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Contagion and contractual consequences: COVID-19s effect on rights and obligations under Jersey contract law

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We are all now affected by the coronavirus COVID-19 outbreak. It has been successively declared a Public Health Emergency of International Concern and now a pandemic by the World Health Organisation. The situation continues to escalate rapidly. Many countries are in enforced lockdown, with the UK looking set to follow, and even where lockdown is not compulsory many businesses, institutions and individuals are restricting contact, work and even closing temporarily, especially in line with social distancing restrictions (which were announced in Jersey on 20 March).

The coronavirus has already led to a significant amount of commercial and economic disruption and this is likely to continue – the Government of Jersey has announced its own direct financial assistance measures alongside the UK government's unprecedented support package.

Notwithstanding support from Government, the question arises how coronavirus-related difficulties could affect existing contractual relationships, should circumstances conspire to make performance of contractual obligations more difficult (or impossible).

Jersey is a separate legal jurisdiction to the UK and has its own distinct approach to contract law. It has mixed different English and French doctrines with the result that it is often not certain in advance which approach the Court will prefer, especially in novel situations. For example, the Jersey courts have often looked to the writings of the eighteenth century French writer and jurist Robert Pothier in developing Jersey contract law.

There are two questions which arise in current circumstances:

1. Has a breach occurred?

Whether a breach has occurred will be a question of fact in each case. Often it will be obvious – where a party to a contract has simply failed to perform its obligations. A breach may also be anticipatory in nature where one party refuses in advance to perform an obligation. Whether this amounts to a breach of contract obviously depends on the precise terms of the contract in question.

In a breach situation the remedies will vary in each case – damages are the usual remedy, and specific performance may be ordered requiring the party in breach to perform what he or she contracted to do. Where the party not in breach also has further obligations to perform, a sufficiently serious breach will give him or her the additional right to treat the contract as repudiated and so be freed from performing them.

In relation to the coronavirus, the most obvious breach of contract for commercial counterparties is likely to arise from delay. The primary question is whether the contract provides, expressly or by implication, a time by when performance is due and so by reference to which it can be said that performance has been delayed. If so, the contractual effect of delay then depends on whether the term can be said to be "of the essence". If time is of the essence, even a short delay may lead to loss of a right or trigger a right to terminate for breach.

There is some legislation in respect of this. In a contract for the sale of goods, the Supply of Goods and Services (Jersey) Law 2009 (the "Law") provides that time is not "of the essence" unless the contracts expressly provides that it is. So a delay in payment may not on its own give rise to a right to excuse

further performance of a contract unless specific provision is made. Whether any other stipulation as to time in a contract of sale of goods is or is not of the essence of the contract depends on the terms of the contract.

If a contract for the supply of services in the course of a business is not clear as to the time for supplying those services, the Law also makes provision for the time within which they are to be supplied. It provides that if the contract does not expressly fix a time or leave it to be determined in a manner agreed by the parties, or if it cannot be determined by the course of dealing between the parties, the supplier warrants that he or she will carry out the service within a reasonable time. If this provision applies, time will prima facie not be of the essence and late supply of the service gives rise only to a claim in damages. If a time for providing the service is provided in the contract, whether that time is of the essence or not will depend on the terms of the contact.

Where the Law does not apply (because the contract in question is not for the sale of goods or the supply of a service, such as a contract of loan) a similar approach will be taken. If no time for performance is specified in the contract, it is likely to be due in a reasonable time; where there is a time specified, whether it is of the essence will depend on the terms of the contract and the nature of the thing to be done.

2. Is there any way for parties to avoid an obligation to perform (or liability for failure)?

Two doctrines could be invoked by commercial counterparties to avoid contractual performance (or to avoid liability for failure to perform):

- A force majeure clause in the contract itself
- Frustration as a free-standing legal doctrine, apart from the terms of the contract.

Force majeure clauses

Whether or not there is a force majeure clause and the circumstances in which it applies depend on the contract itself. The usual effect of a force majeure clause is to excuse contracting parties from contractual obligations and liabilities where they are prevented from performance (either completely or sometimes partially) by external events or circumstances.

Most clauses provide a list (or a class description) of "force majeure" events. Most also go on to describe what happens to the contract, its obligations and any subject matter of the contract in the event of a force majeure event.

Because force majeure clauses are contractual terms, their construction is generally a task for the courts on a case by case basis. In summary, the English courts have held as follows (and the limited Jersey case law is to some extent consistent with this approach). The burden of proof is on the party seeking to rely on the force majeure clause, who must prove that the event falls within the clause and that non-performance was due to the event.

- When courts are interpreting clauses, they generally interpret it by reference to the words the parties had used, not their general intention. The Royal Court has made clear that the clause must be interpreted with due regard to the nature and general terms of the contract and in particular with regard to the precise terms of the clause.
- A force majeure event must be the only effective cause of default by a party under a contract relying on a force majeure provision.
- Most force majeure clauses require parties to take reasonable steps to prevent or mitigate the effects of the event.

The effect of a force majeure clause will depend on its drafting – it may be suspensory in effect or it may enable either party to terminate the contract entirely. There is a suggestion in the Jersey case law that force majeure would be an event which would give rise to the right of the non-defaulting party to seek the "resolution" (or judicial termination) of a contract (*Hotel De France (Jersey) Ltd v The Chartered Institute of Bankers, 2002 JLR Note 5*). To what extent a party is otherwise able to terminate a contract on the grounds of force majeure is unclear.

The question of whether the coronavirus will be a force majeure event is an interesting question – and one which may have the potential to generate a great deal of case law. One of the issues with the coronavirus is that we do not (yet) know the full extent of the risk it poses – meaning the triggering of force majeure clauses may be subject to even more uncertainty.

Whilst many contracts will specifically include epidemics/pandemics and/or disease/sickness or illness, they may not include the impact of government/State action to contain an outbreak. More crucially, they may not include the impact of non-mandatory action taken by businesses to lower the risk of infection or of secondary events (such as travel or transport disruption which are themselves caused by the coronavirus) which may be relevant.

Where clauses do not make specific reference to disease and/or epidemic/pandemic, they may nonetheless refer to "classes" of occurrence such as natural disasters. It is here that the courts would have to consider on a case by case basis whether the coronavirus comes within the class of event referred to. Further, whether the clause applies will turn not only on the fact of coronavirus-related disruption, but on the precise disruption that has prevented performance and whether that is within the clause. For example, performance may be prevented by illness of staff, measures put in place to protect staff and clients, inability to be at a specific place (such as client premises) or disruption further up the supply chain. It may be a governmental or legal restriction causing this or otherwise preventing performance. Whatever the terms of the clause, it will be important to pinpoint the precise reason for not performing the contract in order to assess whether it is within those terms.

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Frustration

Frustration is an English law doctrine which applies irrespective of the terms of the contract. It allows further performance of a contract to be discharged when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil it, or so significantly transforms the nature of the obligation (but not merely its expense or onerousness) that the parties could reasonably have contemplated when they contracted it that it would be unjust to insist on it being performed. A contract may be discharged on the grounds of frustration when something occurs after the formation of the contract which:

- Is so fundamental as to be regarded by the law both as striking at the root of the contract and as entirely beyond what was contemplated by the parties when they entered the contract.
- Is not due to the fault of either party.
- Renders further performance impossible, illegal or makes it radically different from that contemplated by the parties at the time of the contract.

However, there is little if any case law in Jersey on frustration (the case law which does exist has tended to conflate it with force majeure). In in Mobil Sales & Supply Corporation v. Transoil (Jersey) Limited (1981) JJ 143 the Royal Court held that to rely on "force majeure", a party must demonstrate that there is an express - or implied - term of the contract. However, in Hotel De France (Jersey) Ltd v The Chartered Institute of Bankers, 2002 JLR Note 5 the Court held that a contract might have been discharged by reason of force majeure (where the subject matter of the contract had been destroyed by fire) even where there was no force majeure clause, but decided the case on other grounds.

Pothier's Law of Obligations appears to suggest that force majeure may arise as a legal concept in its own right – or at least as a term implied into contracts generally - and not necessarily therefore require an express provision in the contract itself.

Whether by reference to English law or Pothier's writing, it remains possible that the Jersey courts would today be ready to relieve a party from performance on the basis of frustration, even if the precise basis it would choose is unclear. Nevertheless, it is easy to imagine how the coronavirus may frustrate a contract – for example a death preventing an individual from performing a contracted service at a particular time or by preventing the timely production of goods or provision of services (where time is of the essence).

It should be noted that (according to English cases) frustration is not available where:

- The parties have made express provision for the consequences of the particular event which has occurred – so a force majeure provision would prevent frustration.
- Similarly, where the alleged frustrating event should have been foreseen by the parties – eg a contract entered now should probably consider the coronavirus.
- The alleged frustrating event is due to the conduct of one of the parties – in the case of the coronavirus this may be where a party has been negligent or reckless as to the risk of infection.
- An alternative method of performance is possible.
- The contract is merely more expensive to perform.
- The seller under a sale of goods contract is let down by its own supplier (the seller assumes the risk of its supplier's failure to perform) ;
- There are changes in economic conditions – these types of "secondary effects" are problematic both from the view of force majeure and frustration.
- The alleged frustrating event is already apparent when the contract is made and gets no worse during the contract term – so contracts beginning now should arguably contemplate the coronavirus risk.

The Carey Olsen view

Both the doctrines of force majeure and frustration are reasonably uncertain under Jersey law and the reaction of the Courts is by no means certain.

Even under English law, where these rights have been more fully explored and exercised, there is considerable uncertainty as to the availability and impact of the relevant remedies.

The global progress and impact of the coronavirus is also uncertain, although it is already having a major economic and public health impact which has obvious potential knock-on effects for contractual performance.

Jersey businesses (and those contracting under Jersey law) should be locating and assessing their existing contractual arrangements now to understand the risks (and opportunities) that may arise in the event of a major outbreak.

Contracts in the process of negotiation and drafting should make express provision (to the extent possible) for disruption caused by the coronavirus and set out clearly what (if any) events will trigger a force majeure scenario.

Planning and risk assessment now – and where appropriate communication and negotiation between contractual counterparties – may pay substantial dividends. As ever, management and dialogue ahead of a potential breach, especially in the current, universally challenging climate, may better head off difficulty than the further uncertainty of litigation in the future.

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