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Coronavirus Outbreak – Force Majeure and Contract Law



I. Introduction

Having emerged as a public health threat, Covid-19 increasingly poses a threat to business operations as well. The numerous precautionary measures taken by many countries around the world will hopefully help to contain the spread of the virus. Unfortunately, as a side effect, the measures are also increasingly restricting the free movement of people and goods. This has a growing impact on work processes, supply chains and, not the least, compliance with contractual obligations. Recently, we received several enquiries from clients on how to deal with these effects of the coronavirus in a legally compliant manner.

II. Impact on Contractual Obligations

Following the first confirmed cases of patients with Covid-19 in Myanmar and recently announced protective measures and restrictions which inevitably disrupt businesses, transportation, procurement and supply chains, companies are expecting to experience delays and/or disruptions in the performance of contracts. Can companies use the current pandemic to claim relief under force majeure clauses?

1. What is a force majeure event?

The term “force majeure” originated from the French civil law system. Traditionally, such an event must be unforeseeable, insurmountable and external. In common law countries, there is no general legal concept of force majeure; rather, force majeure is a creature of contract. Common law jurisdictions usually interpret a force majeure event as an exceptional circumstance, which prevents one or both parties from fulfilling their obligations under a specific contract.

2. Does the contract provide for a force majeure clause?

The first step to consider would be to check whether the contract provides a force majeure clause and provisions regarding business continuity and disaster recovery obligations.

While most contracts usually contain some form of force majeure clause, independent of the governing law of the specific contract, the scope of the circumstances included in the definition of force majeure and the consequences of the force majeure may differ from contract to contract.

On 11 March 2020, the World Health Organization officially qualified Covid-19 as a pandemic. Many contractual force majeure clauses explicitly include an epidemic or pandemic in their definition, in which case the official qualification leaves little room to interpretation. However, even if the contractual definition of force majeure does not expressly mention a pandemic, some consequences of Covid-19, such as raw material supply shortages and government lock-downs, would customarily constitute a force majeure event.

3. What are the contractual consequences of force majeure?

While every contract must be reviewed individually, a common consequence of force majeure would be, that the contract can be suspended or its performance delayed or reduced until the force majeure event comes to an end, without such delay of the performance of the contractual duties constituting a breach of the contract.

Contracts may however also provide for termination rights in the event of a (continuing) force majeure.

4. What to look out for in a force majeure clause?

In order to establish whether a party may claim relief under a force majeure clause, the following questions need to be considered:

- Is the type of interruption covered, i.e. does the clause cover cases of delay or only cases where performance is impossible in its entirety, and does the definition of force majeure include epidemics and pandemics, or their consequences such as supply shortages and lock-downs?
- Are there provisions in place that deal with business continuity and disaster recovery and could the impact of the disruption be mitigated by implementing the measures as agreed by parties under the contract?
- Are there any notification requirements/procedures in place?
- What rights are provided for the parties under the relevant clauses? Is the affected party allowed to suspend performance of their obligations and thereby avoid liability for any failure or delay in performing those obligations? Is there a right of termination for the affected or unaffected party or either party?

5. How to enforce a force majeure clause?

In general, a force majeure clause can be implemented upon or within a certain time from the occurrence of the force majeure event. A written notice should be sent to the co-contractor to indicate that due to the force majeure event, the contract performance will be interrupted/suspended or the performance of the contract reduced until the force majeure event comes to an end.

Some clauses may also provide for the possibility to terminate the contract after a certain period of time, if the force majeure event is still occurring (e.g. six (6) months).

6. What to do if there is no force majeure clause in place?

If the contract in question does not provide a force majeure clause or the scope of the clause does not cover the specific reason for delay or non-performance, the affected party may still be able to rely on general principles of law. While in some

legal systems, there might be the option to rely on a general legal doctrine of force majeure, in most jurisdictions, another doctrine worth considering would be the concept of “frustration of contract”. In Myanmar, the frustration of contract is governed by sec. 56 of the Myanmar Contract Act (1872).

Generally speaking, frustration occurs when, without the default of either party, a contractual obligation has become physically or commercially incapable of being performed because the circumstances in which the performance is called for would render it radically different from that which was undertaken by the contract. The threshold for the contract to be considered to be frustrated is usually very high. Not every event which prevents the performance of a contract will constitute frustration. The event must be fundamentally different from one originally contemplated by the parties.

Pursuant to sec. 56 of the Myanmar Contract Act (1872), in the event that “a contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.” Therefore, the contract is automatically discharged, meaning neither party has to comply with future obligations.

7. What to be careful about when drafting a new contract?

If the parties wish to enter into a new contract, specific attention should be given to referencing the Covid-19 pandemic. Indeed, the evolution of the pandemic is now not unforeseeable nor unpredictable and could likely not be claimed in good faith as a force majeure event, given that the parties would be aware of the pandemic at the time of signing of the contract.

For more information on this and other related issues, please do not hesitate to contact us. Our team of international and locally qualified lawyers will be happy to assist.

Imprint

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