

COVID-19 to lead to a force majeure outbreak?

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As the World Health Organisation (“**WHO**”) and national governments continue to battle the spread of COVID-19, the impact on travel, events, national economies and supply chains is evolving day by day. Although China’s importance to the global economy is well known, the COVID-19 crisis has brought into sharp focus how interlinked and dependent Western businesses are on China for its exports such as machinery, electrical equipment, iron and steel. The question now arises for those in the construction industry as to whether the COVID-19 outbreak is a *force majeure* event under their particular construction or supply contract.

Such contracts will often contain a *force majeure* clause which in most cases will be defined along the lines of the following terms:

“A Force Majeure Event means any event beyond a party’s reasonable control, which by its nature could not have been foreseen, or, if it could have been foreseen, was unavoidable...which prevents, hinders or delays a party from performing its obligations under the Contract...”

Many of these clauses go on to list examples of *force majeure* events which typically include the outbreak of war, terrorism, worker strikes, acts of God and crucially, epidemics or pandemics. Now that the WHO has declared COVID-19 is a ‘pandemic’ it may be easier to satisfy a triggering event requirement for force majeure under a construction contract especially if it prevents, delays or hinders performance of obligations under the contract. It would be hard to argue that the consequences of the COVID-19 outbreak, be it shipping delays or shortage of materials, are within a party’s ‘reasonable control’ and therefore employers, funders, contractors and subcontractors need to carefully consider the terms of their contracts as part of their ongoing risk assessment process.

Effect of force majeure

There is no doctrine of *force majeure* in Irish law and so in circumstances where there is a *force majeure* clause in a contract this will necessitate a forensic analysis of the contract. The Courts have regularly found that the proper interpretation of a *force majeure* clause is to interpret the clause by

reference to the words specifically used in the contract by the parties[1]. Where a *force majeure* clause refers to ‘prevention of performance’, then it appears from case law[2] that a party seeking to rely on COVID-19 as a triggering event would need to show that performance of its obligations is actually legally or physically impossible and not just difficult or unprofitable to do so. However, a *force majeure* clause which uses wording such as ‘hinders’ or ‘delays’ will be less onerous for a party seeking to rely on the COVID-19 outbreak as a triggering event. Although there may be a duty on a party to take reasonable steps to mitigate the effects of a *force majeure* event, the consequences of a party successfully invoking *force majeure* will commonly include:

- suspension of or relief from the party’s obligations under the contract;
- delay or non-performance will not lead to liability on the part of the party in default;
- extensions of time;
- renegotiation of terms; and
- right to terminate the contract after a period of time.

Analysis of contracts

As Roy Keane once famously said if you “fail to prepare, prepare to fail”, and so as the effects of the COVID-19 outbreak evolve, those in the construction industry would be wise to actively review their various contracts in order to determine any risk exposure they may have. By way of assistance, we set out in the table[3] below a short summary of the *force majeure* risk events as contained in a number of frequently used construction contracts. We also refer to circumstances where a party may be entitled to claim an extension of time and/or costs.

COVID-19 and public procurement

Finally, in relation to public sector construction contracts, an aspect for contracting authorities to consider is the extent to which modifications may be required to an existing contract due to the impacts of COVID-19 on performance of the contract. To the extent that the contract needs to be modified, there are exemptions under the EU Public Procurement Directives to allow changes to contracts for “*unforeseen circumstances*” that a diligent contracting authority could not have anticipated during the term of the contract. The implications arising from a further spread of COVID-19, such as delayed performance on construction projects, could necessitate changes to agreed milestone and completion dates and the application of liquidated damages.

For further information or advice, please contact our Construction, Project and PPP Team.

[1] *Coastal (Bermuda) Petroleum Ltd v VTT Vulcan Petroleum SA (No 2) (The Marine Star)* [1996] 2 Lloyd's Rep 383

[2] For example, *Tennants (Lancashire) Ltd v G.S. Wilson & Co. Ltd* [1917] AC 495

[3] Please note that this is a summary document only and although it seeks to summarise certain risks, the original contract forms should be referred to when required as such standard forms are commonly amended.

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Author

Angelyn Rowan
PARTNER

Hugh Cummins
PARTNER

Kerri Crossen
PARTNER

Michael Cahill
Associate



