



LITIGATION AND DISPUTE RESOLUTION

Can We Rely on Force Majeure Because of COVID- 19?

by **Jane O'Grady**

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Jane O'Grady addresses FAQs about Force Majeure and Contracts in relation to the COVID-19 pandemic.

As the COVID-19 crisis continues to disrupt ordinary life and businesses face difficult choices to continue trading, many are seeking to invoke the force majeure clauses in their contracts to stem their financial losses.

Force majeure clauses can limit a party's risk in contracts when unforeseen events outside the control of the parties arise. They allow a business to delay or not commence its contract obligations without incurring liability. Businesses are familiar with heavily negotiating other liability provisions but force majeure clauses have been misperceived as a straightforward relief with little or no consequential effects. Yet, this is not always the case.

In this article, we answer questions currently being asked about contract obligations and provide practical guidance to mitigate future risk in commercial agreements.

1. Can we trigger the force majeure clause in our contracts because of COVID-19?

To trigger a force majeure clause, the circumstances relied on must be unforeseeable by all contracting parties and the obligations must be impossible to perform (not merely difficult) due to the force majeure event. Since there have been previous outbreaks of strains of flu, a force majeure clause may not cover the occurrence of COVID-19 or the social restrictions imposed by the government. The terms of individual contracts should be reviewed to determine whether the force majeure provisions apply to the current pandemic. Some force majeure clauses include an exhaustive list of qualifying events and are not broad enough to cover epidemics or pandemics. Notably, COVID-19 may not be an "Act of God", the common sweeper term used to cover unforeseen events in most force majeure clauses.

If a contract's force majeure clause does not expressly refer to "pandemics", "epidemics" or "outbreaks of communicable diseases", there may be a need to instead assess whether the contract has been frustrated to avail of that relief. Force majeure does not apply if it remains possible to continue or commence performing the contract obligations even if doing so is an economic burden. In such circumstances, an alternative solution may be to negotiate to vary the contract terms for the duration of the COVID-19 emergency.

Please [click here to read our article on the frustration of contracts](#) in the context of COVID-19.

2. We don't have written contracts / Our contracts don't have a force majeure clause. Can we suspend or terminate them because of COVID-19?

No. Relief for force majeure is only available in a contract that expressly provides for it. A common misunderstanding is that unforeseen events alone give rise to force majeure rights but there is no such implied right in Irish law. It may be due to this misperception that many parties fail to have written contracts

that include a force majeure clause.

Where a contract: does not allow for force majeure; is a verbal contract or a contract concluded by conduct, a party may only be able to rely on the doctrine of frustration to avoid performance. Frustration as a defence is, however, narrowly interpreted by courts and may be difficult to prove.

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3. What steps do we need to take to activate our force majeure clause?

Requirements differ, so a contract should be reviewed to determine:

- whether COVID-19 is a triggering event and
- what effect triggering the force majeure clause will have on the contract continuing after the force majeure event ends.

Prior to activating a force majeure clause the following questions should be considered and any relevant actions addressed:

- *Are there any prevention and mitigation obligations regarding the force majeure event?* Even for Covid-19 compliance may be relevant in being able to demonstrate business continuity measures before giving notice of a force majeure event.
- *Is there a deadline to give notice?* Force majeure clauses often contain strict time limits to notify other parties to a contract that a force majeure event has occurred. Be attentive to express deadlines that must be met to rely on a force majeure clause without breaching the contract.
- *How do we give notice that a force majeure event has occurred?* Many contracts contain strict notice clauses specifying how any notice required under the contract is to be delivered. Social distancing means many people are currently working at home and notice requirements may not be adequate. Contracts should be urgently reviewed for the form of notice to determine whether an alternative method of providing notice needs to be agreed.

4. How do we protect our interests in contracts in the future?

The duration of the present crisis is unpredictable at this stage. If possible, act to find some reasonable compromise with suppliers and customers in order to maintain those relationships. Parties are generally free to renegotiate their contracts. Any variation should be documented as an amendment or addendum to the which is executed by all parties to avoid unintended consequences of relying on a verbal agreement.

Take notice of what is covered as a force majeure event in new contracts and remember the circumstance must be unforeseeable.

Negotiate new contracts to limit and mitigate your liability and risk against business interruption from other infectious diseases.

Consider the practicalities of complying with any proposed mechanism to trigger force majeure rights in any new contract and amend requirements that may be unworkable in situations of mass lock-down.

For queries or advice, please contact Jane O'Grady at jogrady@lkshields.ie.

To view our cross-disciplinary coverage of business continuity during the COVID-19 outbreak, please visit our dedicated [special insights page](#) and sign up to our mailing list by [clicking here](#).

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