

Coronavirus: contracts, force majeure and frustration (quick read)

Short version - as the coronavirus situation and potential impact on commercial and business interests unfolds, businesses are looking to their contracts to ascertain what will happen if contracted goods and services cannot be provided due to the impact of the virus.

09 March 2020

Please note: the information contained in this legal update is correct as of the original date of publication

As the coronavirus situation and potential impact on commercial and business interests unfolds, businesses are looking to their contracts to ascertain what will happen if contracted goods and services cannot be provided due to the impact of the virus.

In ordinary circumstances, a failure to meet the obligations in an agreement will mean that party is in breach of contract. Depending on the nature of the contract, such failure could have disastrous consequences for both parties. The party in breach may be liable for damages, not to mention legal fees, whilst the party on the receiving end of the breach may find itself without the goods or services it has procured, having to find additional time and cost to bring a damages claim and then having to re-procure the goods or services. It is therefore not surprising that businesses are asking whether the contractual and commercial effects of coronavirus, where this has a significant impact on a particular contract, can be dealt with through the doctrine of frustration or force majeure.

Frustration

The legal doctrine of frustration enables a contract to be discharged if an event occurs which the parties could not have foreseen and which either makes the contract physically or commercially impossible to fulfil (for example, in a venue hire contract where the venue is destroyed by fire) or changes the parties' obligations under the contract so drastically that it would be unjust to compel them to continue (for example, performing the contract becomes illegal due to a change in law). The event must be fundamental to the contract and the impact must be more than making performance more expensive or difficult. If a contract is deemed frustrated, it terminates immediately.

Force majeure

An express force majeure clause in a contract allows obligations under the contract to be suspended if specified events or disruptions occur which are outside the control of the parties. This means the non-performing party is not liable for its failure to comply with the contract for as long as the force majeure event continues. Depending on how the clause is drafted, it can also set out a procedure for one or both parties to decide whether to continue with the contract after the period of disruption or terminate in a managed fashion by serving notice.

Courts will not imply force majeure provisions into a contract: if there is no force majeure clause, the parties' only alternative to deal with unexpected events is under the doctrine of frustration.

Often (but not always) there is a requirement for a force majeure event to be unforeseeable or outside of the control of the parties. It is arguable whether a reasonable supplier should have made contingency plans for illness and shortage of resources, in which case it may not satisfy this requirement. Events or situations that make a contract more expensive or more difficult to perform are generally not regarded as force majeure events.

Coronavirus

To establish whether a force majeure clause in a contract is relevant to the coronavirus situation, it is important to carefully review the drafting to identify the acts, events or circumstances that can trigger the clause. Some clauses provide an exhaustive list of trigger events that may be applicable, such as pandemic (very recently declared by the WHO making it more likely that force majeure clauses specifying pandemics are engaged) or perhaps government interventions or changes of law in respect of, for example, new powers of compulsory detention and isolation. However, force majeure clauses are often drafted more widely to refer to events beyond a party's control. The party wishing to rely on the force majeure clause would need to prove that the coronavirus has prevented it from fulfilling its contractual obligations.

In determining whether a force majeure event has arisen, we need to consider:

- whether the specific contract requirements for an event to be declared as a force majeure event have been met;
- the extent to which the outbreak has prevented, hindered or delayed the performance of the contract;
- whether the circumstances were unforeseeable or out of the parties' control (if lack of foreseeability is included in the drafting); and
- whether there are any alternative means available for performing obligations and steps which could be taken to avoid or mitigate the coronavirus outbreak and its consequences.

Where the clause is triggered by an event which prevents performance, the effects of coronavirus on a particular contract must make it legally or physically impossible for a party to perform its obligation. Alternatively if the clause is triggered by delays in performance, this may be easier to satisfy, depending on the nature of the contract. For example, a provider of critical emergency support services ought to have contemplated how services could be provided in the event of large scale disruption, illness or other nationwide emergency and may not be able to rely on force majeure in these circumstances. Where the only impact is additional cost to perform the contract, force majeure is also unlikely to help.

If the coronavirus situation does not constitute a force majeure event based on interpretation of the clauses (if included in the contract at all), it is unlikely that the doctrine of frustration would, in the current circumstances, provide an alternative defence. Frustration is very rarely used successfully and the courts are reluctant to apply it, even though they may have sympathy for the particular circumstances (although this may change should there be a government imposed lock-down). This is likely to lead to a large number of frustrated (but not in the legal sense) customers and businesses.

Get in touch with Paula Dumbill, [Jonathan Tardif](#), Angela Konteas or [Connor Griffith](#) to find out more.

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