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SME DIGEST SPECIAL FEATURE

CORONAVIRUS. HOW SAFE IS YOUR SUPPLY CHAIN?

As coronavirus quickly develops from a local to a global threat with tragic human losses, there are also increasing commercial concerns in relation to the ability of parties to carry out contracts. In particular, the coronavirus outbreak is an illustration of the legal principles of force majeure and frustration.

Force majeure defined

Under English law the concept of force majeure can only apply to the extent that there is an express clause in a contract – it cannot be implied. In essence, where there is a force majeure clause, the party relying upon it will need to demonstrate that a force majeure event has occurred which is beyond its reasonable control; that the event has prevented, hindered or delayed the performance of the contract; and it has taken all reasonable steps to avoid or mitigate the force majeure event.

As a result, the precise scope and consequences of coronavirus will need to be considered in the light of the specific wording in the contract. Where coronavirus is seen as a qualifying force majeure event, this will excuse a party's non-performance or delay in performing its contractual obligations for as long as the event remains in place. As this is a rule which protects a party against non-performance, the courts will interpret any clause strictly and the burden of proof will be on the party claiming force majeure to demonstrate that it has arisen and is the sole cause of delay or non-performance.

Coronavirus could qualify

If the force majeure clause refers expressly to "epidemics" or "diseases", there is a reasonable chance that the virus will be seen as a qualifying force majeure event. Even if such wording is not present, many clauses refer to any circumstances beyond a party's reasonable control and so it may also be possible to show that coronavirus should be seen as a force majeure event.

- ***Causation must be shown:***
  As part of the strict interpretation of force majeure clauses, the English courts have stated that force majeure will only be available to excuse non-performance where the force majeure event is the sole reason for the non-performance, so if it is one of several reasons, force majeure will not apply. In addition, the party relying on force majeure will also need to demonstrate that it would have actually performed its obligations but for the force majeure event.

- ***Notification requirements:***
  Most force majeure clauses will have a clear notification procedure and a party seeking to rely upon the clause must follow the procedure to the letter in order to be able to claim that force majeure applies.

- ***Legal effects of force majeure:*** Whilst this will be covered by the express wording used, most clauses are drafted in such a way that the party affected by a force majeure event is excused from liability for as long as the force majeure event remains in place. In other words, the effect is only temporary, and the affected party will need to resume their obligations as soon as the force majeure event has passed.

- ***Termination rights:***
  In a well-drafted force majeure clause, there will be a provision which allows the party not affected by the force majeure event to be able to terminate the contract without liability in the event that the force majeure continues in place for a stated period. Such a clause ensures that the party not affected is not tied into a very long contract where the other party cannot perform its obligations for a significant period.

Coronavirus can frustrate a contract

If there is no force majeure clause, then the only way an affected party can avoid legal liability is through the legal concept of frustration. This requires a party to show that it is either physically or commercially impossible to perform a contract due to an interrupting event that has occurred since the contract was concluded through no fault of the affected party.

The legal test for frustration is far stricter than that for force majeure as it requires a party to show that it is impossible to perform a contract (or that the obligations have become radically different). The legal effects are more dramatic - if it is shown that frustration has occurred, the contract is automatically terminated and neither party has to perform any future obligations to the other.

Unfortunately, the case law on frustration is not as clear-cut as it could be. For example, although some cases refer to "commercial impossibility" of performing a contract as being sufficient to show that frustration has occurred, other case law makes it very clear that simply because obligations become more expensive (and even uneconomic) to perform, this is not sufficient for frustration. The courts in recent years have suggested that obligations need to become "radically different" after the event for frustration to apply; there is still room for debate as to exactly when performance moves from being more onerous to "radically different" or impossible.

In determining whether or not frustration has taken place, the court often has to undertake a complex assessment of all relevant circumstances, including the terms of the contract; the factual background to the contract; the parties' knowledge and expectations about risk; and the parties' view as to the ability to perform the contract in circumstances which are now said to amount to frustration.

Claiming that force majeure or frustration applies

It should be remembered that an assertion which later turns out to be incorrect about the ability to invoke force majeure or frustration could lead to the court rejecting the claim; the result would be that the party making the claim is itself in breach of the contract, entitling the other party to terminate and claim damages arising as a result of the breach.

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CORONAVIRUS IN THE WORKPLACE

Acas, the government employment advice service, has published advice on the impact of coronavirus. It says that it's good practice for employers to make sure managers know how to spot symptoms of coronavirus and are clear on sickness reporting and sick pay, and procedures in case someone in the workplace develops the virus.

Acas says that a workplace's usual sick leave and pay entitlements apply if someone has coronavirus and employees should let their employer know as soon as possible if they're not able to go to work.

If NHS 111 or a doctor advises an employee or worker to self-isolate, they should receive any Statutory Sick Pay due to them. If the employer offers contractual sick pay, it's good practice to pay this.

An employer might need to be flexible if they require evidence from the employee or worker; they might not be able to provide a sick note ('fit note') if they've been told to self-isolate for 14 days.

If an employee is not sick but their employer tells them not to come to work, they should get their usual pay.

Employees are entitled to time off work to help someone who depends on them in an unexpected event or emergency. This would apply to coronavirus. There's no statutory right to pay for this time off, but some employers might offer pay depending on the contract or workplace policy.