

Contractual considerations in the face of COVID-19: Force majeure and frustration

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One of the many consequences of current measures is that businesses and organisations are unable to operate as they did before, and many will find themselves unable to comply with their contractual obligations during this time.

This article explores two mechanisms that may be available to excuse the non-performance of contractual obligations in extraordinary circumstances, namely force majeure clauses and the doctrine of frustration.

Force majeure clauses

(a) What is force majeure?

Generally, where one party fails to perform its obligations under a contract, the law provides that the other party may sue the defaulting party for breach of contract. The party at loss has various reliefs available to them, which include seeking damages for the losses they have suffered or seeking specific performance of the defaulting party's obligations under the contract.

The inclusion of a force majeure clause in a contract may provide a defence to the non-performance of contractual obligations. This type of clause is designed to excuse one or both parties from performing their obligations under the contract if an event which falls within the force majeure clause occurs.

(b) The form and interpretation of force majeure clauses

The concept of force majeure has its roots in French law and, as such, has no prescribed meaning under Irish law. Therefore, the law does not automatically excuse a party from performing their obligations under a contract because an event that stops or inhibits them from doing so has occurred. The contract must contain a force majeure clause, the event in question must fall within that clause, and the event must have been the sole cause of the party's failure to perform their obligations under the contract.

Because force majeure clauses are the product of negotiation, the way in which they are drafted tends to differ widely from contract to contract. Some clauses may contain a list of situations that constitute force majeure events, such as acts of God, flood, drought, natural disaster, epidemic or pandemic. Others may be more general and provide that any occurrence beyond the reasonable control of the parties which prevents performance of the contract obligations constitutes a force majeure event.

The precise wording of the clause will be crucial in determining whether the occurrence in question constitutes a force majeure event that may excuse the performance of contractual obligations. The wording of the clause will also determine whether the event is so impactful that it excuses the party from performing their obligations. If a clause states that the event must "prevent" a party from being able to perform their obligations, that party will likely be required to show that performance is not just difficult, but impossible. On the other hand, a clause stating that the event must "hinder"

or “delay” a party from performing their obligations will likely require the party to show that performance is substantially more onerous, rather than impossible.

It is important to bear in mind that an event that causes the performance of a contract to be more expensive will not necessarily constitute a force majeure event. The courts are reluctant to excuse parties from performing their obligations when it is merely less commercially attractive to do so.

(c) Suspension or termination of the contract

The effect that a force majeure event will have on a contract will depend on the precise wording of the force majeure clause. Often, these clauses provide that the contract will be suspended for so long as the force majeure event continues, the parties will not be liable to one another for the non-performance of their obligations during that time, and the obligations will resume when the event comes to an end. Some clauses may also entitle either party to terminate the contract if the force majeure event occurs or continues beyond an agreed period of time.

Frustration

Where a contract does not contain a force majeure clause or where the force majeure mechanism is not otherwise available, the doctrine of frustration may provide an alternative means of protection for the non-performing party. Under the doctrine of frustration, a contract may be discharged when something occurs which makes it physically or commercially impossible to fulfil the contract, or radically alters the obligations that the parties agreed to undertake when they entered into the contract.

Frustration of a contract will often result in the contract being discharged and performance of the parties’ obligations cannot be reactivated when the frustrating event comes to an end.

Conclusion

While rarely used in ordinary circumstances, the force majeure clause may prove to be one of the most relevant ways for many organisations and businesses to mitigate adverse consequences arising from the COVID-19 outbreak.

In circumstances where each force majeure clause is specific to its own terms, parties wishing to rely on such a clause must consider the wording of the clause, the intentions of the parties and the overall contractual arrangements between them to ensure that the clause is validly and effectively triggered.

For further information, please contact [Laura Fannin](#) or [Ruth Prendeville](#) at Hayes solicitors.