CORONAVIRUS: CAN IT BE A FORCE MAJEURE EVENT?

The human cost of the novel coronavirus outbreak has been widely reported and the tragic consequences continue. In the commercial sector, we are also seeing an impact on our clients: China is the world's largest importer of crude oil, iron ore and soybeans and the largest exporter of steel; the impact of the virus on supply chains, production and transport has been and may continue to be significant.

“Disputes affecting declarations of Force Majeure arising from the impact of the coronavirus seem inevitable.”

Some companies, evidently including LNG importer CNOOC, have begun to declare Force Majeure (FM) in response to the difficulties they face, and the Chinese government is issuing FM certificates to companies unable to meet their contractual obligations in an attempt to protect them from breach of contract claims.

The question arises - will this work? Will declarations of FM, or even government issued FM certificates, be effective to protect Chinese (or other) companies struggling to meet their contractual obligations?

Many international trading contracts are governed by English law, and it is hard successfully to rely on an FM clause to avoid contractual responsibility under English law. There is no guarantee that a government certificate will make any difference - in fact, it might give Chinese companies a false sense of comfort, resulting in them claiming FM when in fact they are not contractually entitled to do so, and then facing a claim for breach of contract anyway.

FM clauses require careful consideration for a number of reasons:

- A party to a contract will only be able to consider FM to excuse non-performance if there is a FM clause in the contract. Apart from the concept of “frustration”, English common law has no general concept of “force majeure”, and FM cannot be implied into an English law contract.
- Even if the contract does contain a FM clause, it is still not certain that a party will be able to rely on it to protect against claims for non-performance as a result of the difficulties caused by the coronavirus outbreak. Because of their serious impact on the parties’ rights and obligations, FM clauses are interpreted strictly by the English courts - so it will be necessary to consider the precise terms of any given clause.
- Typically, a party will have to show that:
  - an FM event has occurred which is beyond its control; and
  - it has prevented, hindered or delayed its performance of the contract; and
  - it has taken all reasonable steps to avoid or mitigate the event or its consequences.
- Deciding whether the virus outbreak is an “FM event” will depend on the contractual clause. If “disease” or “epidemic” is not expressly included, it may be that another term such as “act of God” (once described as “an irresistible act of nature”), or some other catch-all provision, will suffice - but that will require careful consideration.
- Next the question of prevention, hindrance or delay must be addressed. How has the virus prevented, hindered or delayed performance? The English courts are particularly alive to attempts to use FM clauses to avoid performance for economic reasons. English case law clearly demonstrates that just because a contract has become more expensive - or even uneconomic - to perform, that will not constitute FM.
- Related to this question of performance is precisely what performance has been impacted. What if performance involving some other supplier remains possible? In most cases this will undermine reliance on a FM clause, but there may be situations where what is relevant is the effect on performance by the contract parties.
- There may also be knock-on consequences of an FM event, including so far as concerns the tender of notice of readiness,

cancellation rights, and the operation of laytime and demurrage provisions. There may equally be issues affecting costs incurred as a result of an FM event, such as quarantine costs, and who, as between the parties to the contract, must then bear these.

- FM clauses frequently require evidence to be served in support of any claims and contain notice provisions which must be complied with to the letter. Claims for FM have been rejected by the courts as a result of non-compliance with notice provisions.
- Assuming all relevant hurdles are cleared to trigger an FM Event, the FM clause will usually set out what then happens next - and an FM Event may not mean the end of the contract. The obligation to perform may be suspended for a period of time, rather than conferring an immediate entitlement to terminate. But a declaration of FM can lead to the recipient of the notice of FM ultimately acquiring an entitlement to terminate, so care needs to be taken as to the possible longer term consequences of reliance on an FM event.
- There is also an obligation to mitigate the consequences of the FM event and performance must typically be resumed as soon as the effects of the FM event have passed.

Disputes affecting declarations of Force Majeure arising from the impact of the coronavirus seem inevitable. We are ready to assist with any queries clients may have.

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