



Coronavirus COVID-19 and force majeure: How are your contracts being affected? (Europe)

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By:

The outbreak of coronavirus COVID-19 has caused, and continues to cause, great uncertainty for businesses around the world.

DLA Piper is currently advising clients who are concerned about how these events are affecting their businesses. It is no surprise that the main impact we're seeing relates to manufacturing and supply chain, which has resulted in difficulties for businesses in fulfilling their contractual obligations.

Businesses who have been affected are now seeking to understand their rights and obligations and any relief that might be available to them. Often the first thought that comes to mind in such circumstances is a force majeure clause, which is typically agreed between parties in B2B contracts to allow a period of relief in performance where circumstances arise that are beyond their control. There are several issues to consider before invoking a force majeure clause, some of which we have set out below as an initial guide.

Do you have a force majeure clause?

You will only be able to rely on a force majeure clause if one is included in the relevant contract and it applies to you. English law does not imply force majeure relief into contracts that are silent on the matter. It is very unusual to find force majeure clauses in English leases.

Can you rely on your force majeure clause in the circumstances?

Simply because a force majeure clause exists (that operates in your favour), doesn't necessarily mean you have the right to invoke the relief in all situations. Force majeure clauses are typically drafted to include specified events (often called force majeure events). Whether the current situation constitutes a force majeure event is a matter for interpretation that requires specialist legal advice. It is unlikely that your clause envisages coronavirus COVID-19 specifically, however it may specify events such as pandemics, epidemics and work stoppages, in which case you may find it possible to argue that the outbreak constitutes one or more of those specified events.

If your force majeure clause is particularly favourable to you, it may have been drafted to include events such as:

- compliance with a law or governmental order, rule, regulation or direction;
- any action taken by a government or public authority, including imposing embargo, export restriction or other restriction or prohibition;
- delays by suppliers or materials shortages;
- difficulty or increased costs in obtaining workers, goods or transport; or
- other circumstances affecting the supply of goods or services.

It is also wise to consider how the outbreak is being classified by bodies such as the World Health Organisation at the

time you're seeking to invoke the force majeure clause, as this may or may not support your argument or claim.

Force majeure clauses typically include a requirement, for the party seeking relief, to show that the event could not have been mitigated by preventative action. This demonstrates the point force majeure may only be invoked when the relevant event has prevented performance of the contract, not simply that the event exists, has caused economic hardship or that performance has become difficult or commercially undesirable.

Certain government agencies around the world have begun to issue "force majeure certificates" to some businesses in an attempt to prevent or stall breach of contract claims and limit liability. Please get in touch with us before using such certificates as their effectiveness in relation to your contract (including its governing law) must be carefully assessed. As the leading global business law firm, DLA Piper has lawyers in more than 40 countries who can help.

Should you invoke your force majeure clause?

This question is typically the one on which DLA Piper is instructed to advise as it involves careful consideration of the circumstances. The following non-exhaustive list contains some of the matters you should consider:

- force majeure clauses typically include a right for the unaffected party to terminate when the event has continued for a specified period of time. Although claiming force majeure relief may seem immediately beneficial to your business, it may have unintended consequences, such as triggering termination rights for your customers;
- what do the contracts say? Do not assume or guess the language of the relevant contracts. No force majeure clause is the same, therefore a one-size-fits-all approach will not work. Each relevant contract must be reviewed and DLA Piper has specialist contract lawyers, experienced in such matters, who can support you with this;
- have you communicated with your customers and suppliers? The outbreak continues to affect global trade and the number of cases and countries involved is increasing, so it may be that simple communication will suffice without the need to resort to legal action. DLA Piper can provide advice and suitable language for such communications to avoid inadvertently waiving your rights, varying the contract terms or admitting liability;
- there may be other remedies available to you in addition to a force majeure claim. DLA Piper can advise you of all available options and help you determine the most suitable course of action in line with your business needs.

How do you invoke your force majeure clause?

Force majeure clauses typically set out a procedure which must be followed to effectively claim relief under the clause. You should obtain advice before invoking the clause to ensure that you have properly complied with that procedure. Recent case law suggests that failure to comply can jeopardise subsequent legal claims.

Further considerations

When faced with such circumstances, it is advisable to have each affected contract reviewed in its entirety, as there are likely to be several terms that are impacted, including but not limited to exclusivity, liability and liquidated damages, delivery and termination rights, change control regimes, governing law and jurisdiction.

What about frustration?

The coronavirus COVID-19 outbreak may also place contracts at risk of termination as a result of the common-law doctrine of frustration – though this has a high threshold in practice and is unlikely to be relevant where there's an applicable force majeure provision. For more information, see our article on coronavirus COVID-19 and frustration.

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For advice on how such events affect your contracts and relationships with customers and suppliers, or advice on how to safeguard against such risks when entering into new contracts, please get in touch with Steve Wright (Partner) and Adam Kelly (Associate).