

Force Majeure

Businesses should carefully consider their contracts and obligations during the coronavirus outbreak. What are the options for companies if they are unable to fulfill their obligations in contract?

Where a party is unable to fulfil a contract for the supply of goods and/or services exclusively due to the impact of the coronavirus, there are two main potential ways to discharge the contract, namely 'force majeure' and frustration.

Force majeure is a term used to describe an event that is beyond the control of the parties and which ultimately then prevents them from fulfilling their obligations in contract or makes fulfilling the contract impossible.

Force Majeure Clause

Parties should first check to see whether the contract contains a force majeure provision. This may often be presented differently, for example a description of an 'exceptional event' would be a force majeure provision. It would be advisable to check whether this extends to such an event like a pandemic or if the clause allows the inference of such an event - some clauses may be wide and reference any event beyond the reasonable control of the parties. If the contract does contain a force majeure clause, or similar, it cannot be assumed that such provisions will necessarily be triggered by coronavirus. This will very much depend not only on the wording of the provision, but also on the impact which coronavirus may have on a party's performance. Parties should consider:

- Is force majeure a defined term within the contract?
- Are there any examples provided in the contract such as epidemic, pandemic, or Government sanctions?
- What is the impact of coronavirus on performance?
- What steps have you taken to mitigate the effect?

Parties will need to consider if the completion of contract has been completely prevented or if it has been simply made more inconvenient or expensive. If it is either of the latter two then it may not be enough to discharge the contract. A force majeure clause may also stipulate what is to happen in such an event whether that be a pause, a right to terminate after a certain time, a right to vary the contract or automatic termination. Any clause may also state what will happen if such an event occurs, for example, what happens in respect of payments both past and future.

Contract Frustration

In the event that a contract does not include an express force majeure clause, the contract may be considered frustrated. Contract frustration occurs when the contract becomes impossible to perform and therefore cannot be completed. This can often be a high threshold to meet on the basis that performance of the contract must be rendered impossible rather than difficult or expensive to rectify. If a contract is frustrated, the contract will immediately be terminated, and both parties released from their future obligations.

As the parties released from future obligations, the goods or service to be provided would not be and future payment would not be required. Frustration would not impact upon the requirement to pay for work done to date. Where there has been payment up front for work not yet carried out, or perhaps on partially carried out, or a deposit has been paid, these sums should be refunded, minus reasonable costs incurred or work done.

One of the key instances in which frustration may occur is when a contract becomes illegal to perform. In the case of coronavirus it could be argued that because the Government ban certain actions it therefore becomes illegal and impossible to fulfil the contract. If this is accepted any obligations under the original contract cease and the work to date is paid for, before both parties go their separate ways.

Further information about contracts and coronavirus is available on the radar Coronavirus portal.



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