

# Out of <sup>my</sup> control

A summary consideration of the impact of the Coronavirus (COVID-19) on simple contracts

Businesses across The Bahamas and the world over, are feeling the impact of the Coronavirus (COVID19) (the 'Virus').

Suppliers are defaulting on delivery of goods. Employees are being laid off.

Governments are issuing stay at home orders.

The way we do business, is forever changed!

While many companies are seeking to adjust to this global pandemic, the flexibility to adjust is constrained /governed by contractual relationships. Many contracts are being tested. The prevailing statement no doubt is,

***"The Virus has changed my contract, I cannot perform it anymore.***

In response to this statement, there are *inter alia* two important legal considerations.

## 1. Force majeure

*Force majeure*, is a, "contractual term by which one (or both) of the parties is excused from performance of the contract in whole or in part, or is entitled to suspend performance or to claim an extension of time for performance, upon the happening of a specified event or events beyond his control".

The starting point is to examine carefully the contract, to determine if there is a *force majeure* clause. If one exists, its definition will have to be carefully reviewed to determine the exact scope and ambit of the clause, *i.e.* does the clause contain exhaustive or non-exhaustive examples of events that may extend, suspend or terminate the contract.

An exhaustive list *may* restrict the Virus from being classified as a force majeure event.

Whereas, a non-exhaustive list makes it arguable that the Virus, (though not expressly named/listed in the definition of the contract), is a *force majeure* event as a "pandemic", a "war", or "any other cause beyond our control".

In order to take advantage of a *force majeure* clause, prompt notice (**in writing**) must be given to the other party, notifying them of the nature and extent of the circumstances.

Do not take for granted that as the Virus has received (and receives) widespread national and international news coverage, it is automatic that ones contractual obligations are suspended or terminated. Such thinking would be foolish!

Bahamian law, does recognize that there are events, beyond the control of contracting parties, that may *frustrate* the performance of a contract.

Please note however, the event or incident that may give rise to the frustration of a contract, invokes a deeper level of judicial scrutiny and operates within narrow confines.

## 2. Frustration

Frustration, as a legal concept, "***operates to bring a contract prospectively to an end because of the effect of a supervening event***".

Frustration does not apply to, "*mere incidence of expense or delay or where performance becomes more "onerous"*".

In order to succeed on the plea of frustration, it must be shown that the contract, "radically" changed/ there was a fundamental change from the obligation originally undertaken.

A *change in law, loss of common purpose* are recognized reasons of frustration. However, the class of frustrating events is not closed. The Virus no doubt will develop its own body of legal jurisprudence.

It is conceivable that one of the biggest contentions of frustration will be, the issue of delay. The Bahamas, like the world over, is on "pause".

Does mandatory quarantine/social distancing policies, create an issue of delay, sufficient enough to frustrate a contract?

*Perhaps.*

Our response to this question is guided by what has been settled by our courts, "*where the effect of that event [the Virus] is to cause delay in the performance of contractual obligations, it is often necessary to wait upon events in order to see whether the delay already suffered and the prospects of further delay from that cause, will make any ultimate performance of the relevant contractual obligations "radically different"*".

The unavailability of supplies and/or employees *may* radically change the obligation. The scenarios created by the Virus are unique, and each must be assessed on their own facts.

If it has not been done as yet, now is a good time to review contracts and seek the advice of your legal advisor for further clarification.

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This is not intended to be a legal opinion. Please seek independent legal advice for particular scenarios.