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DICKINSON GLEESON

BRIEFING NOTE

Practical considerations for Jersey contracts in light of COVID-19

COVID-19 is causing huge disruption to the performance of contracts worldwide. We will attempt here to provide a practical guide to our Jersey clients to navigating these issues.

The central tenet of Jersey contract law is the maxim "*la convention fait la loi des parties*" which means that the Court will pay particular regard to the bargain struck by the parties. The first step is always to read the contract to see if there are any clauses about performance of the contract, the time within which that must be done, what might happen in the event of breach, or what might happen if there is a change of circumstances (a "force majeure" clause).

Has there been a breach of contract?

Contracts often stipulate a time by which you must do something. If you fail to do so, you are generally in breach.

However, many delays (especially if short) do not result in any damage to your counterparty. Such a breach is not "actionable". Other delays may cause significant loss, for which you may be liable.

Usually, delay will not result in your counterparty being entitled to terminate the contract. They may be entitled to terminate it if the contract includes a term providing that 'time is of the essence', or if the delay is, in all the circumstances, so fundamental a breach that termination is reasonable.

However, where the delay is unavoidably caused by the effects of COVID-19, there may be other legal considerations which prevent it amounting to a breach.

Force majeure clauses

A contract may contain a force majeure clause, which in modern contracts can often be called a "material adverse change" clause. Such clauses provide for what happens in the event that an "Act of God" prevents performance. These allow a party's obligations to be suspended in case of events defined by the clause. Some contracts may identify pandemics or epidemics specifically; others may identify labour or supply shortages, or more generally events which are exceptional, beyond the

control of the parties, or unavoidable. These are all potentially triggered by COVID-19 but this will depend on the precise circumstances.

Conversely, many clauses expressly do not apply where the problem is caused by defined concepts such as an economic downturn or government regulations. Precision is required as to exactly what is causing the problem.

Frustration

There is some debate as to whether frustration forms part of Jersey law. For practical purposes, our view is that whatever label is put on it, a frustration-type doctrine is likely to apply to Jersey contracts.

Frustration is very unlikely to apply if there is a force majeure clause in the contract. If there is not, then a party may still avoid being liable for a breach of contract if the contract has become entirely incapable of being performed due to unique circumstances. If that is the case, the doctrine of frustration may provide that the parties are no longer required to carry out their obligations under the contract – whether or not there has been already part performance of the contract. In order for a contract to be frustrated, however, it must be entirely impossible for the contract to operate as previously intended by the parties. It is considered to be a very high hurdle, and not to be used to relieve a party from fulfilling a contract which has simply become expensive to fulfil.

Practical considerations

In addition to the above, the following are steps that clients can take now to try to protect themselves and their businesses from uncertainty in the weeks and months ahead:

- As a starting point, conduct a review of your contracts. Consider contacting your counterparties to see how their own businesses and supply chains are likely to be affected going forwards.
- If you are likely to be unable to fulfil a contract, check for force majeure or similar clauses early and check carefully for any notice requirements.
- Consider whether there are any clauses in relation to damages, or whether the counterparty will be able to terminate the contract. Consider whether there might be a way to mitigate any loss suffered by your counterparty, and if so, whether being upfront with your counterparty might limit the damage in the long run.
- Equally, if a counterparty notifies you that they are unable to fulfil a contract, in addition to checking your contract carefully, you must immediately consider what steps you can take to mitigate your loss – eg if suppliers are unlikely to be able to perform, consider whether a replacement supplier can be found.
- Consider any insurance policies, and the relevant notification provisions.
- Keep accurate and detailed contemporaneous records of any events or discussions.
- In particular, consider whether any of your contracts have a 'dispute resolution' clause which allows for any issues to be resolved without the need for formal litigation. Consider whether it might be possible to renegotiate terms with your contractual counterparties, particularly if

you want to preserve a relationship with them going forwards. The Courts are likely to expect contractual parties to show more flexibility in these difficult times than they otherwise would.

Conclusion

The above is designed to be a helpful guide but is no substitute for taking legal advice. Parties should always attempt to negotiate a practical solution where possible. All businesses are suffering from the effects of COVID-19 at this time, and it is expected that many businesses will work with each other where possible rather than necessarily relying on their strict legal rights.
