

Article

Coronavirus: Performing Under Pressure

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During these difficult times, as the COVID-19 outbreak continues to disrupt our daily lives, health and safety is paramount. However, as travel bans are implemented, quarantines are enforced and restrictions are placed on the flow of goods, the global supply chain and commerce in general will be put under immense pressure. The unprecedented measures many governments are taking to 'flatten the curve' and protect the human population will have a flow-on effect for business and raise a number of legal issues.

The Cayman Islands have had to deal with extreme events in the past (e.g. Hurricane Ivan in 2004), which often have repercussions that were not contemplated by contractual counter-parties at the time their agreements were entered into. Hurricane Ivan and the novel coronavirus are prime examples of exceptional events which may prevent the performance of obligations. In this article, we consider remedies available in Cayman in circumstances where parties may be unable to perform their contractual obligations. In particular, we focus on the common law doctrine of frustration and the enforceability of force majeure clauses.

Frustration

In common law jurisdictions, such as Cayman, the doctrine of frustration is designed to deal with situations where parties to a contract are incapable of performing one or more obligations under that contract. In order to invoke frustration, non-performance must be linked to an unforeseen event and must not arise out of the failings of either party. In such circumstances, the contract may be deemed 'frustrated' and terminated with immediate effect.

In deciding whether or not to cancel a contract in light of the COVID-19 outbreak, the Cayman courts will analyse the primary purpose of the contract. If the principal mission and object can still be achieved, the court is unlikely to allow parties to rely upon the doctrine of frustration and be absolved of their obligations. It is unsurprising that the Cayman courts are reluctant to forcibly terminate an agreement. Cayman is of course a world-leading financial services hub and, in recent times, the Cayman courts have observed that freedom of contract is critically-important and have held that sophisticated parties must be allowed to negotiate and agree their own terms of business (see, for example, recent Privy Council decisions in *Fairfield Sentry v. Migani* and *Primeo v. Pearson*).

Whether or not the doctrine is engaged will depend on the terms and underlying purpose of the relevant contract. As governments impose restrictions on the movement of people and goods and workplaces are shut down for indefinite periods, parties need to consider with their legal advisors whether contracts have been frustrated by the coronavirus itself and/or other related external factors beyond their control.

Force majeure

"Force majeure" is a French term that translates as "greater force" or "superior strength". As the name suggests, a force majeure event is typically an unforeseen event beyond the parties' control, such as an act of terrorism or a natural disaster. It follows that, although force majeure clauses are often included in commercial contracts, they are very rarely invoked. Prime examples of force majeure events in a commercial context include the flooding of coal mines or the sabotage of oil pipelines. If a party to a contract declares a

force majeure event, it may seek further time to perform its obligations when the interruption subsides or, depending on the severity of the event, exercise the right to terminate the contract.

In the Cayman Islands, force majeure clauses are purely contractual in nature. Parties to an agreement are free to list categories of events which constitute force majeure events. If any one of those events occur, as highlighted by the commodity contract examples above, that may trigger time extensions or termination of some or all of the obligations arising under that particular contract. As noted in the frustration section, to encourage certainty, the Cayman courts invariably respect the parties' wishes and have a strong preference for protecting the sanctity of freedom of contract. Accordingly, where an agreement contains a force majeure clause which details the events that constitute force majeure, then such a clause is likely to be valid, binding and enforceable between the parties to that agreement. Parties may have chosen a broad or narrow definition of what constitutes a force majeure event.

Epidemics and pandemics may be listed in the definition of force majeure event. Further, governmental actions and externally-imposed restrictions, such as travel bans, may be included. In light of the current restrictions in place due to COVID-19, performance of obligations may become more difficult, more expensive or less profitable in many cases. However, none of those factors will necessarily help to demonstrate that a force majeure event has occurred. The party seeking to invoke a force majeure clause must show that:

1. the event falls within the definition of force majeure event in the contract;
2. the event was outside of the control of either party to the contract;
3. the event impeded performance of contractual obligations; and
4. it could not have taken reasonable steps to avoid or mitigate the event and the consequences of the event.

Whether parties are able to invoke force majeure clauses in response to COVID-19 and/or related restrictions will depend on the terms of the relevant contract.

Comment

There are likely to be contractual and common law remedies available to all parties seeking to enforce rights or avoid obligations. It is important for individuals and companies to review relevant contracts to determine whether they are in a position to act now. In particular, parties should consider whether COVID-19 or any other related matters are covered by existing force majeure clauses. In consultation with legal advisors, parties must endeavor to understand the implications of and requirements for invoking such clauses. If there are steps parties might take to mitigate loss or improve their position, they should explore those options immediately and continue to monitor the situation as it unfolds.

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