**Coronavirus and Force Majeure**

The Coronavirus outbreak, which has been declared by the UK health secretary as a serious and imminent threat to public health, presents challenges to a party's ability to perform contractual obligations in affected areas.

The question of whether parties will be able to rely on a contractual force majeure ("**FM**") clause to entirely excuse or temporarily suspend performance depends on the particular wording of the clause.

Relevant considerations

A Definition of the FM event

* The starting point is to determine what events are listed in the clause as constituting FM. In particular, is an epidemic or pandemic listed, and if so, how is this defined?Even where a pandemic or epidemic is specifically stated as constituting FM, there may be other qualifying conditions that have to be met before the clause can be relied on.
* Where an epidemic or pandemic is not specifically listed, is the wording of the FM clause wide enough to cover the outbreak?  FM clauses often contain wording to suspend or excuse performance where there has been political interference. It is therefore necessary to consider whether governmental action has been taken which makes contractual performance impossible. Examples include border closures, closure of ports, quarantine, and entry and exit restrictions.
* Other potentially relevant FM events may include: "*Acts of God*", "*Acts of Government*" or "*other circumstances beyond the parties control*".

B. Foreseeability

* FM clauses will frequently state that a party may not relay on the FM event to excuse performance if the event could have been reasonably protected against, avoided or overcome. It is an objective test as to what constitutes reasonable protection. A relevant factor may be to consider actions taken by parties in previous outbreaks, such as the SARS epidemic in 2003.

C. Causation

* The party seeking to rely on FM has the burden of proof to show that the FM event has hindered or prevented performance.
* Some FM clauses will require that performance has become "*impossible*". This is clearly a high threshold to meet. Similarly, the clause may provide that the FM event has prevented performance, which would require the relevant party to demonstrate that performance had become legally or physically impossible.
* By contrast, terms such as "*hinder*" and "*delay*" have a wider scope, and may be satisfied if performance is substantially more onerous.
* A mere increase in the difficulty or cost of performing the contract is likely not to be sufficient to trigger a FM clause.
* For companies dealing with Chinese suppliers/contractors, from 30 January 2020, the China Council for the Promotion of International Trade ("**CCPIT**") is offering to issue FM certificates (upon request) to businesses in China if their businesses with overseas partners have been affected by the virus outbreak.
* The CCPIT requires companies seeking a certificate to provide legitimate documents to evidence the extent of the disruption, including proof of delays, cancellations of transport, copies of exports contracts and customs declarations.
* Obtaining a certificate from the CCPIT will be useful evidence that there was a valid FM event, but is unlikely in itself to be conclusive. Other relevant factors will be whether the party has been truly and seriously affected by the virus outbreak, whether it has had to halt its business operations and/or whether it is unable to fulfil its contractual obligations.

D. Mitigation

* The party seeking to rely on the FM clause has a duty to show that it has taken reasonable steps to mitigate/avoid the effects of the FM event.
* It will also be necessary to consider whether the party seeking to rely on the FM clause had in place and followed planning mechanisms, for example business continuity, disaster recovery and/or serious incident plans.

E. Notice

* Parties seeking to rely on an FM clause must ensure that the notice of the FM event is given strictly in accordance with contractual requirements.

What if the Contract is silent?

Under English law, FM provisions must be explicit, they cannot be implied.

Where there is no FM clause in a contract, the common law doctrine of frustration may apply. A contract may be discharged on the ground of frustration when an event occurs after the formation of the contract which goes to the root of the contract and:

(i) renders performance physically or commercially impossible; or

(ii) transforms the obligation to perform into a radically different obligation to that undertaken at the moment of entry into the contract.

If the contract is frustrated, parties will no longer be bound to perform their obligation. Notably, the contract will be permanently frustrated – temporary frustration (i.e. temporary suspension) is not allowed.

Recommendations

A. Carefully review the FM clauses (together with their notice requirements) in all contracts that have a link to areas seriously affected by Coronavirus.

B. Obtain up-to-date information on Coronavirus (i.e. its spread and governmental action) to assess whether the delay or disruption being claimed by any relevant party can be said to relate directly to Coronavirus.

C. Consider whether the spread of the Coronavirus to other geographical locations outside of China may impact the supply chain. Ensure that contingency plans are put in place and followed.