



Aircraft Sale and Purchase Agreement (APA) and COVID-19

By Ilona Avramenko, Director – Head of Aviation

As countries continue to introduce protective measures and restrictions in order to manage the COVID-19 outbreak, one pertinent question worth discussing is ***whether a party (either a buyer or seller) could avoid its contractual obligations under an English law APA by relying on a force majeure clause and/or by invoking the common law doctrine of frustration.***

Firstly, and as everyone in the industry is well aware, there is no standard form of an APA and accordingly, the below advice would need to be considered bearing in mind the specific terms of an APA which the buyer or the seller is a party to. Furthermore, there is no general doctrine in English contract law by which contracts are discharged by force majeure events. This means that force majeure events are only relevant, and a party is able to seek to rely on a force majeure event, when there is an express force majeure clause in an APA.

Force Majeure

The APA must first contain a force majeure clause which specifies a type of event capable of encompassing the COVID-19 outbreak. There is no generic definition of force majeure in common law and it is a matter of contractual interpretation in each case. For example, would a party be able to rely on force majeure clause if the APA did not list '*pandemics, epidemics and other civil emergency situations*' as force majeure events?

The burden of proof is on the party seeking to rely on the force majeure clause and that party (i.e. defaulting party) must prove that:

- One of the events it is seeking to rely upon falls within the definition of force majeure.
- Non-performance was due to that event.
- Non-performance was due to circumstances outside of its control.
- That it used its reasonable endeavours to prevent, or at least mitigate, the effects of the force majeure.

So when would a party to an APA seek to rely on a force majeure clause? An obvious scenario would be where an aircraft completion has had to be put on hold because for example, due to airport closures, a seller is unable to deliver an aircraft to the delivery location. In the meantime, due to the COVID-19 outbreak, the buyer may have decided that it wishes to walk away from the APA and seek to rely on force majeure because in fact, the transaction is no longer economically beneficial. In such case, the buyer should be cautioned that is a well established principle under English law that a change in economic or market circumstances, affecting the profitability of a contract or the ease with which the parties' obligations can be performed, is not regarded as being a force majeure event¹. Similarly, a downturn in economic conditions (even if caused by an event like COVID-19) will generally not constitute force majeure².

Practically speaking, the APA should contain some wording in the force majeure clause similar to that of the below:

"In the event of any such failure or delay, the affected Party must notify the other Party, and the time fixed or required for the performance of any obligation in this Agreement shall be extended for a period of a maximum of ninety (90) days, with the non-performing Party using all reasonable efforts to eliminate such cause or to overcome the effects thereof, provided if such delay extends for more than 90 days, then either Party may terminate this Agreement."

This covers the situation whereby if a closing, inspection or PPI works are genuinely not possible because of COVID- 19, then a fair middle ground between the seller and the buyer is to allow a party more time to perform its obligations; failing which, either party may terminate the APA.

Frustration

In the absence of an express force majeure clause or if the force majeure clause does not cover an event such as the COVID-19 outbreak, the common law doctrine of frustration may apply.

Generally speaking, an APA will terminate automatically when a frustrating event occurs. A frustrating event is an event which:

- Occurs after the contract has been formed.
- Entirety beyond what was contemplated by the parties when they entered the contract.
- Is not due to the fault of either party.

Following the 2003 SARS epidemic, the Hong Kong District Court held that a 10-day period in which a property was uninhabited did not frustrate the tenancy agreement, which had a two-year term³.

Practical advice – next steps

- Start a dialogue with your counter-party as to what each party is seeking to achieve. Try to understand the impact of COVID-19 on each party and their business. It is likely that any future court proceedings in relation to COVID-19 could be in many months, or even years, so it is in everyone's best interest to find a solution without taking the matter to court.
- Keep a record of all discussions and decision-making so that later on you have the evidence to justify your actions.
- Notification provisions under the APA should not be ignored and they can be extremely important. If a '*force majeure*' clause requires notification of the counterparty in order to be relied upon, the business must follow that requirement meticulously. English law places huge importance on this.
- Any changes to the terms of the APA must be done in accordance with the provisions of the APA for them to be valid.
- If negotiations are not getting you anywhere, seek legal advice to ensure that you do not compromise your own position.

Amidst COVID-19, it may be tempting to act first (or not act at all) and hope that one will be able to blame the pandemic for its business's actions/inactions. I must stress that this is not the case. The business environment is rapidly changing and survival in a highly challenging business environment may very well depend on knowing one's contractual rights and remedies.

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Further information

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