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Insights

SANCTIONS ON RUSSIA: WHAT ABOUT YOUR CONTRACTS?

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SUMMARY

As you will know, an unprecedented sanctions regime has been imposed by the UK, EU and US in response to Russia's actions concerning Ukraine. But what issues could arise for your contracts with Russian or Ukrainian parties or where your supply route relies on those countries? Can you avoid those contracts?

You may be able to take advantage of a force majeure clause if your contract contains one. A force majeure clause provides for a party to the contract to be excused from performance of their obligations under the contract should a specified event occur which is beyond the party's control. Should your contract contain such a clause which covers the events in Ukraine then you may be able to avoid your obligations in circumstances where your inability to perform, caused by the imposition of sanctions and/or the war, are inevitably beyond your control. You need to bear in mind that your counter-party may also have the benefit of any force majeure clause in your contract.

INTERPRETATION OF FORCE MAJEURE CLAUSES

The meaning and effect of a force majeure clause depends entirely on its wording: the question is whether the Court would interpret it to cover the event in question. The wording of the clause and ultimately its interpretation by a Court will also determine whether the clause, if it covers the event in question, allows a party to cancel the contract, be excused from performance of part or all of its obligations under the contract or be entitled to suspend performance or claim an extension of time for performance.

When interpreting the words of any force majeure clause the Courts will seek to determine objectively what the parties using the words in the clause meant when they made the contract, giving the words their natural and ordinary meaning. Evidence of what the parties themselves **actually** subjectively intended is not relevant. The Court will interpret the words of the contract in

the context of the other relevant provisions of the contract, the overall purpose of the provision and the facts and circumstances known to the parties at the time of the contract.

The Court will not however interpret a contract to relieve a party from a bad bargain: accordingly if your force majeure clause does not, applying the above rules of interpretation, cover the circumstances which you face, then the Court will not where clear language is used allow you to escape your contractual obligations on the basis of the force majeure clause. When the contract uses unambiguous language, the Courts will apply it. It is only when the words used are ambiguous that the Court may apply a meaning which makes the most business common sense.

WAR AND SANCTIONS – ARE THEY COVERED?

It may be that your force majeure clause includes reference to "war" but it could well be considered relevant that in the current situation, there has been no declaration of war by Russia and a question arises as to whether such wording would be sufficient when the broader words "conflict" or "hostilities" would have been available. Much may depend on the definition given to the word "war" in the contract.

The imposition of economic sanctions is an even trickier issue: it may be less likely that sanctions are specifically included as a force majeure event but even if they are, the definition of sanctions in the contract and the impact which the sanctions has had on the parties will be key when determining whether a force majeure clause can safely be relied upon.

If sanctions are not specifically mentioned as a force majeure event, a wide definition of "war", "hostilities" or "conflict" – which could cover the **consequences** of such war, hostilities or conflict – may assist. Of course, your counter-party will be quick to consider whether your inability to perform is actually a consequence of the conflict and seek to argue that your inability to perform is caused by a separate event.

Consideration will also need to be given to whether your contract includes an "act of government" as a force majeure event and the extent of the definition of this event in the contract.

Disruption to your supply chain may also be either specifically covered or covered by more general force majeure language commonly found in contracts.

If your contract does not contain a force majeure clause or your clause is too constrained to be of assistance, all may not be lost since the legal doctrine of frustration or the defence of illegality may assist you.

ILLEGALITY AND FRUSTRATION

In the absence of a force majeure clause, the doctrine of frustration or the defence of illegality may be available.

A contract is frustrated whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken in the contract.

An English law-governed contract is discharged if its performance becomes illegal under English law provided that the illegality clearly prohibits performance. If performance is illegal in any specific case, the Court itself may of its own volition – and without the defendant pleading the defence of illegality - refuse a remedy to the counter-party suing in respect of any non-performance since this is a public policy issue.

Each case would however fall to be considered on its own facts and the availability of the doctrine of frustration or the defence of illegality to assist in any given case is dependent not on the interpretation of the contractual words but on the application of an extensive body of case-law.

NO CLAIMS PROVISIONS

As with many EU sanctions regimes, the EU's Russian sanctions contain so-called 'no claims' provisions, which protect a party who refuses to perform a contract on the basis that they may breach EU sanctions from claims that they might otherwise face. This prohibits designated parties and, as regards some of the restrictions, any Russian person (whether designated or otherwise) from bringing claims in connection with the performance of a contract or transaction, which has been affected by the EU's sanctions. The UK's Russian sanctions regime does not contain these provisions. This is an area of divergence that may be significant depending on the construction of the contract.

INSURANCE

You should check any insurances on which claims could arise (including trade credit, travel, property etc.) to see whether they contain sanctions clauses. Typically insurance policies will contain a provision that will suspend cover and payment of existing claims where that cover or claim would be impacted by sanctions. Sometimes the policy will allow insurers to cancel cover on notice.

The UK Government and EU have introduced specific sanctions prohibiting the provision of any insurance for aviation and space goods and technology to a person connected with Russia or for use in Russia. Any insurer of such insurance has to cease to insure such risks as from 28 March 2022. It is possible that other sectors may also be targeted.

CONCLUSION

You may be able to escape liability for a failure to perform arising out of the imposition of sanctions and/or generally the current conflict in Ukraine by relying on a force majeure clause but

careful consideration needs to be given to how a Court is likely to interpret what that clause covers before any reliance is placed on it: wrongful reliance could lead to a liability in damages for repudiatory breach of the contract.

Usually a force majeure clause will provide the most certainty to a party but if it is not sufficiently widely drafted, is badly drafted or you don't have one, it is important not to forget to consider whether you could be assisted by the doctrine of frustration or the defence of illegality.

CONTACT US

We are happy to assist with any queries which you may have. Please contact **Anthony Lennox** if you have any insurance queries; or **Chris Bryant** if you have any questions about the applicability of sanctions or the sanctions regime generally.

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