

Contractual obligations and Covid-19

Despite England's so-called 'freedom day' seeing the end of nearly all measures for mitigating the spread of Covid-19, the disease continues to cause problems for millions of people across the country. With many people forced into self-isolation and the announcement that 'vaccine passports' will become a requirement for entry into nightclubs (and possibly other mass gatherings), it is clear that we cannot yet wave goodbye to the disruption and uncertainty caused by the pandemic. Here we set out how Covid-19 may continue to affect contractual agreements – both those currently in existence and those currently being negotiated.

Frustration

In some circumstances, performance of a contract may be "frustrated". A contract may be discharged on the ground of frustration when something occurs after the contract has been entered into which makes it physically or commercially impossible to fulfil the contract, or changes the parties' obligations into something entirely different from what they had envisaged.

In the context of Covid-19, a contract might well be frustrated because of a change in the law that makes fulfilling the contract illegal. Parties who entered into contracts before the pandemic are unlikely to have contemplated performance of their contractual obligations becoming impossible as a result of it. However, it may be harder to claim that any contracts entered into after the pandemic started (including those being negotiated now) are frustrated by future government measures, as it may be deemed that the reintroduction of measures was foreseeable.

It is important to bear in mind that a contract will not have been frustrated simply because it is no longer commercially attractive or has become more difficult to perform due to the impact of Covid-19. For example, a

KEY QUESTIONS TO ASK

- Q:** What are the parties' obligations under the contract, and when must they be performed?
- Q:** How does the continuing Covid-19 uncertainty impact on the parties' ability to perform their respective obligations under the contract? What specific practical difficulties does it create?
- Q:** Does the contract contain provisions allowing one or both parties to terminate it, or postpone performance? If so, in what circumstances can the parties do so?
- Q:** Does the contract explain what the consequences of termination or delay would be?
- Q:** Is performance of the contract physically or commercially impossible (see 'Frustration')?
- Q:** Or, can you rely on Covid-19 and its effects as a force majeure event? Is there an express force majeure clause in the agreement? What, in practice, are the consequences of invoking it?
- Q:** What would you ideally like to achieve – ending, suspending or varying the contract – and how important is it to preserve your commercial relationship with the other party?
- Q:** Can you reach agreement with the other party and if so, what does the contract say about how it can be varied?



commercial tenant that operates a nightclub would be unlikely to establish that a requirement to determine the vaccination status of customers as a condition of entry has frustrated its lease – even if the profitability of its nightclub business is affected due to having to spend large sums on the required technology and/or staff training. Ending a contract without legal justification for doing so could result in you being liable to the other party for financial losses they suffer as a result of your wrongful termination of the contract.

A party cannot rely on the concept of frustration if the contract has already made express provision for Covid-19 and its impact (see ‘Force majeure clauses’ below). Many parties entering into contracts after March 2020 will have ensured that the contract makes express provision for the impact of Covid-19.

If a contract is frustrated, it is dissolved permanently. The parties are excused from performing future obligations under the contract and are not liable for non-performance. In many cases, some or all the money paid before the frustrating event will be recoverable. However, a party will be able to recover reasonable expenses they have incurred relating to their contractual obligations before the contract was frustrated.

Force majeure clauses

Force majeure refers to a set of circumstances beyond the reasonable control of the parties to a contract. You can't rely on force majeure unless the contract expressly refers to it. If so, the contract will define what a force majeure event is, for example, war, natural disasters, disease, “acts of God” and so on. The volcanic ash cloud in Iceland that caused major travel disruption in 2010 is an example of a force majeure event.

Where any of these circumstances apply, the parties will be excused from performance of their obligations, at least until the conclusion of the force majeure event(s). A force majeure clause will normally set out clearly how the obligations under the contract will be affected in the event that the clause is triggered.

If your contract contains a force majeure clause, you will need to carefully review the wording and consider whether the impact of Covid-19 falls within the definition. You will also need to be able to show that the force majeure event has prevented, or sufficiently delayed or

hindered, the performance of the obligations under the contract, i.e. that there is a causal link.

If you intend to invoke a force majeure clause, you will need to discuss the matter with the other party to the contract and, preferably, reach agreement.

COMMERCIAL CONSIDERATIONS

- You may need to raise these points during negotiations with the other party to try to reach agreement – rather than before a court.
- You will want to factor in how important the relationship is to you and to the other party, and what concessions you, and they, are likely to make to preserve the relationship.
- Take care during your discussions to make sure you are not breaching the terms of the contract, admitting liability, and/or waiving your rights. It is advisable to have those discussions on a without prejudice basis, i.e. “off the record”.
- Don't forget to check your insurance policies, and consider whether losses as a result of Covid-19 would be recoverable under the policy. Most policies require that you notify the insurer of an intention to claim or circumstances that may give rise to a claim as soon as reasonably possible, so you should review your policies and consider whether notification is necessary.

Get in touch

Should you have any questions or would like some more detailed advice, do not hesitate to get in touch.



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