

Contractual Implications of the COVID-19 Pandemic – Can it Excuse a Business from Performance of Contractual Obligations Under Contracts Governed by English Law?

by Joseph Lewin

The continuing COVID-19 pandemic is causing significant disruption across the globe with governments implementing a variety of measures, including travel restrictions, nationwide lockdowns and the cancellation of large-scale events, in an attempt to curb the spread of the virus. Such unprecedented measures mean that businesses around the world are now faced with the question of whether they will be able to perform their contractual obligations.

In this article, we consider the circumstances under which the COVID-19 crisis may either (i) constitute a force majeure event under a contract; or (ii) lead to a contract being discharged by frustration, and therefore allow one or more of the parties to avoid contractual performance.

Force Majeure

Purpose

A force majeure clause is a clause designed to excuse a party from the performance of its obligations under a contract upon the occurrence of certain specified events which are beyond that party's reasonable control. A classic example would be in the event of a natural disaster.

An example of a force majeure clause is as follows:

A party shall not be in breach of this agreement, nor liable for any failure or delay in performing any of its obligations under this agreement arising from or attributable to matters beyond its reasonable control. If such circumstances arise, the party concerned shall be granted a reasonable extension of time for performing its obligations. If the period of non-performance persists for 30 days, either party may terminate this agreement by giving 14 days' written notice to the other party.

If a contractual force majeure event occurs, then a contracting party may be excused

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from its contractual obligations without incurring any liability, and it may be able to suspend, or in certain circumstances, terminate, the contract.

Interpretation

The key determinant of whether an event can allow a party to be excused from performance is whether that event is in the drafting of the clause itself.

- **Scope** – The wording of a force majeure clause will determine whether the COVID-19 pandemic fall within its scope. The force majeure clause may refer specifically to a pandemic, or to other events which have occurred as a result of the pandemic, for example, an act of government which has prevented contractual performance. A party seeking to rely on a force majeure clause will need to carefully consider whether the COVID-19 pandemic constitutes a force majeure event, something that will ultimately depend on the precise wording of the clause.
- **Trigger event** – It will also be necessary for a party seeking to rely on a force majeure clause to demonstrate that the COVID-19 pandemic has caused that party's failure to perform its contractual obligations, often by hindering or preventing performance. Again, this will depend on the wording of the clause and the particular factual circumstances. However, the mere fact that a contract becomes more expensive to perform as a result of a force majeure event is generally insufficient to constitute a force majeure allowing that party to be excused from its obligations.

Mitigation and notification

Force majeure clauses often require the party seeking to rely on the clause to (i) give the other party notice of anticipation or occurrence of a force majeure event; and (ii) take reasonable steps to prevent or mitigate the effects of a force majeure event.

For example, prevention of a force majeure event in a supply of goods contract may require finding an alternative method of transportation for the goods if the desired method becomes unavailable.

Even if a force majeure clause does not expressly include an obligation to mitigate, the obligation may be implied by law, so it is prudent for parties to take steps to mitigate the impact of a force majeure in any event.

It is important that any notification and/or mitigation requirements are complied with correctly, as failure to do so may prevent a party from relying on a force majeure clause.

Consequences

If a valid force majeure event is established, the party relying on it may be entitled to:

1. temporary suspend contractual obligations with an extension of time to perform those obligations;
2. relief from liability for non-performance or delayed performance for the duration of the force majeure event; and
3. terminate the contract if the force majeure event continues for a specified period of time.

Frustration

If there is no force majeure clause in a contract, a party that is unable to perform its obligations will need to consider other possibilities.

In some circumstances, it may be possible for a party to rely on the doctrine of frustration, which can allow termination of the contract and discharge all parties from future obligations.

Frustration applies if an unforeseen event occurs *after* the contract was entered into, which renders performance of the contract impossible or radically different from what was agreed by the parties when the contract was formed.

Frustration is, in normal times, difficult to establish. Generally, a contract will only be frustrated in extreme circumstances.

In previous cases, the Courts have found that the destruction of the subject matter of the contract by fire or a change in the law making the contract illegal to perform were frustrating events. Generally, a contract will not be frustrated if (i) the event renders the contract more expensive or difficult to perform; (ii) an alternative method of performance is available; or (iii) the event is the fault of one of the contracting parties.

Although frustration requires a high threshold to be established, we are living in unprecedented times and it is possible that the COVID-19 pandemic may lead to the frustration of contracts which have become impossible to perform.

Practical considerations

Businesses that are faced with contractual obligations which have been significantly disrupted by the COVID-19 pandemic should:

- identify whether any key contracts contain a force majeure clause, and determine whether the COVID-19 pandemic, or any events relating to the pandemic, might fall within the definition of a force majeure event;
- ensure strict compliance with any notice or mitigation requirements set out in the force majeure clause itself. Even if a force majeure clause does not contain a mitigation obligation, steps to mitigate the impact of a force majeure event should be taken in any event as the duty may be implied by law, and records of any steps taken should be kept; and
- if a contract does not contain a force majeure clause, consider whether frustration may be available.

Dorsey are experts on the matters discussed in this article and have advised clients on force majeure and frustration previously. For more information, please contact [Timothy Maloney](#) or [Matthew Blower](#) in our European Arbitration, Dispute Resolution and Commercial Litigation Practice.

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