party to and see if there is a force majeure clause. If one does exist, then it can be invoked as your best defence in commercial disputes.

The court would consider the specific wording of a clause in question, and whether or not relying parties were entitled to do so. The court will consider the context of any clause in order to understand what was meant when it was signed. Where a clause contains a non-exclusive list of events, followed by general language such as "any other cause beyond the party's control" it has been found that for an event to fit this wording, it must be similar in nature (Tandrin Aviation Holdings Ltd and Aero Toy Store LLC and others., 2010).

Force majeure is a term that can be difficult to define, but in general, it means an event or circumstance outside of your control. Floods would qualify as such by the ICC's 2020 clause on force majeure events since they prevent one party from performing their obligations under the contract; this definition will work well for our purposes here too.

Performances are more difficult or expensive now – is that enough?

Even if the events occurred during Covid-19 epidemic or a related result, are covered by the force majeure clause in issue and prevent affected parties from fulfilling their contractual commitments; the next point to evaluate is whether there will be any impairment on that impacted party's ability execute those agreements.

Force majeure clauses are, by definition, only triggered when the incident or condition that "prevented," "hampered," and/or "delayed" performance, for example, may be mentioned. A party will be relieved from liability when their actions have a more significant impact on performance than those of another.
What if there is no force majeure clause?

Force majeure is unfortunate, but a common occurrence that can cause major disruptions to a project. In order for this type of clause in contracts and agreements to function properly though there needs to be much more consideration put into its implementation than simply listing out some general language at the bottom without any specifics about what would qualify as force majeure situations or how they should operate once found. If the contract does not allow for such approaches, it may be possible in some cases to rely on the principle of contract frustration.

However, proving that a contract has been breached is extremely difficult. A contract is frustrated when an unforeseeable subsequent event beyond the reasonable control of both the parties makes it impossible for the parties to perform their contractual obligations as originally agreed by and between the parties in a manner so radically different from holding one party accountable would be unfair.

A preclusion from performing under force majeure clauses can only be avoided if there are alternative routes available, which provide access at similar conditions than those invoked by such exceptional circumstances - but even then, some cost associated with these alternatives must remain when considering whether the party invoking them should also incur expenses during their term. In addition to that, the idea that an epidemic is unforeseeable may be a misconception. People have been warning about the possible effects of pandemics and epidemics for years, so it would seem unlikely to think that we are unprepared now given all this previous knowledge as to what's coming next.

Are these frustrating times?

The party seeking to rely on the doctrine of frustration must be able to show that the COVID-19 pandemic only occurred after they entered into a contract; and that he had no idea that COVID-19 would happen, so there's nothing he could do about it now.; and that the Coronavirus has had a huge impact on the contract and its essence; and that the delay in performing the contract is unfortunate, as COVID-19 has been reported to be lingering. The doctrine of frustration operates to excuse further performance where an unforeseeable event or activity occurs, which renders the original task impossible (Hogg, 1977).

Although 'Force Majeure' is not a recognised legal term in English and Welsh law, the theory of frustration is a close relative. What happens when the conditions of performance drastically change? If you've entered into a contract, it's unlikely that your frustration should just go away. The law views this as a "radical" difference and considers any such scenario grounds for the termination of an existing deal or creation of new terms in response to changed circumstances that make its obligations substantially different from those originally undertaken by either party before entering into discussions about them (for example due to unforeseeable events). The change in circumstances must have been the result of something outside of your control. When frustration occurs, the parties are

exempted from further performance and a temporary agreement is put on hold indefinitely.

In rare instances, the theory of frustration can apply to a contract when an event happens after signing and makes fulfillment impossible. In these circumstances, and if both parties agreed on this principle beforehand, they may renegotiate their final terms without penalty or rescission (a doctrine that states all executed agreements must be fulfilled) (Taylor v Caldwell.,1863). The discharge of contract by the impossibility of performance must arise after the contract was made (Ramdas V Amerchand & Co., 1916).

What long-term effect do we anticipate COVID-19 will have on commercial contracts in general? In what ways may it prompt reconsideration?

In the age of uncertainty and the recent first-hand experience of unforeseeable obstacles to performing routine commercial contracts, it is important to assess potential obstacles before signing any contracts. At the very least, it is reasonable to anticipate that in the near future, parties will be considerably more attentive to force majeure provisions.

Parties will give more thought before signing agreements that may be impacted by these new rules, so it's important for them not only to consider their own situation but those of all stakeholders involved in this transaction as well. Be on the lookout for the boilerplate language in contracts you're drafting – even if an industry has been deemed "safe" under current law or guidance documents from past years (or decades!), things could change quickly depending on who is doing business with whom! We can expect parties to give more thought and consideration to circumstances in which their business might be severely impacted. This heightened level of risk awareness could result from an increase in discussions between all members whether they work together directly on projects at hand or not, these types of conversations often lead towards finding solutions by way of brainstorming - ultimately leading toward improved productivity.

COVID-19 is likely to lead to an increase in litigation and arbitration, just as the global financial crisis did. For a well-informed party, the court process should not be slavish obedience to default. Alternative dispute resolution (ADR) processes are becoming more widely accepted as a cost-effective method of settling disputes. International arbitration remains challenging outside of common trading areas such as the EU.

Conclusion

Force majeure is a term used in the construction of agreements to account for unforeseen events. The key to force majeure lies with how it's worded, and there are many different examples that could occur when considering this concept such as natural disasters or war which render one party unable perform their obligation under contract without penalty due them being released from said agreement if these types of situations arise during its duration. COVID-19 has come with a lot of uncertainties. What will happen next? Even though we are now in the post-COVID-19 era, it remains to be seen what businesses and the legal world will offer. The writer has been able to discuss how COVID-19 may impact commercial agreements, and the possible defences available for a non-performing party. Although this event is uncharted territory, it remains to be seen how these would play out practically in our courtrooms.

Force majeure clauses are a legal tool that can help protect parties from financial loss if there is an unforeseeable

event. Parties should consider the specific wording in order not only for it, but also because of its complexity and tendency towards vagueness; this could lead them into unexpected difficulties with their use. This should take into account: (i) The degree of causation required between the force majeure event and party’s difficulties in performance will depend on a number of factors, such as its seriousness or when did they happen; and (ii) Whether or not there are any conditions precedent for the operation of providing may depend on what kind of legal proceedings you want to participate in, such as giving some type notice first. The current crisis may serve as an incentive to reconsider how contract law regimes cope with the impact of many unforeseeable events.

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