Broker Watch

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Acts of God?

In its first quarterly column, Crisis Survivor and its associates seek to identify and respond to business continuity planning issues that can cause difficulties for clients. Karla Dooey and Bill May tackle the problems surrounding force majeure clauses.

What will happen if events outside the broker's control, such as the current outbreak of swine flu, affect their ability to deliver a contracted service?

With clients expecting high levels of service and reliability from their broker, what would be the legal impact on the relationship if, for any reason, the broker was unable to deliver that which was either promised or reasonably expected? Unfortunately, this is not just a question for brokers but for their clients as well.

All too often, terms and conditions of business are lacking in even the most basic legally reliable provision. Typically, these will have been drafted many years ago, inherited from an acquisition or, worse still, simply 'borrowed' from someone else or downloaded from the internet. This situation is not confined to the very small or small to medium-sized enterprise sectors but likely to affect larger organisations too.

The same can be said of a broker's clients who will seldom have access to the specialist commercial legal advice they need from the average high street solicitor. Moreover, could a poorly drafted or missing force majeure clause lead to a claim being repudiated?

What would happen if, as a result of a possible swine flu pandemic, insurers withdrew cover for events such as festivals, sports meetings, conferences or film shoots? Would clients be able to rely upon their terms and conditions of business to rescue them?

So, what is force majeure and what does such a clause in a contract to supply goods or services actually do?

Force majeure is usually described as acts, events or omissions beyond reasonable control. Common examples would include acts of god, war, terrorist attack, fire, flood, earthquake, natural disaster, loss at sea and collapse of buildings.

Contract variation

The list of force majeure events varies from contract to contract, and carefully worded clauses can also include labour disputes, non-performance by suppliers or subcontractors, failure of machinery, computers or vehicles and interruption or failure of utility services.

Force majeure clauses are common in most commercial contracts but their importance tends to be overlooked, with people often ignoring their content because they believe that by simply including a basic force majeure clause they are protected in any situation where an unforeseen event outside their control occurs.

However, the real effectiveness of a force majeure clause will depend on how it is drafted and how specific it is to the needs of the individual business. Careful consideration needs to be given to the content to ensure there are no loopholes that could put a business at risk.

In principle, a force majeure event will trigger a temporary suspension of the contract while the relevant incident continues. During this period, liability for a party's non-performance or delay in fulfilling its obligations can - with the right wording - be successfully removed.

In some cases, however, where specialist advice has not been taken, clauses may be inadvertently worded in such a way as to prevent it from actually triggering at all.

Difficult to prove

For example, some may require notice to be served by the non-performing party and other clauses may only trigger where the affected party has taken all reasonable steps possible to minimise the consequences of the force majeure event. This can be difficult for a non-performing party to prove.

Some clauses may allow for termination of a contract if the force majeure event lasts for a certain period of time. This tends to be without liability, but not necessarily always. For example, if a contract provides for pre-payment of goods that are not provided due to a force majeure event, the paying party may well want to be reimbursed.

There has never been a greater need for force majeure events and their consequences to be clearly defined in contracts and drafted to fit the circumstances of the particular transaction in question.

One size rarely fits all

One size rarely fits all and careful drafting, coupled with an assessment of risk in the light of available insurance cover on commercially viable terms, is always recommended.

It would also very much pay brokers to encourage their clients to take a wider perspective when it comes to contractual risk transfer, especially as the quality of legal advice can be so variable and is often delivered without understanding as to how such advice can seriously impact upon how insurance is written and claims paid.

Contractual risk transfer is a key weapon in the risk management armoury and should have equal standing with the purchase of the correct insurance.

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