

May 12, 2020

COVID-19: Both sides now: How to maintain commercial relationships

Disputes

The songwriter Joni Mitchell imagined clouds as beautiful poetic creations. She also noted that they blocked the sun, and indeed rained and snowed on everyone. She was able to look at them from both sides whilst recognising the illusions they generated.

In the current unprecedented and uncertain circumstances of the coronavirus induced economic and social lockdown, canny lawyers need to be able to advise from both sides. They may be instructed at different points in a supply chain and have to deploy apparently inconsistent arguments.

Perspectives in the supply chain

When contractual performance is uncertain a client may want to demand rights from one counter-party and refrain from performing obligations further down the chain. Applicable clauses will need to be extracted and construed and the doctrine of frustration examined to see if past precedent can be applied to the present circumstances. Arguments from the

same sources will be exploited to produce different results.

The standard litigators' mindset is traditionally this: your client is the fount of injured virtue. The "other side" is wrong, unreasonable and to add insult to injury "unhelpful". Your client is entitled to performance (or entitled to withhold performance) depending on which side of the blockage they stand. And they will want to raise the same Janus-faced arguments depending on which way they are looking.

Relevant questions

Here are some of the questions to ask:

Is there a clause in the relevant contract which regulates the risk of the unexpected?

This is often called a "*force majeure clause*" but it does not necessarily have to be described as such. They will vary in the specific details given by way of examples of the sort of events giving rise to the stated consequences and there may well be a need to construe a reference to the specific out of the general. An effective clause does not necessarily have to refer to diseases, epidemics and pandemics to be effective to cover them, but that is what you are likely to be looking for.

What formalities need to be complied with in order to invoke the relevant clause effectively?

The steps you need to take may be precise in terms of method and timing and there may be a requirement for third party certification.

Can the failure to perform be causally linked to the event relied upon?

Causation is always an important issue. Whether a result is attributable to a particular event may well need careful factual understanding and legal analysis

Has the party seeking to rely on the clause failed to take reasonable steps to mitigate the consequences of the event in question or indeed prevent it from occurring?

You cannot rely on what might turn out to be effectively self-induced impossibility. It may be that you can alleviate the problems by following official guidelines.

If there is no relevant clause, can it be said that a frustrating event has occurred?

If it has, this legal doctrine excuses the parties from further performance. The test for frustration is that an event has occurred which renders performance of the contract impossible or at least a thing radically different from that which was undertaken by the contract. Of course the facts of any particular case are important and, if you are relying on impossibility of achieving the underlying commercial purpose of the contract rather than physical impossibility of performance, it may be necessary to analyse the allocation of risk in the original contract. This may negate the applicability of the doctrine.

What is the relationship between the duration of the supervening event and the overall timescale of the contract?

This is one reason why a hopefully relatively brief lockdown period may not frustrate a long term supply or concessionaire type contract.

And finally, what should be the consequences?

The law in summary permits recovery of sums paid and benefits conferred. A broad assessment is made depending on all the circumstances.

Constructive commercial and legal strategy

So in this unusual and indeed unprecedented time, unless your legal position on all fronts is clearly secure in all respects and unless you hold the entire moral high ground, there is a lot to be said for constructive co-operation and compromise. For addressing mutual benefit and aiming to identify, as the mediators say, “win-win solutions”.

Ultimately you may want to try to enable the parties to continue a commercial relationship at least for the time being and not let malign non-human forces behind frustrating events ruin expected outcomes. If your counterparty is unhelpful, you can always store up your annoyance for future reference.

When you look at the position from both sides, you will as the song makes clear be able

to identify the illusions generated by lack of the perspective of a broad overview. And alleviate the risk that you really don't know law at all.



Richard Harrison

Partner

[Disputes](#) | [LinkedIn](#)

Related Expertise



Arbitration Commercial & Corporate Disputes International Disputes Intellectual Property Disputes Real Estate Disputes Remedies & Resolutions

□ Share

□ COVID-19: Board and Shareholder Meetings COVID-19: Execution of Documents: E-Signatures □

Stay Connected | Sign up to receive updates.

Sign up



Useful Links

[Home](#)

[People](#)

[Expertise](#)

[Pricing](#)

London

+44 (0)20 7842 8000

london@laytons.com



[News & Insights](#)

[International](#)

[Careers](#)

[About Us](#)

[Complaints](#)

[Make a payment](#)

LAYTONS^{LLP}  | More London
Charity Forum



© 2020 Laytons LLP | SRA No. 566807

[Legal Information](#) | [Website Terms of Use](#) | [Privacy Policy](#) | [Cookie Policy](#)