COVID-19: Five 'C's for Commercial Parties

As companies reel from the impact of the COVID-19 pandemic, Andrew Stevens sets out five practical pointers for commercial parties whose contracts have been impacted by the crisis.

The pointers are based on common themes across advice given in construction, shipping, shipbuilding, rig / tug & tow and international sale of goods cases since the crisis began.

Many clients are asking, "has force majeure occurred?" and, "we/they cannot perform, what should we do?"

The aim of this article is to prompt parties to gain a better understanding of their options and the strengths and weaknesses of their position under English law by inviting consideration of five 'C's:

- Contract
- Causation
- Compilation of evidence
- Commerciality, and
- Communications

This should help parties decide what steps to take to find resolution now and boost their chances of favourably resolving any arbitration or litigation should it come to that.

As ever, though, legal advice specific to the relevant contracts and particular facts must be obtained and acted upon on a case-by-case basis.

1. Contract

The first 'C' is for Contract. The contract and its precise terms are crucial.

Even for force majeure? Yes, the contract terms are key even for force majeure, which can come as a surprise to some international clients.

Unlike many civil law systems, in English law force majeure is not a free-standing doctrine imposed on all contracts by law with pre-defined rights and remedies.

So, whilst several clients have asked, "has force majeure occurred?", the answer is to ask: "what does the contract say?"

In a nutshell, what might be thought of generally as a force majeure event will – under English law – only act as a force majeure-style event to the extent the parties agreed this under the contract.

Similarly, the consequences of such events are also generally whatever the parties agreed in the contract.

Sometimes contracts contain clauses which purport to deal expressly with "force majeure". Other times, the words "force majeure" do not appear in a contract, but the terms of the contract still deal with events which might loosely be thought of as force majeure-style events. Some contracts contain no force majeure-style provisions at all, in which case, parties can only look to other clauses of the contract or some other doctrines of English law.

Where the parties have agreed that certain force majeure-style events do trigger rights or remedies, it is vital to consider e.g.:

- the specific definition of relevant events and their required impact;
- what if anything is said about causality between events and outcomes;
- whether any mitigation is required (e.g. reasonable efforts to perform despite the difficulties or to find an alternative);
- what remedies are expressed; and
- any notice requirements.

Is the contract key even for 'frustration'? Yes!

Frustration is a doctrine of English law which – in certain limited circumstances – 'kills' a contract if performance of it is no longer possible.

To work out whether a contract has been 'frustrated', particular attention will be paid to e.g. what the parties specifically agreed in the contract and what the impact of events is in relation to what was foreseen and undertaken when the contract was entered into.

The prevailing view is that frustration is difficult to establish, so appropriately qualified legal analysis is needed here.

What about the doctrine of illegality? Again, the contract is a key starting point.

Some standard form contracts include terms addressing changes in rules, regulations and laws. Also, English law "force majeure" clauses sometimes refer to "restraint of Princes" or of governments, which may be relevant to COVID-19 lockdowns, prohibitions of exports or the shutdown of certain industries.

Otherwise, the law on illegality is relatively tricky and should be considered carefully in relation to each specific contract and set of facts.

What about seeking an extension of time? Or cases where a counterparty might have prevented performance? Yes, again, contractual terms are the key starting point.

For instance, the terms of construction contracts or shipbuilding contracts often set out contractual machinery to deal with specific causes of delay (e.g. bad weather) or even general causes of delay ("events beyond the control of the builder/contractor"). Those events may include things which might be thought of as force majeure-style events even if not called such.

Again, whether those defined events have occurred, and whether any notice or other formalities are required to obtain an extension of time, needs to be examined carefully.

Whether or not acts of prevention can be relied upon to extend time depends on the overall construction of the contract, including whether the contract already deals with such events in some way. Notice may also be required.

In March 2020, I argued a s.69 appeal from a shipbuilding arbitration before Butcher J in the Commercial Court (albeit remotely by telephone due to COVID-19 social distancing rules in the UK) in which the inter-play between extension of time provisions, force majeure-style provisions, notice requirements and the prevention principle were argued. Judgment has been reserved. Watch this space!

What about inability to load cargos under shipping contracts? The precise wording of e.g. 'exceptions clauses', demurrage, laytime or deadfreight clauses is likely to be crucial. So, the contract is again key.

For instance, voyage charterers usually have an obligation to provide a cargo for loading. The general rule (unless displaced by express wording) is that 'exceptions clauses' protect a charterer only in respect of its duty to load and not its duty to provide cargo. So, it is important to work out whether it is the provision of cargo to a port or the loading of cargo in the port that is causing delay to performance of a contract. This issue is likely to be common where lockdowns affect both port activities (i.e. loading) and in-land activities (e.g. manufacturing, mining or transportation).

In this respect, not only is the general contractual wording important, the precise causes of difficulties in performance need to be ascertained, too. This leads neatly into Section 2.

2. Causation

The second 'C' is for Causation.

Establishing that there is a pandemic, that laws have changed, or that lockdowns have been imposed, is rarely, if ever, likely on its own to be enough to trigger contractual rights and remedies.

That relevant events have caused a specific impact will usually need to be established.

Where e.g. a right to an extension of time, reliance on an exception, or "force majeure" remedies are asserted, a party might have to prove that the event defined in the contract and now complained of is (subject to the wording of the contract) the sole cause of the delay or other relevant impediment to performance.

This brings us to the third 'C'.

3. Compiling Evidence

Compiling evidence of e.g. the events, a causal link between an event and its consequences, and the consequences themselves, is important in determining what rights arise.

Often, I have been asked to provide advice without (understandably) being given much information regarding the actual events and how they are said to have caused a particular consequence. This makes it difficult to assess for certain whether rights or obligations have actually been triggered.

Importantly, if the parties end up arguing their positions before judges or arbitrators, evidence about what happened is usually vital. The best evidence is collected at the time.

Required evidence might include (depending on the contract terms):

- Evidence of the event. E.g. records of laws or notices enacting lockdowns, quarantines, closures or prohibition of certain activities or exports. Clarity should be sought as to the nature of those measures (e.g. is it legislation, presidential or governmental decrees or orders, local authority orders, or decisions by purely commercial bodies).

- Evidence of the impact on performance (causation). This might be evidence of lack of labourers, lack of material or lack of cargo and the cause of that. This evidence would hopefully also be capable of establishing that performance was prevented or disrupted by that and that there was no other reason why performance could not have taken place. This might include photographs of (lack of) materials, notices of readiness, logs of goods, material or personnel, time sheets, contemporaneous correspondence etc..
- Evidence of reasonable steps taken or lack of reasonable alternative methods of performance.
- Evidence of the (consequential) duration and extent of the impact. This may include time sheets and logs, invoices, and even third-party surveyor or expert reports.

In many instances, lockdown measures may prevent the immediate gathering of such evidence. In that case, written records of the difficulties are useful. Requests for information might also be made to third parties for such documents or records (and consideration should be given to engaging lawyers to make such requests for reasons of potential privilege over such documents).

Be quick before records are lost!

4. Commerciality

The fourth 'C' is about Commerciality. Understanding what rights do and do not arise under a contract is an important part of any analysis (see Section 1), but a commercial and financial overview of one or both sides' positions might ultimately steer decisions.

Current general economic uncertainties and long-term financial survival must be kept in mind.

In some cases, re-negotiation and continuation may be preferable to termination.

For instance, in a long-term project, even if a "force majeure" provision is triggered permitting a party to terminate, it may not be an option that a party wishes to pursue if it could undermine the long-term project.

That said, one might also consider whether – at a time of such economic uncertainty – the threat of termination (especially of a long-term contract) by either party under any clause might bring the parties together to negotiate a price reduction.

If disputes escalate, consider the alternative forms of dispute resolution. For example, a mediation may preserve a relationship, keep costs down and offer swifter resolution than the court or arbitration.

Whatever approach is taken, a party's hand is strengthened if it has conducted a full analysis of the contract (Section 1) gathered the necessary evidence (Section 3) and presented a strong position to its counterparty (Section 5 below).

In some cases, waiting out any delay (without insisting on alternative performance or terminating) has proven less financially damaging than the impact that alternative performance or termination would have had on a chain of related contracts.

So, make sure contractual analysis is carried out in unison with consideration of the commercial realities and goals.

5. Communications

The fifth 'C' is for Communication.

A co-ordinated approach should be taken to communications at all levels so as to present a strong position and not to undermine any legal or commercial strategy.

Correspondence may resolve matters.

The letters and emails written at the time may also provide useful evidence later on before a court or tribunal so they must be drafted with care.

Crucially, any notices required by the contract must also be given and given in a way compliant with the contract terms. Otherwise, the rights may be lost altogether.

Care should also be taken not to waive any rights in correspondence or by lack of communication or reservation of rights.

Conclusion

The fallout from COVID-19 has caused and will continue to cause many difficulties.

Commercial parties can help themselves by undertaking early analysis of both the position under the contract and the commercial realities, combined with gathering necessary evidence and sending considered correspondence and the right notices.

Spending time (and some money) on such an approach early on may ultimately save a great deal more time and hassle (as well as much greater sums of money) by avoiding court or arbitration claims.

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