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CLIENT ALERT

Force Majeure in Aviation Contracts

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A common query in light of the COVID-19 pandemic is whether or not the circumstances may constitute a *force majeure* event for the purposes of aviation contracts. It would be unusual to see a specific *force majeure* clause in a lease or loan agreement, but other aviation contracts such as purchase agreements, hedging agreements, and supply contracts may include such clauses. What are the implications of the inclusion or non-inclusion of *force majeure* clauses under English law in the current climate in which we find ourselves?

Where a contract does not contain a force majeure clause, is the concept implied into the contract?

In English law, *force majeure* is neither defined in statute nor in case law. However, the Merriam-Webster Law Dictionary defines *force majeure* as "*an event or effect that cannot be reasonably anticipated or controlled*".

The concept of *force majeure* will not be implied into a contract (in contrast to some civil law jurisdictions). It can, however, be invoked, if it is expressly incorporated into the contract. Therefore, where a lease or a loan agreement does not contain a *force majeure* clause, as would usually be the case, no such concept will be implied into the agreement.

How will a force majeure clause be construed?

When a *force majeure* clause is included in a contract, whether such clause is triggered will depend entirely on the words that the parties have used in the contract. It is for this reason that many contracts have *force majeure* clauses which list out in detail the events which would constitute a *force majeure* event. Such lists may either be exclusive or non-exclusive. Non-exclusive lists (which tend to be most common) allow for the possibility of other, non-listed events qualifying as *force majeure*.

Importantly, a party seeking to rely on a *force majeure* event must also establish that its inability to perform the contract was in fact caused by the claimed *force majeure* event. This requirement of causation is likely to be the key battleground in COVID-19 *force majeure* cases in the months and years to come, and the focus in any eventual

litigation or arbitration will certainly be on whether any travel restrictions, quarantines imposed, lack of available employees or similar specifically impacted the party at issue in the period of time surrounding the notice of *force majeure*.

Additionally, the *force majeure* event must be the direct cause for the non-performance / delay in performance of obligations. If there are other reasons which exist (such as general financial inability to pay lease rentals or loan repayments) which would have existed in any case, it is unlikely that a COVID-19 related *force majeure* argument would be successful. It should also be noted that merely making a contract more difficult or unprofitable in performance will not be sufficient in itself to constitute a *force majeure* event.

Some *force majeure* clauses will expressly state that the party seeking to rely on it must have been "prevented" from performing due to the *force majeure* event. If the clause is drafted in this way, the party must show that performance of its obligations has been made physically or legally impossible due to the COVID-19 outbreak (or the governmental measures taken in response) and that there is no alternative way in which the obligation can be discharged. A key issue likely to arise in this context is the nature of governmental measures taken, and whether such measures are mandatory or advisory in nature.

A party relying on a *force majeure* clause must also show that there are no reasonable steps that it could have taken to mitigate or avoid the effects of the *force majeure* event.

What if There is No Force Majeure Clause in the Contract and/or What About an Alternative to a Force Majeure Claim?

In the absence of an express *force majeure* clause or as an additional or alternative argument, the defaulting party might attempt to excuse its non-performance by reference to the English doctrine of frustration of contracts.

This doctrine provides that a contract may be discharged on the grounds of frustration when an event or circumstance arises after the formation of a contract that renders its performance physically or commercially impossible or transforms the obligation to perform into a radically different obligation than that to which the party originally agreed.

The frustration principle is subject to a very high threshold, and generally speaking it is unlikely that COVID-19-related issues would frustrate the performance of most aviation contracts. This is particularly the case in respect of lease and finance agreements which contain "hell-or-high-water" payment clauses. A well-drafted "hell-or-high-water" clause will make it very difficult to argue that the agreement has been frustrated due to the inability to fly the aircraft. However, it is possible to envisage a range of factual circumstances in which COVID-19 and the ensuing governmental response measures could be construed as a frustrating event, particularly where it may be rendered illegal to perform the contract.

Another potential alternative is a claim under a change of circumstances or price renegotiation clause, if such a clause is contained in the relevant contract. These clauses are used less frequently in English law-governed contracts, given the general principle under English law that an agreement to agree is not enforceable. That said, if such a clause is included in a contract it will certainly come under close scrutiny by both parties as a result of COVID-19.

Is COVID-19 a Force Majeure Event?

Notwithstanding the severity and the impact of the COVID-19 outbreak, it is not a foregone conclusion that, under English law, a contractual *force majeure* provision will apply.

If the *force majeure* clause refers to pandemics and/or epidemics, then it will almost certainly be applicable given that the World Health Organisation on 11 March 2020 declared COVID-19 a pandemic. In addition, if the specific *force majeure* clause references "governmental acts" or similar, then the quarantine, lockdown, closing of borders, and

other such acts may also qualify as *force majeure* events for the purposes of the relevant contract. However, the position becomes more uncertain where the clause may, for example, refer to an "act of God" without further definition.

If the outbreak or relevant government actions do fall within the scope of the clause, it must then be determined to what extent the contractual obligations are affected. It is possible for example that some obligations within the contract are not impeded by the outbreak and some obligations may simply be postponed. Therefore, both parties will need to closely scrutinize the relevant evidence, including the timing of the alleged performance difficulties as compared to the spread of COVID-19 and corresponding government measures taken in the particular place of operation at a given time. In addition, and as mentioned above, the mere existence of such an event will not necessarily be sufficient, as there must be a causal link to the non-performance / delay in performance of obligations.

Risk of Getting It Wrong

For the above reasons, careful thought should be applied (and advice taken) before relying on a *force majeure* clause. If a party declares *force majeure* but is not contractually entitled to do so, it may expose itself to a claim for repudiatory breach of contract and the other party may be entitled to claim damages as a consequence.

What Steps Should I be Taking Now?

Irrespective of the duration of the crisis, at the time of writing it is safe to say that many major contracts and their obligations will be greatly impaired. It would be advisable to take the following steps:

- Review the wording of *force majeure* clauses in key contracts, paying particular attention to the list of non-exhaustive events which is often included, and the consequences of triggering a *force majeure*.
- If a long list of *force majeure* events is included, it is likely to be helpful (where you are seeking to rely on the clause) if specific wording is included such as "pandemic," "epidemic," "outbreak," "crisis," or "governmental action."
- It is important to check the notice provisions of any *force majeure* clause to check whether a notice is required, when it is required, what information and evidence it must contain and where it should be sent to and by what means.
- Be vigilant for opportunism from counterparties. It is possible that unscrupulous counterparties will seek to use the COVID-19 outbreak as a pretext for seeking to terminate an unfavourable contract on the purported grounds of *force majeure*. If such a notice is received, obtain the appropriate advice to make sure you are rejecting it effectively and protecting the company's rights.
- Watch out for wording in new contracts that requires that the event of *force majeure* is "unforeseeable." Based on current circumstances, a virus outbreak (or at least the continued effects of the COVID-19 pandemic) would qualify as foreseeable.
- Contact counterparties of contracts which may be affected and discuss a possible renegotiation, or postponement of, obligations, as appropriate.
- Consider how the risks associated with this outbreak, or a future outbreak of similar effect, could be provided for and minimised in future contracts.

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