

CORPORATE AND COMMERCIAL

COVID-19: Practical Considerations: Force Majeure Clause in Contracts

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Guidance for organisations in Northern Ireland.



The recent COVID-19 outbreak has led to significant disruption to many businesses in affected areas and indeed to their customers, suppliers, joint-venture partners or indeed anyone who may be in their supply chain at any level in terms of missed obligations, disruptions to supply chains or the provisions of services, events of default and financial distress. This has raised questions around the ability of those defaulting parties to rely on 'Force Majeure' clauses in their contracts to avoid liability in those circumstances.

1. Force majeure

The concept of 'force majeure' originates in French law and translates as "superior force". Force Majeure contracts clauses excuse one party from fulfilling its contractual obligations where those obligations have become impossible or impracticable to perform, due to an event that the parties could not have anticipated or controlled.

With no recognised definition under Northern Irish law, for a party to consider a claim for Force Majeure to excuse non-performance, there needs to firstly be a Force Majeure clause in the contract. This is essential as Force Majeure will not necessarily be implied into a contract governed by Northern Irish law.

Once established that there is a Force Majeure clause, the party will then need to decide whether the coronavirus

outbreak is a 'Force Majeure Event'.

This will depend on the wording of the contractual clause and if, for example, "disease" or "epidemic" is expressly included, noting most contracts will define the events by reference to general criteria, with a non-exhaustive list of matters that may constitute such an event.

In the absence of a reference to specific events, a party may have to rely on more general contractual terms, such as circumstances beyond a party's reasonable control or for which they could not reasonably have provided for etc.

Depending on the contractual wording, Change In Law clauses may also provide an avenue for relief in circumstances where government bans on the movement of goods or people come in to effect.

2. Impact of coronavirus on force majeure clause

Lawyers are being increasingly sought out to advise on 'Force Majeure' clauses on projects that are being impacted by the recent outbreak.

The World Health Organisation warns that the virus could reach most, if not all, countries. It is therefore likely, that the outbreak will have a major effect on existing contracts and development projects in a range of sectors.

This document is a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

Force Majeure claims in relation to the outbreak are particularly relevant for contracts with a long-term or ongoing supply, particularly in the construction sector. Suppliers and contractors may see the largest effect by being unable to fulfil their contracts within the prescribed time or at all.

On the 30 January 2020 the Chinese government began issuing 'Force Majeure Certificates' to companies unable to meet their contractual obligations in an attempt to protect them from breach of contract claims. It is too early to tell if other governments will adopt this approach and even if they do, there is no guarantee such a certificate will obstruct the opposing party from bringing a claim for breach of contract or will prevent them from seeking to terminate the contract.

Most contracts will in any event require an affected party to take reasonable steps

in order to mitigate any impact that may result from a force majeure event. What this may mean in practical terms is that steps will have to be taken and alternative arrangements put in place in order to ease the overall impact upon a business.

3. Impact on lenders

Lenders will be particularly concerned about the outbreak of the virus falling within the definition of a Force Majeure event in a contract.

This is because there are not just concerns around claims arising under contracts, but also concerns that delays in projects or supply chains will lead to delays in revenue generation or a rise in corporate insolvencies.

Lenders may therefore request that the relevant agreements carve out Covid-19 or epidemic related wording, in addition to seeking contingency finance or additional security is put in place to cover

this risk before they agree to lend or to finance a particular project

4. Alternative contract claims

Under Northern Irish law, as an alternative to relying on a Force Majeure clause in a contract, a party could claim relief under the doctrine of frustration. This would permit the parties to cease performing the contractual obligations where it becomes impossible to do so in circumstances entirely beyond the remit of the parties. Although a claim under the doctrine of frustration is difficult to establish, this could be a potential avenue for relief where emergency measures have made the supply permanently unavailable or the necessary skilled labour to perform a contract becomes unavailable due to travel restrictions or illness.

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