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COVID-19: CONTRACTUAL CONSIDERATIONS

In light of the unprecedented measures that have been implemented by the Irish Government over the past number of weeks, it is likely that many businesses have faced considerable disruption to their normal operations. As a result of this disruption, businesses may find themselves in a position where they are unable to complete certain contractual obligations.

As a precautionary measure, businesses may wish to review their current contracts in order to determine whether they are protected or can avail of some form of relief, in case they are unable to perform their obligations.

Certain legal clauses and doctrines, such as *force majeure* and *frustration*, may apply to these contracts and may temporarily or permanently relieve a party from the performance of its obligations. Whether a *force majeure* clause or the doctrine of *frustration* can be relied upon will depend on the exact circumstances of each case, so each case and contract will need to be individually considered to ascertain whether the Covid-19 outbreak will be relevant.

Force Majeure

A *force majeure* clause is often inserted into contracts to either excuse a party from performing their obligations or suspend their obligations due to unforeseen circumstances outside of their control which renders the action impossible. Under Irish law there is no standard definition nor legal presumption of *force majeure*. This means that in order for a party to rely on it, they must insert an express *force majeure* clause into their contract.

Generally such a clause will include a non-exhaustive list of unforeseen events and circumstances which will trigger a *force majeure*. Obviously any reference to a disease or pandemic would be

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useful, given the current situation, however terms such as “Act of God” or “Act of Government” could also be potentially relied upon in some cases. It is likely that a Court will find a general catch all *force majeure* clause to be void for uncertainty.

Force Majeure in Irish Courts

When determining whether a *force majeure* clause is effective, the court may have regard for whether the party seeking to rely on the clause took reasonable steps which could have avoided or mitigated the effects of the event, and also whether the party complied with any other relevant obligations in the clause. Some of the other relevant obligations in the clause may require the party to:

- ▣ Serve notice of the *force majeure* in writing within a certain time;
- ▣ Outline and / or estimate the impact and duration of the effects resulting from the *force majeure*; or
- ▣ Serve a notice of the cessation of the event.

If the party seeking to rely on the clause satisfies these requirements then the court will be more likely to suspend or, if there is a time limit on the contract, potentially terminate the contract.

Force Majeure in the context of the Covid-19 Pandemic

In order for a party to rely on a *force majeure* clause within the context of the Covid-19 pandemic, they must demonstrate that the clause is sufficiently clear and that the outbreak is the sole cause of them not fulfilling their obligations under the contract. It is of key importance to identify the precise reason or circumstance giving rise to the inability to perform the contractual obligation and not just cite Covid-19 in the abstract even if it may be the underlying or indirect cause.

There are also a number of other factors which the courts will take into account when determining whether the pandemic would constitute a *force majeure* event, including, whether the virus merely hindered performance, or whether it made it impossible, and whether the outbreak was foreseeable at the time the contract was made. The exact level of disruption caused by the virus that will be required by the courts in order to trigger a *force majeure* clause will depend on the exact wording of it.

Finally a party to a contract that faces a breach by the other party must take reasonable steps to mitigate the potential harm that the breach may cause.





Frustration

In the absence of a *force majeure* clause, parties may seek to rely on the doctrine of *frustration*. This may allow a party to be relieved of any liability under a contract in the event of a breach where a party is prevented from, or unable to, perform their obligations under the agreement due to an event that occurs outside of their control.

The threshold for *frustration* in Ireland is extremely high and Irish courts have traditionally been reluctant to allow parties to rely on it in order to relieve themselves of their obligations under the contract. In order for a party to successfully claim *frustration*, the frustrating event cannot have been envisaged by the parties. This means that the event cannot have been provided for within the contract. In recent years parties have included protection from a pandemic in their contracts following

the outbreaks of SARS and MARs. Any contract which has protection against pandemics will be precluded from relying on *frustration* as a result of the Covid-19 outbreak.

As recently as 2009 the Irish courts confirmed the narrow scope of the doctrine of frustration. However, there are some situations which may become relevant following the effects of Covid-19 in which parties may be successful in a claim:

-  where there has been a death of a party to a personal contact;
-  where the concept of the business venture is rendered impossible;
-  where unforeseen events have increased the burden of performance; or
-  where there has been a delay which could not have been anticipated.

In 2011 the Irish High Court confirmed that frustration will not provide protection in circumstances where the profitability of a contract has been adversely affected due to changes in the economy.

Conclusion

While a *force majeure* clause and the doctrine of frustration may provide some relief for some contracting parties, they are still quite difficult to rely on in the Irish legal system. As a consequence, we would recommend that contracting parties, who find themselves in difficulty, should seek, in the first instance, to discuss potential commercial workarounds with their counterparts within the current Covid-19 environment before contemplating the alternative legal route.

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