The coronavirus pandemic, and the restrictions on economic and social activities which it has brought in Jersey and the wider world, has already had a serious impact on most businesses. The further the virus spreads and the longer the ‘lockdown’ continues the more serious the impact on business will be. Businesses’ rights and obligations under contracts are coming under close scrutiny.

Non-performing parties may seek to rely on force majeure provisions and/or the doctrine of frustration so as to avoid liability for what would otherwise be a breach of contract. These doctrines and/or contractual provisions which seek to engage them, may allow a party to avoid liability for a failure to perform its obligations under a contract, or at least not to be held liable for any delay in performance. These will be of particular relevance to contracts for the sale of goods or the supply of services.

**Force Majeure**
The literal meaning of force majeure is ‘superior force’. In the context of contract law, the phrase is used to denote intervening acts, outside of the control of the parties and beyond their reasonable contemplation, which prevents the performance of obligations under a contract. Where the doctrine applies it may excuse a party to a contract from performing its obligations under it, either at all, or at least for a period of time.

In English law there is no general common law doctrine of force majeure. The applicability of force majeure is purely a question of whether or not the terms of the contract provide it. This differs from other jurisdictions, such as France, where force majeure is a general legal concept implied into contracts by virtue of the provisions of the Code Civil. This is an important distinction. In English law it is entirely a matter for the parties to define the events which constitute a force majeure (these usually include war, strike, riot, crime, epidemic or an ‘Act of God’, although what the latter term actually means is the subject of some debate). It is also for the parties to determine their rights and obligations should such an event occur. In French law, Article 1218 of the Code Civil provides that a force majeure event justifies suspension or termination of a contract, even if the contract does not contain any provision in that respect. As such, the doctrine of force majeure is always available to a party as a defence to liability (providing the test for establishing an event as a force majeure is met).

In Jersey the principles of force majeure were, to a limited extent, discussed in the case of Hotel de France (Jersey) Limited v. The Chartered Institute of Bankers [2002 JLR Note 5]. The case concerned a booking made for a particular function room at the Hotel de France. The day before the event there was a fire at the hotel which (it was said) rendered the specified room unusable. The CIB declined the use of an alternative room and was sued by the hotel for damages. The Court held that the particular room was a fundamental term of the contract and thus the CIB was entitled to set aside the contract and that, in any event, the fire was a force majeure (or cas fortuit, the Court stating that the two doctrines amount to the same thing). There was no specific clause in the contract which dealt with force majeure, which suggests that the Jersey courts may take a less restrictive approach to the issue than the English courts would.

Where there is a contractual force majeure provision, in order to make a valid claim under the clause, a party would have to show that:

- The factual event came within the scope of those defined as force majeure in the contract;
- The occurrence of the event impacted upon the company’s performance of its obligations;
- The company had done all it reasonably could to mitigate the effect of the event; and
- The company had complied with all relevant notification requirements.

Where a force majeure is properly raised, the parties’ obligations under the contract will usually be deferred until after the force majeure has passed, or the parties’ breaches of obligation will be excused.

**Frustration**
The doctrine of frustration applies where a supervening event occurs after the formation of the contract which renders the performance of the obligations under the contract impossible or illegal, or fundamentally changes the parties rights and obligations under the contract to such an extent that it would be unjust to hold the parties to the original bargain. It is important to note that the parties to a contract can specifically exclude the doctrine of frustration from applicability to the contract in question.
The doctrine appears to form part of Jersey law as its application was considered in the case of *Mobil Sales & Supply Corporation v. Transoil (Jersey) Limited [1981 J.J. 143]*. The Court in *Mobil v. Transoil* referred exclusively to English authority so it is likely that the Jersey courts will place reliance on English jurisprudence in this area, although will not be bound by it. There is no later Jersey authority. In that case, it was held that a shutdown of a particular oil refinery did not amount to a frustration of the contract because it was one for supply of a specified amount of oil to a particular place, not from a particular refinery. Other refineries were operating as normal and the defendant could and should have sourced oil from an alternative source.

Frustration is a difficult argument to run. There are few reported cases where a contract has been found to have been frustrated as a matter of English law. The test to be met is a high one. Whether a contract has been frustrated will depend upon the precise contractual terms, the surrounding factual matrix, and how the facts impacted upon the performance of the contract. The focus will be on whether the parties’ specific contractual obligations have fundamentally changed to the extent that it would be unjust to require a party to comply with its strict contractual obligations because that would mean requiring it to do something fundamentally different from that which the party had originally agreed to do.

It is important to note that the ‘supervening event’ relied upon to invoke the doctrine must not be the fault of the non-performing party. Obviously, the spread of coronavirus is not the fault of any business. However, decisions taken by a business in response to the pandemic which render the performance of the obligations impossible or more expensive may still amount to an actionable breach of contract. For example, a decision to close a business to protect staff may be the correct response to the pandemic but may not result in that business escaping liability for breach of contract. If, however, the Government passed legislation requiring that business to close, the performance of the business’s contractual obligations would become unlawful as a result of changes in the law implemented after the contract was entered into. In such a case, the contract would be highly likely to be held to have been frustrated.

The effect of a contract being frustrated is that the contract is set aside. Any sums paid by one party will be returned (subject to a discretion to allow retention of sums for costs and expenses). Strictly, there is no requirement to notify the other party or parties to the contract although as a matter of practical reality it would be sensible to do so.

**Practical Tips**

The starting point for those facing difficulties in fulfilling their obligations, or dealing with those who assert such difficulties, is to look at the terms of the contract. If the contractual provisions contain a *force majeure* clause, and its scope is wide enough to include the current pandemic, then it may be that *force majeure* comes into play. If it does, it is imperative that any notification requirements are strictly complied with. *Force majeure* clauses will usually stipulate strict time limits within which claims for force majeure relief must be made. Such clauses are also likely to stipulate precisely what any notice given must contain by way of detail. Businesses should also check what the clause stipulates as to the parties’ rights and obligations in the event of a *force majeure* event. Is the defaulting party permitted to avoid performance of its obligations entirely, or only to delay them? What provisions are there in relation to any monies already paid?

If the contract does not contain a *force majeure* clause, it may be that in Jersey the Court would ultimately conclude that the intervening event was a *force majeure*, as it seems to accept that it has such a jurisdiction following the *Hotel de France* case. Equally, it may be that the doctrine of frustration might come into play, although as noted above, the cases in which the English courts have held that a contract has been frustrated are very few in number and there are no such cases in Jersey.

On a common sense level, these are difficult times for all of us. The first step should be to contact the other parties and seek to open a constructive dialogue to explore what alternative routes might be open which would be acceptable to all concerned, rather than invoking strict legal rights and remedies immediately (although be mindful of any contractual time limits).

**Contact**

This briefing is only intended to give a summary of the subject matter. It does not constitute legal advice. If you would like legal advice or further information, please contact us using the details below.

Jeremy Heywood, Partner  
+44 (O) 1534 760 851  
jeremy.heywood@bcrlawjersey.com

Emma Baker, English Solicitor  
+44 (O) 1534 760868  
emma.baker@bcrlawjersey.com