

CORPORATE AND COMMERCIAL

COVID-19 Practical Considerations: Force Majeure clauses in contracts

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As the impact of COVID-19 unfolds, in Ireland the Government has initiated measures to attempt to slow the spread of the virus, including the enactment of emergency powers. There are clear impacts on the global economy, including disruption to supply which will affect activity across many sectors. Against this backdrop, parties to commercial agreements nationally and internationally are assessing their contractual rights and obligations and, in particular force majeure.

FORCE MAJEURE

Commercial agreements generally contain a force majeure clause. Broadly, a force majeure clause relieves a party from strict compliance with its contractual obligations where a force majeure event occurs, and any such non-performance will not constitute a breach of contract.

A force majeure event will generally be an unanticipated event that is beyond a party's control and which prevents a party from performing its obligations under the contract. If your agreement contains a force majeure provision, your first point of information is the precise wording of the clause itself.

DOES COVID-19 CONSTITUTE A FORCE MAJEURE EVENT?

Many force majeure provisions in commercial contracts list specific events that the parties agree constitute force majeure. For example, since the outbreak of foot and mouth disease in 2001 it has become more common to specify epidemics and pandemics as force majeure events. Other types of events that may be specified as force majeure events include outbreak of disease, war, work stoppages, actions of governments and extreme weather events. In addition, some contracts may include industry-specific eventualities, which may or may not cover COVID-19.

Force majeure clauses may also refer to more general examples, such as acts of God. These provisions will likely give rise to debate as to what may or may not come within scope, and will need to be interpreted in context. One often cited comment is that the term is *"used with reference to all circumstances independent of the will of man, and which it is not in his power to control... war, inundations and epidemics are cases of force majeure..."*.

On 11 March 2020, the World Health Organisation announced its assessment that COVID-19 can be characterized as a pandemic. If your clause specifically refers to pandemics (or work stoppages, lay-offs or actions of government) as events of force majeure, then your clause may be activated by the outbreak of COVID-19 and subsequent events. Whether the clause can be relied upon to excuse, delay or cancel performance (as specified in the clause) will depend on a number of factors.

CAN YOU RELY ON THE FORCE MAJEURE PROVISIONS?

A force majeure event must not have been foreseen by the parties. For example, a party seeking to rely on widely drafted and non-specific force majeure clause entered into since the outbreak in China came to light, may find it difficult to convince a judge that the parties did not foresee the risk of COVID-19 impacting

the contract. Additionally, a counterparty may try to argue that the Covid-19 outbreak is not unforeseeable, in light of the SARS outbreak in 2002.

There must be a genuine failure or likely failure to perform and it must be established that COVID-19 caused the failure to perform i.e. the simple fact of COVID-19 existing will not be enough to be able to rely upon the force majeure provision, if the impact of the outbreak did not actually cause the party's failure to perform the obligations. (Bear in mind that the onus of proving that the event has prevented performance in manner outlined in the clause lies on the party seeking to avail of the force majeure clause.)

HOW DO YOU INVOKE THE FORCE MAJEURE PROVISIONS?

The provisions of the contract are also paramount. The force majeure clause will typically define the scope of the remedy available to the party and prescribe the steps to be taken to trigger the clause, for example, obligations to notify and mitigate. The contract may contain additional obligations which could also impact the operation of the clause, for example, obligations to adhere to 'good industry practice', or to put in place business continuity or disaster recovery plans and so forth.

Overriding factors such as industry specific regulation, codes of practice or international law may also be relevant. In addition, it should be remembered that any party claiming force majeure relief is usually under a duty to show it has taken reasonable steps to mitigate/avoid the effects of the force majeure event.

WHAT IF THERE ARE NO FORCE MAJEURE PROVISIONS?

A force majeure clause will not be implied into a contract as a matter of law. Therefore, in the absence of an express force majeure clause, a party could try to claim that the contract has been frustrated.

The doctrine of frustration provides that a contract may be discharged where circumstances arise (1) which were not envisaged at the time the contract was entered into, and (2) which render the contract impossible to perform or transform a party's obligations such that they are fundamentally different to those the parties originally agreed to perform. While similar in description to force majeure, the doctrine of frustration is a narrow one and requires a very high threshold to be met before it can be established. For example, a contract would not be frustrated simply because performance has become more expensive for a party to achieve.

PRACTICAL CONSIDERATIONS

- **Attempt to resolve the issue:** Parties should in the first instance discuss the matter and try to find a practical and reasonable solution. Given the global nature of this crisis, very few people will be unaffected so it will be worthwhile trying to reach a compromise, such as suspending obligations or reducing the level of those obligations until such time as they can be resumed in full. Record decisions reached and audit all mitigating actions.
- **Follow the procedure in the contract:** A force majeure clause generally sets out the steps that must be followed if a party wishes to claim force majeure. This usually involves giving the other party written notice within a certain period of time. It is important to follow these steps precisely to ensure there is no inadvertent breach of contract. The wording of the specific provisions should be carefully analysed. Identify other express obligations which mandate specific actions such as business continuity and disaster recovery plans.

- **Monitor developments:** Depending on the wording of the force majeure clause, redesignations by the WHO or new directions issued by the Irish government may affect whether or not COVID-19 falls within the scope of force majeure. These should be closely monitored as they may either bring COVID-19 within the scope of the clause, or may result in the force majeure event being brought to an end, in which case a party will need to follow the contractual provisions relating to resumption of obligations.
- **Insurance coverage:** Consider whether there is any insurance coverage in place that may cover losses arising out of COVID-19. Business interruption insurance may be relevant here, but the policy will need to be carefully assessed to determine if losses arising out of COVID-19 will be covered. As a result of the 2002 SARS outbreak, many policies may now exclude losses arising out of outbreaks of disease, epidemics or pandemics.