



# L&RS

## Note

### *Force majeure* and frustration of contracts in the Covid-19 emergency

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#### Abstract

The spread of COVID-19 and the resulting lockdown has placed a number of sole traders and businesses in a precarious financial situation. Limitations to the labour market and interruptions of supply chains (both domestically and internationally) have made it difficult for individuals and businesses to fulfil contractual obligations, many of which were entered into prior to the Covid-19 emergency. This paper looks at how those individuals and businesses might limit their contractual liability should they find themselves in a position where they cannot fulfil their contractual obligations. The paper also examines possible legislative reforms to the law affecting frustration of contracts and *force majeure* clauses in contracts.



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## Frustration

Frustration occurs when contractual obligations can no longer be performed (where the performance of the contract is impossible, illegal or radically different from what was intended) as a result of unforeseen circumstances which are beyond the control of either party. It is not enough that a contract becomes more expensive or onerous than originally contemplated. In Ireland, the doctrine of frustration has been very narrowly interpreted.<sup>1</sup>

In the case of *Ringsend Property Ltd v Donatex Ltd*,<sup>2</sup> Kelly J explained that the doctrine of frustration is “one of limited application and narrowness” and arises “in circumstances where performance of a contract in the manner envisaged by the parties is rendered impossible because of some supervening event not within the contemplation of the parties”.

In cases where frustration has been successfully argued, all future obligations under the contract are deemed to be discharged, bringing the contract to an end immediately - automatic discharge happens without the need for either party to take any further steps. The contract is not void *ab initio* (parties are not returned to the position that they were at immediately prior to the contract).<sup>3</sup>

In cases where there has been a total failure on one party to meet contractual obligations as a result of the circumstances causing frustration, it is likely that the court will order the return of any money paid.<sup>4</sup> This would not apply to partial frustration, unless the affected part of the contract is deemed by the court to represent a separate contract.<sup>5</sup>

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<sup>1</sup> Paul A McDermott and James McDermott, *Contract Law*, 2<sup>nd</sup> Ed, Bloomsbury Professional, Dublin: 2017, [21.01] and [21.03]. See also Norton Rose Fulbright, [‘Force majeure/hardship clauses and frustration in English law contracts amid COVID-19’](#), March 2020 (last accessed 2 April 2020).

<sup>2</sup> [2009] IEHC 568.

<sup>3</sup> Paul A McDermott and James McDermott, *Contract Law*, 2<sup>nd</sup> Ed, Bloomsbury Professional, Dublin: 2017, [21.83], [21.85]. See also *Byrne v Limerick Steamship Co* [1946] IR 138 at 150 per Overend J and Norton Rose Fulbright, [‘Force majeure/hardship clauses and frustration in English law contracts amid COVID-19’](#), March 2020 (last accessed 2 April 2020).

<sup>4</sup> *Fibrosa v Fairbairn* [1943] AC 32 (HL).

<sup>5</sup> *Ringsend Property Ltd v Donatex Ltd* [2009] IEHC 568.

## Force Majeure

In practice, parties don't rely on the common law concept of frustration. Rather, they frequently utilise contractual provisions designed to deal with unforeseen difficulties. These are known as *force majeure* clauses and are particularly common where the contract is of a kind where the parties can foresee that such problems are likely to occur but cannot foresee their nature or extent.<sup>6</sup>

Typically, a *force majeure* clause in a contract will:<sup>7</sup>

- set out a list of matters that qualify as *force majeure*;
- explain the contractual consequences of these events; and
- provide for specific conditions or exceptions.

A *force majeure* event is an objective event or situation which is:<sup>8</sup>

- (1) unforeseeable (at the time of entering into the contract),
- (2) unavoidable in terms of occurrence or impact, and
- (3) impossible to overcome.

A party relying on a *force majeure* clause must satisfy any obligations stipulated in the clause. For example, written notice may need to be served within a specified timeframe to trigger the clause, other parties may need to be informed of the potential impact and duration of the event, and relevant parties may need to take specified actions to mitigate the effects of the event.<sup>9</sup>

In Ireland, a *force majeure* clause will not be implied into a contract as a matter of law. Further, the doctrine of certainty of contract requires that vague or unspecific contractual clauses may be declared invalid.<sup>10</sup>

Since the outbreak of foot-and-mouth disease in 2001, it has become more common to specify epidemics and pandemics as *force majeure* events. Other types of events that may be specified as *force majeure* events may include a general outbreak of disease, war, work stoppages, actions of governments and extreme weather events. In addition, some contracts may include industry-specific eventualities such as a pilot's strike (in relation to the airline industry) or a local insurrection (in relation to the mining industry).<sup>11</sup>

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<sup>6</sup> Paul A McDermott and James McDermott, *Contract Law*, 2<sup>nd</sup> Ed, Bloomsbury Professional, Dublin: 2017, [21.03].

<sup>7</sup> Norton Rose Fulbright, '[Force majeure/hardship clauses and frustration in English law contracts amid COVID-19](#)', March 2020 (last accessed 2 April 2020).

<sup>8</sup> Claudia Galvis, Jose Moran and James Obrien, '[Coronavirus Outbreak: Global Guide to Force Majeure and International Commercial Contracts](#)', *Baker McKenzie Global Compliance News*, 19 March 2020 (last accessed 2 April 2020).

<sup>9</sup> Paddy Murphy and Sarah Plunkett, '[Force Majeure Clauses: Contracting Against the Coronavirus](#)' *William Fry News Article*, 6 March 2020 (last accessed 2 April 2020).

<sup>10</sup> Paul A McDermott and James McDermott, *Contract Law*, 2<sup>nd</sup> Ed, Bloomsbury Professional, Dublin: 2017, [2.153].

<sup>11</sup> Arthur Cox, '[COVID-19 Practical Considerations: Force Majeure clauses in contracts](#)', 20 March 2020 (last accessed 2 April 2020).

## The Covid-19 emergency and contractual liabilities

As highlighted by [Associate Professor Brian Hutchinson](#), UCD School of Law:<sup>12</sup>

“The full impact of the coronavirus outbreak and the knock-on effect of emergency measures worldwide on international and domestic trade remains to be seen. Already, however, the substantial disruptions to the Chinese (and international) supply chain, and the shortages in the labour market caused by lockdowns and travel restrictions ... have placed a common question on the tips of the tongues of contracting parties around the world: who is liable to pay for this disruption?”

Thus, a general *force majeure* clause may not provide sufficient or effective protection against a Covid-19-related event even if the event limits the capacity of a party to satisfy contractual obligations.

It is expected that Irish courts will likely interpret a *force majeure* clause strictly and whether the Covid-19 emergency would constitute a *force majeure* event will depend on an objective interpretation of a number of factors including:<sup>13</sup>

- whether the event is covered by the terms of the contract,
- whether the virus hindered performance of the contract or made it impossible, and
- whether the outbreak was foreseeable at the time the contract was made.

The court's determination will also depend in part on the governing law of the contract, as the concept and effect of *force majeure* varies significantly even across European jurisdictions.<sup>14</sup>

A party hoping to rely on frustration or a *force majeure* clause must be able to prove that the intervening event could not have been foreseen by the parties. A widely drafted and non-specific *force majeure* clause, entered into after the outbreak in China, may find it difficult to convince a judge that the parties did not foresee the risk of Covid-19 having an impact on the contract. Another counter argument may look at whether the Covid-19 outbreak was actually unforeseeable, especially in light of the relatively recent SARS, H1N1 influenza ('swine flu') and MERS outbreaks. The party looking to invoke the defence must also show a genuine failure or likely failure to perform the contractual obligations and that Covid-19 was actually the cause. For many contracting parties, Covid-19 intervention will only render performance more difficult or costly, not impossible or different, so the argument is unlikely to provide a successful defence.<sup>15</sup>

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<sup>12</sup> G. Brian Hutchinson, 'Is the Coronavirus Outbreak a Frustrating or Event?' (2020) *Commercial Law Practitioner* 27(3), p. 42.

<sup>13</sup> See Paddy Murphy and Sarah Plunkett, '[Force Majeure Clauses: Contracting Against the Coronavirus](#)' *William Fry News Article*, 6 March 2020 (last accessed 2 April 2020); Walkers, '[Coronavirus pandemic: Force majeure and frustration under Irish law](#)' *Advisory*, March 2020 (last accessed 2 April 2020); Claudia Galvis, Jose Moran and James Obrien, '[Coronavirus Outbreak: Global Guide to Force Majeure and International Commercial Contracts](#)', *Baker McKenzie Global Compliance News*, 19 March 2020 (last accessed 2 April 2020).

<sup>14</sup> Osborne Clarke, '[Will coronavirus be a force majeure event? It depends on your governing law](#)' *Insights*, 12 March 2020 (last accessed 2 April 2020).

<sup>15</sup> Arthur Cox, '[COVID-19 Practical Considerations: Force Majeure clauses in contracts](#)', 20 March 2020 (last accessed 1 April 2020); G. Brian Hutchinson, 'Is the Coronavirus Outbreak a Frustrating or Event?' (2020) *Commercial Law Practitioner* 27(3), p. 42.

# Legislative intervention

## Existing legislative protection

Regulation 7 of the [Consumer Protection Act 2007 \(Grocery Goods Undertakings\) Regulations 2016](#) (SI 35/2016) provides parties to a grocery goods contract with a level of legislative protection, limiting the liability of a party for a delay or failure to perform a contractual duty “resulting from circumstances beyond the reasonable control of the party concerned”. Where the circumstances persist for a specified continuous period of time, either party may terminate the contract.

In the airline industry, passengers may be protected in specific cases due to unexpected events such as flight delays or cancellations.<sup>16</sup>

## Possible future legislative intervention?

Given the potential for mass disruption to supply chains and shortages in the labour market, some legislative protection may be necessary to protect parties to a contract who struggle to satisfy their contractual obligations, through no fault of their own.

Legislative reform could:<sup>17</sup>

1. retrospectively insert a *force majeure* clause into all contracts settled before January 2020 (pre-Covid-19 contracts) through emergency legislation covering the duration of the Covid-19 emergency;<sup>18</sup>
2. lower the ‘impossibility of performance’ threshold of frustration to a lesser requirement such as ‘impracticability of performance in the circumstances’;
3. confer a discretion on the courts to intervene by varying the terms of the contract or partially cancel the contract in cases where circumstances make contractual obligations unduly onerous on one or more party; and/or
4. impose a duty on the contracting parties to enter into negotiations where one party can show that, due to the Covid-19 emergency, specific performance of the contract is unduly difficult.

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<sup>16</sup> [Regulation \(EC\) No 261/2004](#) of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91.

<sup>17</sup> See Paul A McDermott and James McDermott, *Contract Law*, 2<sup>nd</sup> Ed, Bloomsbury Professional, Dublin: 2017, [21.93]; G. Brian Hutchinson, ‘Is the Coronavirus Outbreak a Frustrating or Event?’ (2020) *Commercial Law Practitioner* 27(3), p. 42.

<sup>18</sup> The Chinese Government, notably, has been issuing *force majeure* certificates to local businesses and industries in the hope of strengthening the chances of Chinese industries and workers being excused from their contractual obligations. These certificates do not purport to have a relieving effect in and of themselves, but they are intended as evidence to prove the fact of the events certified: see Claudia Galvis, Jose Moran and James Obrien, ‘[Coronavirus Outbreak: Global Guide to Force Majeure and International Commercial Contracts](#)’, *Baker McKenzie Global Compliance News*, 19 March 2020 (last accessed 2 April 2020); G. Brian Hutchinson, ‘Is the Coronavirus Outbreak a Frustrating or Event?’ (2020) *Commercial Law Practitioner* 27(3), p. 42.



Each of these interventions would have its own drawbacks:<sup>19</sup>

1. The idea of inserting a *force majeure* clause into all pre-Covid-19 contracts may be constitutionally unsound, especially if it purported to have retrospective effect. [Article 40.3.1° of the Constitution](#) provides that the “State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen” and such a law could be considered as an unjustified interference with property rights and the right to contract freely. There is a general common law principle reflected in [Article 15.5 of the Constitution](#) that legislation does not operate retrospectively – “the Oireachtas shall not declare to be infringements of the law Acts which were not prohibited by law at the date of their commission”. This should be read in line with a legal presumption that the Oireachtas does not intend an Act to apply retrospectively unless that purpose has been stated expressly.<sup>20</sup>
2. The use of an ‘impracticability’ or ‘unreasonably onerous’ threshold would involve a big shift away from the common law threshold of ‘impossibility’. These terms have not yet been subject to judicial interpretation, which may lead to inconsistency of application.
3. Conferring a discretion on the court, outside its equitable jurisdiction, to vary contract terms or cancel parts of contracts may undermine the doctrine of certainty of contract. Prospective parties could not be certain of the subject matter or application of contract terms.
4. Imposing a requirement on parties to enter into negotiations does not guarantee agreement and such a requirement may not be enforceable in practice. At any rate, it is common commercial practice to attempt to work around difficulties in order to facilitate contractual performance.

As noted by Hutchinson:<sup>21</sup>

“It is inevitable that all of the arguments will be played out in due course in courts and tribunals around the world and at cabinet tables. Perhaps the issue will even precipitate discussion about a reform of Irish contract law to introduce a general force majeure remedy for contracting parties in the future. For now, however, the advice to businesses affected by the coronavirus seems to be not to treat it as a force majeure or frustrating event without strong legal advice in support, and meanwhile to seek to mitigate or avoid the consequences to the best of their abilities.”

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<sup>19</sup> See Paul A McDermott and James McDermott, *Contract Law*, 2<sup>nd</sup> Ed, Bloomsbury Professional, Dublin: 2017, [21.93]; G. Brian Hutchinson, ‘Is the Coronavirus Outbreak a Frustrating or Event?’ (2020) *Commercial Law Practitioner* 27(3), p. 42.

<sup>20</sup> *Hamilton v Hamilton* [1982] IR 466 at 480–81 per Henchy J.

<sup>21</sup> G. Brian Hutchinson, ‘Is the Coronavirus Outbreak a Frustrating or Event?’ (2020) *Commercial Law Practitioner* 27(3), p. 42.



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