

## **Coronavirus: Contract issues**

Businesses enter into contracts every day and with the Coronavirus crisis it has become clear that many businesses cannot fulfil their obligations. Obviously this is a worrying time for small businesses facing an uncertain future. Our advice line solicitors are responding to an increasing number of queries around the contractual impact of Coronavirus, for example if/when contracts can be cancelled, when/how contracts can be frustrated and questions around force majeure.

In this guidance we'll aim to answer those questions with reference to the position under English law.

### **Contractual issues**

#### **Can I cancel a contract?**

Whether you can legally terminate a contract will always depend on your specific circumstances, including the wording of the contract and the events giving rise to an alleged right to terminate. The right to terminate might also be affected by other factors, such as the waiver of a breach.

The most common termination events include: if the other party is in breach of their obligations or an express/implied term in the contract which allows for termination.

Other examples include: expiry - at the end of a fixed term, a contract is said to have expired, performance, mistake, illegality or frustration (see below).

#### **Other contractual issues**

Broadly speaking, the general rule is that if you enter into a contract you are required to perform your obligations or face potential liability if you don't. There are two main exceptions to this rule, having a relevant force majeure clause in a contract or the legal concept of frustration.

#### **What is force majeure?**

Generally, it's the legal term used to explain how the parties' obligations under a contract are impacted by certain events or circumstances outside their control. It's important to know that under English law, force majeure is not defined by legislation or case law. And you cannot imply it in a contract which means it must be in the contract if you want to rely on it.

If your contract does contain such a clause you'll need to scrutinise the wording carefully to determine if a party can rely on it in light of the coronavirus crisis. A well drafted force majeure clause may lead to the following consequences:

- Non-liability or suspension of contractual obligations;
- Extension of time to complete obligations or renegotiation of terms;
- An obligation to mitigate losses or a right to terminate the contract.

#### The main points to consider:

- The specific wording of the force majeure clause;
- Any list of force majeure events or specific exclusions;
- The consequences of a relevant force majeure event;

- Are any of the following words mentioned in relation to the force majeure clause: Covid-19/epidemic/pandemic/outbreak/act of God or government action? Note: even if it is, other requirements may still need to be satisfied to constitute force majeure;
- Are there mitigation or avoidance duties included in the contract e.g. where there is a duty to show the reasonable mitigation steps or a duty to avoid the effects of the force majeure event;
- If a party wants to rely on the force majeure clause, what evidence is available and is there any notice requirement stated in the agreement?
- How has the force majeure event hindered, prevented or delayed performance?

### **What is contract frustration?**

As stated above, there are two main exceptions to the general rule that parties must fulfill their obligations under a contract. We've discussed force majeure and the second exception is frustration.

Generally, this common law principle provides that a party is discharged from their contractual obligations if a change in circumstances makes it physically or commercially impossible to perform the contract, or would render performance radically different. This is not an easy task but one example where this high bar may be reached is if there is a government imposed lockdown, but ultimately that will be for a court to decide depending on the exact circumstances of each case.

The consequences of frustration of contract include recovery of monies paid under the contract before it was discharged, subject to an allowance, at the court's discretion, for expenses incurred by the other party.

### **Conclusion**

If you are currently entering into a new contract, ensure that you are comfortable with all the terms, especially any provision around force majeure.

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