

Guidance to DMCs & PCOs on Contracts in light of COVID-19

What is Force Majeure?

The term Force Majeure means superior force. It is a contractual provision that provides for an event that is outside the control of the parties. Such clauses typically provide for certain obligations under a contract to be temporarily suspended and sometimes terminated. Force Majeure can occur in a wide variety of circumstances including (but not limited to) pandemics, natural or nuclear disasters, trade disputes, acts of government and terrorist attacks.

Are there examples of when Force Majeure has occurred and had an impact in Ireland?

Yes. Recent cases of Force Majeure in Ireland include the Ash Cloud (2010), Foot & Mouth (2001) and the terrorist attack of 9/11 in 2001.

Is there a legal definition of Force Majeure?

It is important to note that Force Majeure is not defined in legislation. However, it is a common contractual clause that has been considered by the Irish courts. In a recent Supreme Court case, a Force Majeure event was held to occur in circumstances that were:-

- abnormal
- unforeseeable
- outside the control of the asserting party
- not possible to avoid even when the concerned parties had taken reasonable care

From a legal perspective, the status of Force Majeure will be considered in the context of how the clause is set out and defined in individual contracts.

How might the courts view Force Majeure?

From the court's perspective, Force Majeure would be viewed under the following key criteria:

1. **The scope of the clause:** i.e. how the clause is defined and set out in the contract
2. **The burden of proof:** this rests on the party that is relying upon the Force Majeure clause
 - In this case, the business needs to clearly demonstrate that due to Covid-19 it cannot carry out certain obligations
3. **Sole cause:** That the Force Majeure event (i.e. Covid-19) is the sole cause preventing the performance of the event
 - i.e. that the Force Majeure is not being used as a convenient mechanism for cancelling an event that may for various reasons no longer be commercially attractive
4. **Mitigation of losses:** That parties endeavour to mitigate their losses
 - the business must demonstrate that it has done its utmost to mitigate the consequences of the event (by finding a reasonable solution).

How should I approach reading my contracts?

It is advisable to read all contracts objectively and logically to clearly interpret the wording so as to determine the exact direction given by the clause.

What should I look out for regarding Force Majeure clauses in contracts?

The following are key considerations for Force Majeure clauses:

1. **The wording that defines the context when Force Majeure applies**

- The contractual reference to the Force Majeure clause is often followed by a list of events that relate to this clause. This list could include reference to war, terrorism, earthquakes etc.

In the case of the current Covid-19 crisis, tourism businesses should note if references to acts of government and/or pandemic are referenced.

- There may also be wording in the contract that states that "this is a non-exhaustive list," or that Force Majeure applies to "any other causes beyond the relevant parties' reasonable control."

In this instance, the contract will be interpreted according to the intentions of the relevant parties having regard to the contract between them.

2. The date/s when the Force Majeure Clause applies

- Tourism business will also need to consider the specific dates when the Force Majeure event pertaining to Covid-19 was actioned. For tourism businesses, the following dates are especially relevant:
 - **11th March:** date that the World Health Organisation announced a global pandemic
 - **12th March:** government directive that cultural institutions including museums and galleries should close
 - **24th March:** accommodation providers were directed by government to avoid providing tourist accommodation
 - **27th March:** government directive that non-essential services should close

3. Clause references to terms "prevent, hinder or delay"

- If the Force Majeure clause is to be invoked in the contract, it will be necessary for the person seeking to invoke the clause to prove that the event resulted in them not being able to fulfil their contractual obligations. The usual wording found in these clauses would include "prevent, hinder or delay."

Prevent: this scenario demands a high legal threshold. In this case, the business must show that legally and professionally the event could not take place due to Force Majeure

Hinder: a less high legal threshold applies here, for example that there was a lack of supply and to provide the service would be risky.

Delay: the party invoking the clause because the event resulted in a delay in the performance of their obligations under the contract would need to prove that the performance was onerous.

4. A stipulation that clarifies the liability and the financial implications of invoking a Force Majeure clause

The wording of the contract may clarify the financial and practical implications of invoking the Force Majeure clause.

- **financial implications:** including for example the issue of credit notes, full or partial refunds, full or partial protection of DMC/PCO fees
- **practical implications:** which might include references to termination, or postponement.

5. The consequences of the Force Majeure Clause

- The consequences of invoking a force majeure clause will depend on what has been set out in the clause or in the contract.
- More often than not, the obligations of the party invoking the clause will be suspended until the event has passed.
- It is also possible that the clause may allow the parties to terminate the contract.

6. Notifications in the context of Force Majeure

- The contractual clause might state that the business needs to notify a third party in writing in the case of Force Majeure
 - In this case, the contract might state how this notification needs to be issued. For example, in writing and via registered post

- The contractual clause might also state that the Force Majeure event itself automatically invokes the Force Majeure clause

What is a Dispute Resolution Clause and how does that impact Force Majeure?

The business should note if a Dispute Resolution Clause exists in the contract. Such a clause may be used in the event that you fail to reach agreement with the other party to the contract. Its objective is to allow for the parties to seek to resolve any issues without recourse to litigation in the first instance.

What does my business need to consider when engaging in contracts from other jurisdictions such as the US and European markets?

There are two key points that need to be considered:

- **Choice of law:** this determines which countries law will apply to the dispute (for example, Irish, European or US law)
- **Jurisdiction:** this is the country where a dispute would be litigated (for example, Ireland, a European country or the US)

In the majority of cases, it is likely that Irish law will apply and that the correct jurisdiction is the Irish Courts.

However, tourism businesses should carefully read their contracts to determine if they have unwittingly signed up for a choice of law and/or jurisdiction clauses mandating that another countries' legal system applies. In that case, the business will be bound by this contractual provision.

What happens if there is no Force Majeure Clause in my contract?

In this case, the Doctrine of Frustration may apply. This defines when the parties are unable to apply their contractual obligations through a) no fault of their own

and b) through a supervening event over which they have no control (as in the case of Covid-19).

To note that the legal threshold for proving a frustration to contract is very high and if successful will result in the termination of the contract.

My business has an insurance policy, what do I need to consider?

The two key insurances that can provide cover to DMC and PCO businesses pertaining to the Covid-19 crisis are:

- Business Interruption Insurance
- Event Cancellation Insurance

If your business has an existing insurance policy, it is recommended:

- To carefully read the conditions of your policy
- If you need clarification regarding the wording and implications of the policy, seek advice from your broker, insurance provider or legal adviser

To note that the insurance industry and policy holders are equally trying to understand their position in the current unprecedented crisis. It is therefore worth being tenacious and thoroughly investigating the conditions of an existing policy to determine if a business can thereby mitigate some of its losses.

Having reviewed my contracts, I realise that my business is in a vulnerable position. What should I do now?

DMC and PCO businesses thrive on the strength of their relationships. The Covid-19 crisis represents a difficult time for Ireland's tourism industry. It is also a time that will pass and based on experiences learned from previous Force Majeure events and other trying times, it is important to remember that how we behave now:

- will be remembered in the future
- may even impact upon how quickly the business can return to normal trading once the recovery occurs

While it is crucial for the DMC/PCO to fully understand their own position and perspective, it can also be useful to understand the position of the end client and the supplier. In this way, DMCs /PCOS can engage in reasonable, professional and measured conversations that seek to reach a compromise and resolution.

What can I do to protect my business in the case of a future Force Majeure event?

Looking forward, it is important for tourism businesses to consider:

- Seeking advice on the construction of Force Majeure clauses in future contracts
- Creating mechanisms whereby contracts are regularly reviewed
- Working with suppliers to create greater alignment of the clauses noted in their contracts (including Force Majeure) and the contracts created by DMCs/PCOs for their end clients
- Ensure that the team is skilled and regularly trained in
 - the construction of contracts for end clients
 - the interpretation of contractual clauses in supplier contracts.