

Force Majeure and the Corona Crisis

The declaration of the global outbreak of the Novel COVID-19 (2019 nCoV) virus (*corona virus*) by the World Health Organisation¹ has sent shockwaves into the world of international trade besides the direct impact on the global health. Impacts as such on cross-border transactions and subsequently on the contracts concerned are becoming clearer with time.

Furthermore, specific government directives in affected countries with respect to import/export and travel restrictions have led to a justifiable uncertainty amongst companies involved in international transactions.

This article sets out the legal fundamentals of relying on force majeure, declaring force majeure respectively, and provides relevant information as may be pertinent in combatting the situations at hand.

Introduction

Although certain minor specifics in the understanding of events of Force Majeure (“FM”) varies between several jurisdictions, the core remains the same. Any clauses referring to FM are typically designed to combat situations “*beyond the control of the parties to a contract*” that prevents, impedes or delays the performance of the contract. In addition to the same it is also imperative that the concerned impediment to the performance of the contract ***should not have been able to be taken into account at the time of conclusion of the contract***. As a testament to the collective understanding of FM one may look at the Principles of International Commercial Contracts².

Importance of wordings

At the time of determining whether a particular situation amounts to an FM event and the objective tests thereof is heavily dependent on the specific wordings of the concerned clause. The definition of FM is generally inclusive and bears a wide range of interpretation but can be engineered to be exhaustive instead. To exemplify further, if it is the requirement of the clause concerned, that the occurrence of the FM event must “prevent” performance, the party relying on it shall have to establish a direct link between the FM event and the legal/physical impossibility of performance.

¹ [https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)) — as recovered on 12.03.2020 at 14:30 Hrs EST.

² Article 7.1.7 of the Principles of International Commercial Contracts by The International Institute for the Unification of Private Law (UNIDROIT)

However, if the clause concerned refers to the FM event as “affecting”, “hindering” or “delaying” performance of the contract, the threshold to be satisfied for relying on such clause shall be lower.

FM clauses are designed to set the parameters of deviation of the parties’ contractual obligations in the events of FM. It is pertinent to mention that the events constituting FM may be temporary and excuses from the otherwise due contractual obligations may therefore be limited to the tenure of such events.

Such clauses are commonly known to impose the duty of notification upon the party that seeks to rely on it. It is important to decipher such duty and strictly adhere to it, as it may serve as a “condition precedent” for instituting any claim flowing from the concerned clause. In whichever case, the specific wordings of the FM clause are of paramount importance.

In the unlikely event that any long term international contract does not include a FM clause, one must look at the “choice of law” clause that sets out the governing law of the contract, and the relevant provisions applicable in the absence of the former.

Hence, in order to determine whether the coronavirus outbreak can excuse parties of their contractual obligations, and also the extent of the excuse thereof, one has to analyze closely the wordings of their respective FM clauses.

Exemptions

Variations in understanding of the contract law related to FM, however has similar if not the exact same exemptions in most jurisdictions. That is to say that the FM does not apply in the following scenarios:

- in cases where the contract has been entered into after the FM event;
- in cases relating to non-performance of monetary payment obligations; or
- in cases where the FM events has occurred post delayed performance of the affected party.

Factors to Consider: Impact Points

1. ***Causal Link:*** Inability to discharge contractual obligations may be due to an isolated factor or a combination of a few. E.g. employees and/or labours being ill or quarantined may solely constitute grounds for inability to perform the contract, or may be clubbed with lack of raw materials due to export restrictions. The need to establish a direct link between the FM event and a party’s inability to perform the contract, depends on the wordings of the FM clause as mentioned earlier.
2. ***Indicators of global supply chain disruptions:*** Several restrictions are being issued by affected countries on a daily basis with respect to international trade including closure of workplaces and ports, supply and distribution chain disruptions, labour shortage, and decreasing demand.
3. ***Provisions of the Governing Law:*** The primary analysis of such FM situations by companies or their assignees must include an in-depth look into determining the extent up to which the governing law of the contract allows any claims flowing from the invocation of the FM clause.
4. ***Dispute Resolution Clauses:*** It must be determined whether the contract concerned refers to International Arbitration as a means of recourse or does it place the party before an unfamiliar jurisdiction. Devisable legal strategies will primarily depend on it.

5. **Hardship Clauses:** In the event that a contract includes a hardship clause, the threshold to invoke an FM clause may become significantly higher, especially in situations where factors constituting FM may be rendered temporary.

Suggestions

Upon consideration of the comprehensive list of factors stated earlier, it is suggested that the companies affected by the current coronavirus outbreak should adhere to the following:

1. Preliminary determination of whether the corona virus outbreak constitutes FM under the clause of the contract concerned.
2. Monitor and discharge the contractual duty of notifying the other party or parties to the contract, if the FM clause so provides. It may be the case that the buyer may have to declare FM in response to the notification of the seller to avoid being in breach, thus making monitoring of such correspondence material.
3. Engage into the situation early. Notification requirements under most FM clauses require such notices to be prompt.
4. Conduct objective analysis of contractual obligations. The performance ability and default prospects must be very clear at the outset of FM circumstances.
5. Consider re-negotiation over termination. It is often the case the contractual relationships being affected by the coronavirus outbreak were intended to be long-term and it is likely that the outbreak may be contained and finally neutralized in the near future.
6. Devise contingency plans for supply chain disruptions. Apart from being directly affected by the disruption, certain FM clauses may come with the duty of best efforts to mitigate the circumstances of FM and may therefore be relevant in any future claims flowing from the same.
7. Employ a tactical approach towards public statements. There must be a balance between complete disclosure and compromising future business.
8. Increase attention towards disclosure obligations. Specific disclosure obligations may be imposed by the government in light of the rapid spread of the COVID-19.
9. Revisit Legal Insurances. Under circumstances of FM, companies must reassure and vet all insurances that cover foreseeable claims against themselves.

Remedies

The remedies in the event of FM yet again flows directly from the wordings of the concerned clause in the contract or the applicable law. The usual set of remedies are, a) Suspension of the contract and all contractual obligations thereto; b) Right to cancel or terminate the contract altogether; c) Right to extend the time for performance of the contract; and d) The Right to extend along with an imposed duty to make efforts to mitigate the circumstances of FM.

Alternative remedies however exist in certain jurisdictions that include:

1. *The doctrine of frustration*, under the English Contract Law that may allow a party to a particular contract to cease from performing the contractual obligations where it becomes impossible to do so under circumstances completely beyond the remit of the parties. It is however, extremely difficult to establish when a FM clause already exists. But it can be used in adverse cases when emergency measures of supplier countries have made certain materials permanently unavailable or the necessary skilled labour is unavailable due to travel restrictions or infection.
2. *The doctrine of “change of circumstances”* that may apply where a FM remedy is not available according to e.g. the laws of People’s Republic of China (PRC). The doctrine becomes operational wherein there is an unforeseeable material adverse changes to the fundamental circumstances under which the contract was entered; the change is beyond the scope of usual commercial risks; and that the further performance of the contract would be inequitable for either party. It is the case that establishing a claim under this doctrine is an uphill task. However, the affected party bears the option to have the contract terminated or modified upon establishment of such case.

Force Majeure Certificates by the CCPIT

It is the case that the China Council for Promotion of International Trade (CCPIT) announced on 30th January 2020 that it would offer “force majeure certificates” with the view of assisting the companies in dealing with their foreign trading partners with respect to disputes arising from government control measures. As of 2nd March 2020, the CCPIT has issued a record of over 1600 of such FM certificates in order to help protect the Chinese companies against liabilities of non-performance.

The certificates are purported to facilitate the invocation of FM remedies where the contract bears the pre-requisite of the same. There is however no binding effect of such certificates whatsoever on the Chinese courts of competent jurisdiction, but bears merely a persuasive value and a prospect of addition of a level of authenticity to any related claims. However, no strong recommendations are made in such regard.

Conclusion

While the implications of the corona virus outbreak are set to become even more far reaching by the day, the extent of such may vary from case to case, and therefore, all contracts need to be reviewed and analyzed on an individual basis in order to implement the correct approach.

For more information about this topic please contact us

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