Commercial contracts in Ireland and Irish parties to international contracts governed by civil law: points to bear in mind due to COVID-19

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The essence of any contract is that the parties make a bargain involving mutual commitments. A decision by one or more parties not to honor any of those commitments, or the objective inability to do so, can thus lead to contractual disputes. COVID-19, categorized as a global pandemic by the WHO since 11 March 2020, has significantly affected an array of commercial contracts: interrupting supply lines, halting construction works and generally destabilizing business. It is clear that the occurrence of the virus was unforeseeable, unforeseen and is outside of the control of contractual parties. In common law jurisdictions like Ireland, the law approaches situations like these in two main ways.

Force majeure and change in law clauses

The first defers to the letter of the contract, which must contain clauses such as *force majeure*, or change in law, before relief can be granted under the terms of the contract. While *force majeure* clauses may be worded in various ways depending on the contract, they generally apply where an event within the scope of the clause prevents one or more parties from performing obligations under the contract e.g., natural disasters, civil war, acts of God, epidemics, or other unforeseeable events of similar nature. Where such a clause is drafted very broadly, it may be void for uncertainty (a catch-all phrase like that at the end of the previous sentence is generally considered reasonable since its interpretation is informed by the specific events that are listed before it). Therefore, provided the clause is drafted with a sufficient degree of certainty, COVID-19 may well qualify as a *force majeure* where it renders contractual obligations impossible to carry out. In this situation, it is important to review the contract in detail to determine the legal options available. These typically include extensions of time for, or suspension of, performance, along with the option to terminate in the event of prolonged *force majeure* events. It is important to remember, however, that a court will normally enquire as to whether reasonable steps were taken (by the party invoking the clause and/or the party "against" whom it is invoked) to seek to mitigate the effect of the *force majeure*.

Another relevant clause that may be found in commercial contracts is a "change in law" clause that relates to changes in the law, after the conclusion of the contract, that make it significantly more onerous or impossible for one or more parties to perform their contractual obligations. Rights to additional payment or to termination of the contract are often provided for in such circumstances. Since widespread containment efforts are required to combat COVID-19, material changes in the law that impact commercial contracts may become more common.

Frustration of the contract

The second way in which Irish common law, like its UK peer, intervenes in situations of unforeseen circumstances is through the doctrine of frustration. The Irish High Court case of *Collins v Gleeson ([2011] IEHC 200)* confirmed that, based on this doctrine, an Irish court can declare a contract to be at an end and discharge all parties from further

performance where:

- A supervening event occurs without the default of either party
- The contract makes insufficient provision for this event
- The event changes the outstanding contractual rights and obligations beyond what the parties could reasonably have contemplated at the time the contract was entered into, and/or the event makes it physically or commercially impossible to fulfil the contract; and
- It would be unjust to hold the parties to the contract.

While these criteria constitute a high bar to reach, in particular because – unlike *force majeure*, which is a contractual creature that often affects only certain obligations under the contract – frustration applies extra-contractually and cancels the entire contract, as opposed to just certain obligations thereunder. Nevertheless, these criteria are also based on the application of an Irish Supreme Court decision that regarded the doctrine of frustration as "flexible and capable of new applications in suitable circumstances", as noted by the judge in the *Collins* High Court judgment. Therefore, there could potentially be an opportunity to apply it in the context of the current pandemic.

As always, the devil is in the detail. Parties must pay attention to the notice periods that apply to the exercise of *force majeure* and change in law provisions. Particularly in the supply chain context, they should look both down and up the chain to identify any situations of exposure. For example, if your supplier must only give a notice period of 15 days and is entitled to cease performance, whereas your contracts with your buyers contain a longer notice period together with obligations remaining on termination, this is something to be looked at. Communication with counterparties, including insurers, is vital. We have already seen examples of suppliers in international supply contracts, who may be entitled to terminate due to COVID-19, but such a termination would affect payout under export credit insurance agreements. In short, full contractual review is crucial before contemplating exercising the options discussed above.

Irish parties in international contracts governed by civil law

If you are an Irish party to a contract subject to civil law (like that of Spain or France), you should be aware that, where the contract is silent, relief is generally available under the relevant civil codes for unforeseeable, inevitable events. However, this can be subject to exceptions. For example, a party cannot use *force majeure* to obtain relief for its own negligence or prior late payment. Furthermore, in certain civil law jurisdictions like France, it may be possible to renegotiate the contract in the event of "hardship" (*imprévision*) provided the parties have not excluded the option in the contract. Irish companies operating in foreign markets must therefore be alert in relation to the contractual and legal options available during this global emergency since, even if they themselves are not impacted heavily enough to warrant the exercise of certain contractual clauses, their counterparties may be in a different situation.

If you have any questions concerning any of the above, please contact Risteard de Paor, Partner in the International Disputes department of Dentons who is an Irish- and English-qualified solicitor and is also qualified to advise under French and Spanish law.

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