



HARE COURT

COVID-19: Legal options for struggling businesses

In these unsettling times, few individuals and businesses will escape being adversely affected by the COVID-19 pandemic. For many, the struggle for financial survival will depend on the performance of contracts suddenly rendered commercially non-viable by the outbreak. Here are some of the legal avenues those groups would be well-advised to consider:

- **Force Majeure Clauses:** Some – but by no means most – written contracts will contain a force majeure clause aimed at discharging the parties from further performance of the contract in specific circumstances. These will vary from contract to contract. Potentially relevant force majeure events will range from the specific e.g. “epidemic,” “pandemic,” “quarantine,” “disease” and “government action” to the general, e.g. “events beyond the reasonable control of the parties”. Such clauses have traditionally been construed restrictively but it is still too early to know whether the English courts will take such a restrictive approach in light of the unforeseeable and incomprehensible financial hardship caused by COVID-19. Contracting parties should review their contracts urgently to identify whether they could benefit, or be vulnerable to, an applicable force majeure clause.
- **Common law frustration:** A contract will be frustrated (and so discharged in its entirety) if a frustrating event occurs post-contract; goes to the root of the contract and was not contemplated by the parties at the time of contract; is not the fault of either party; and renders further performance impossible, illegal or makes it radically different from that contemplated by the parties at the time of the contract. The test is high and to date there have been few cases meeting the strict requirements. That said, the COVID-19 pandemic poses the greatest public health emergency in a century and the UK Government has been taking unprecedented steps to compel the closure of businesses and otherwise curb the movement of individuals – and therefore of goods and services. Dicta in cases concerning wartime government action and international sanctions are likely to be useful, being premised upon government action (e.g. *Metropolitan Water Board v Dick, Kerr & Co Ltd* [1918] AC 119 and *DVB Bank SE v Shere Shipping Limited* [2013] EWHC 2321 (Ch)). Contracting parties should consider whether they could take advantage of, or be vulnerable to, an argument that their contracts are frustrated.
- **Insurance Policies:** Many businesses adversely affected by the COVID-19 pandemic will have insurance policies intended to cover business interruption. Such business interruption clauses vary significantly from one insurer to another and need to be carefully construed. Narrowly drafted policies may only cover business interruption due to “illness on or around the premises” or similar which will be difficult to apply to most businesses in the current circumstances. Those with broader policy wording covering business interruption due to “an epidemic or pandemic” without any geographical or other obvious limitations may be more promising. Insureds should not only carefully consider their insurance position but would be

well-advised to start documenting their losses and the causal connection to the COVID-19 pandemic.

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