

BLACK SWANS

How to approach contractual performance

PRACTICAL COMMERCIAL APPROACH

Opening transparent discussions as early as possible with your contracting party is key to potential variations that could be mutually agreed upon in both parties interests.

LEGAL CONTEXT

The law provides limited mechanisms to suspend performance under a commercial contract as a result of black swans.

FORCE MAJEURE ("BLACK SWAN") – A SANCTUARY

Black swan events are acts, events or circumstances that fall beyond the reasonable control of one of the parties to a contract. A black swan clause typically excuses both parties to a contract from performance. The event must prevent performance—be physically impossible, not just difficult or unprofitable.

Is a pandemic a black swan event?

Black swan clauses will often list pandemics, epidemics and quarantines as black swan events.

What happens if a pandemic is not listed in the agreement?

There may be reference to events beyond a party's reasonable control which may cover a pandemic.

What happens if the contract is silent?

This will be a matter for interpretation by the Courts as to whether the event was foreseeable.¹

¹ Under the Uniform Commercial Code a seller of goods can be excused from timely delivery or non-delivery where performance has become impractical by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any foreign or domestic government regulation or order whether or not it later proves to be invalid.

EFFECT OF A BLACK SWAN CLAUSE

Suspension

Black swan clauses generally suspend and do not cancel contractual obligations. When the event comes to the end the contract is re-activated.

Non-Liability

Once triggered the non-performing party's exposure for delay or non-performance is removed while the event continues.

Obligation to Mitigate

The clause may require that the affected party has taken all possible steps to avoid the event or mitigate its circumstances.

Right to Terminate

The agreement may provide that the parties can terminate it if it is commercially impractical to resume performance.

Need more assistance in understanding contractual performance?

We're here to help. Email us at james@oury.law or visit our website for more ways to get in touch.