Browne Jacobson

Whose clause is it anyway?

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Please note: the information contained in this legal update is correct as of the original date of publication

Since the outbreak of the Covid-19 pandemic, the spotlight has increasingly been on force majeure and termination clauses in contracts. Much has been written about how such clauses may give rights to contracting parties but also how they can create risks for unwary businesses. Force majeure will without doubt become a battleground for disputes around many issues, from service delivery and impact on payment obligations through to the potential termination of the contract. However, before going into battle on the impact of a force majeure clause or an entitlement to terminate a contract, it is important to first consider what terms have actually been agreed by the parties.

Recap on force majeure

Force majeure clauses generally provide that, upon the occurrence of a specified act, event or circumstance which is outside of a party's reasonable control, that party will be excused from performing part or all of its specific obligations under the contract and will not be liable to the other party for failing to perform those obligations.

When looking at the correct interpretation of a force majeure clause, the specific words used in the clause itself must be scrutinised, having regard to the contract as a whole. There is no general doctrine of force majeure and so it essentially comes down to the application of the clause itself.

Whose terms apply?

Before jumping into a review of force majeure or termination provisions, thought must be given as to how the contract was formed in the first place, as that will determine what terms and conditions bind the parties. In some situations, there will be no doubt as to what the contractual terms are: this is usually where there is a binding written contract, accepted by both parties, with only one set of terms and conditions in play. However, often that is not necessarily the case.

Consider for example the following scenarios:

- Both parties have sent each other their own terms and conditions (T&Cs) at different times and potentially in different ways, for example on the back of an order, acknowledgement, delivery note, invoice, or even by reference to their website. This is a classic 'battle of the forms' scenario.
- The parties have agreed the majority (but not all) of the terms contained in a draft contract, but the agreement was never finalised or perhaps signed before the parties started performing it.
- A draft written contract was in circulation between the parties, but they then started working together on substantially different terms to those in the written document.
- A contract was not set out in writing but can be demonstrated by the repeated conduct of the parties.

Each scenario can give rise to some complicated issues in assessing what terms and conditions bind the parties. They are also typical of the issues that the pandemic is highlighting as parties consider whether they can take the benefit of a force majeure or termination provision.

Consider again the four scenarios:

- Party A relies upon a force majeure or termination clause in its T&Cs, but Party B's T&Cs were the last T&Cs to be supplied before the contract was formed. Party B's T&Cs contain no force majeure clause and entirely different termination provisions.
- One of the terms that the parties had not agreed upon in a draft written agreement concerns the specific events that would be included in a force majeure clause, such as pandemics and governmental actions.
- A broadly worded force majeure clause is contained in a written agreement, but the parties have never acted in accordance with any of the material terms contained in the written agreement.
- A party claims force majeure applies to their business relationship, but there is nothing in writing.

Clearly in these situations, businesses need to understand what terms and conditions bind the parties to a contract before delving into the specific wording and impact of force majeure or termination clauses, or indeed any other clauses.

Conclusion

Given the considerable supply chain disruption which has already been caused by Covid-19, it is more important than ever to carry out a proper review of how a supply contract was formed so as to establish precisely what rights and obligations bind the parties. Only then can parties look more closely at any prospect of invoking force majeure or a perceived right to terminate.

If you require any assistance in reviewing your contracts, considering how Covid-19 may have impacted on performance of those contracts, or what the likely consequences might be, please do get in touch.

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