

# Legal Update

## Ukraine Crisis – Implications for English Law Contracts

### Introduction

The crisis in Ukraine will increase the pressure on global supply chains, which are already under significant strain as a result of the ongoing impact of COVID.

We anticipate that businesses will need to review their supply contracts urgently to assess the possible impact and whether specific actions are required in order to comply with their contractual obligations and/or protect their position.

### Areas of Focus

We see the following areas as being central to that review for English law governed contracts:

#### *Force majeure arising from supply disruption:*

- Force Majeure clauses generally allow a party affected by an event beyond the control of that party to suspend performance of its obligations without penalty.
- However, the wording of these clauses is critical to understanding how contractual performance is impacted by the force majeure event, as English law does not imply the concept of force majeure into contracts.
- Particular challenges may be faced by parties in the middle of supply chains, on the one hand requiring suppliers to perform, while on the other hand needing to argue to customers that performance is impossible or should be delayed.

#### *Price escalation clauses:*

- Price escalation clauses contain mechanisms to prevent a contract becoming too financially onerous on one or both parties.
- They are intended to reflect (and respond to) changing market conditions – particularly over the course of a long term contract. Increased cost of raw materials, energy and transport are likely to arise from the current crisis.
- Disputes often arise in respect of whether the clause has been engaged and the method by which the price adjustment should be calculated.

### *MAC/MAE clauses:*

- MAC/MAE clauses are designed to protect parties against the risk that an unforeseen event or circumstance may arise, which has a materially adverse impact on one or more of the contracting parties.
- Any “change” will need to be material, not just to the general financial health of a business but to whether or not it has the means to (for example) repay a loan or enter into a transaction.
- Establishing that an event has caused a MAE or that a MAC has occurred is rarely straightforward, and a common area of debate is the reference point against which to measure the adverse change or adverse effect.

### *Sanctions related compliance clauses:*

- Sanctions compliance clauses are intended to prevent or limit trade with entities which are subject to global sanctions regimes.
- Failure to ensure compliance with sanctions regimes may result in domestic and foreign authorities initiating investigations into sanctions compliance, and may result in significant fines and/or other penalties being imposed.
- In the event a counterparty becomes subject to a sanctions regime, it may be necessary to cease supply to that counterparty and/or terminate the contract.

## Actions

There are various actions that businesses can take (and should be taking) now to ensure that they do not become legally and/or commercially exposed, as a result of the present crisis in Ukraine. These include:

1. Reviewing all key contracts to assess whether or not they can be performed on time (or at all) and whether changing market conditions have made contracts materially more onerous or expensive to perform.
2. Considering what (if any) contractual protections they have to delay or suspend performance or (potentially) terminate contracts, as a consequence of the effect(s) of the ongoing crisis.
3. Assessing whether contracts contain any mechanism for a price adjustment, in the event that the cost of performance has increased by a material amount.
4. Checking the sanctions provisions in all material contracts and standard terms, in order to ensure that they are up to date and contain necessary restrictions on trade with newly sanctioned countries, including Russia.

Although the present circumstances and their impact on supply chains are likely to heap further pressure on already strained supply chain conditions, the risk of a dispute arising can be mitigated through clear and regular communication between parties up and down the supply chain – all of whom are likely to be facing common challenges.

Therefore, whilst it is important for businesses to ensure that all their legal positions are adequately protected, it is equally important to keep commercial channels of communication open to avoid supply issues escalating into full-blown commercial disputes.

*For more information about the topics raised in this Legal Update, please contact any of the following lawyers.*

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