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5 initial steps when your English law contracts are disrupted by events outside of your control

Global disruption and volatility have far-reaching consequences on businesses across all sectors. Prompt consideration of the impact on commercial contracts is vital.

1. Consider contractual clauses

It is common practice for commercial contracts to include a force majeure clause, which apportions the commercial risk of unforeseeable events between the parties. Contractual clauses often contain a number of examples of events (without limitation), and further conditions or triggers for linked contractual rights. It is important to consider: (i) whether the disruptive event clearly falls within the clause and (if not) whether to put an early marker down with your contractual counterparty; and (ii) whether there are additional conditions for contractual rights, such as a prescribed period of time, or a requirement for a 'material effect' on a party's ability to perform its obligations under the contract.

If you believe that a contractual force majeure event has occurred, but rights arising from that event have not yet been triggered, the timing of any notification to your counterparty will be crucial. Too early, and it may unnecessarily damage the relationship. Too late, and it may be said against you that your position has been manufactured with hindsight.

2. Ask whether or not clauses are effective

There are a variety of reasons that clauses in commercial contracts can be ineffective, or take effect in ways that you do not anticipate. Before proceeding based on a particular interpretation (or making any concession) it is important to seek legal advice.

3. Reserve your rights

There are many circumstances in which it may not be desirable to take immediate action to exercise contractual rights. This is particularly so with respect to rights arising following disruption events. A reservation of rights can help protect you against any risk of waiver of rights through inaction, affirmation of the contract, or the passage of time. In the event of any ambiguity a reservations of rights will generally be construed narrowly, so explicit, broad language should be used.

4. Take a purposeful approach to written communications

The commercial rationale and justification for key decisions should generally be discussed and recorded. All communications created during these crucial decision making periods could potentially be subject to disclosure in any dispute further down the line. This applies to all communications – including through informal methods such as WhatsApp, Teams etc.

5. Seek legal advice early

Decisions made in the early stages of disruption can influence the course of any dispute which arises at a later stage. Any correspondence sent to a contractual counterparty should ideally be reviewed and considered from a disputes perspective to avoid limiting or damaging arguments you might not yet be aware of. For example, serving a termination notice reliant on only one of two available clauses may prevent you from later arguing that termination was justified under the alternative clause. It may also, where it does not prevent reliance, weaken that argument. Opposing parties will routinely seek to characterise arguments not made in initial correspondence as opportunistic or an after-thought.

Lawson Caisley
Partner, London
T +44 20 7532 1205
E lawson.caisley@whitecase.com

Stephanie Stocker
Partner, London
T +44 20 7532 1852
E stephanie.stocker@whitecase.com