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Coronavirus Disease 2019 (COVID-19): Is It Force Majeure or Something Else?[1]

The World Health Organization (WHO) reports that the global number of confirmed cases of COVID-19 is in the hundreds of thousands, with the number of confirmed deaths in the tens of thousands. Unfortunately, the numbers continue to rise and may soon reach seven and six figures, respectively.

While there are mixed reports on how the world is faring in the battle against COVID-19, the potential legal battles over whether COVID-19 constitutes force majeure are only just beginning.

What Is Force Majeure?

Force majeure is a doctrine that, in general, may relieve parties from their contractual obligations or liabilities when an extraordinary event beyond their control prevents either or both from performing their contractual obligations.

Meaning "superior force" in French, the doctrine of force majeure historically comes from statutory protections developed in the civil codes of dozens of countries and dates back to the Napoleonic Code (if not before). In most civil law jurisdictions (e.g. France or the UAE), statutory force majeure will apply even where there is no mention of force majeure in the relevant contract and may supplement (or sometimes counteract) contractual provisions.

In common law jurisdictions (e.g. the US or the UK), force majeure is generally a creature of contract, rarely codified by a statute. It was essentially "borrowed" from civil law jurisdictions to avoid the general (and harsh) common law position that "promises are meant to be kept, come what may", without any implied conditions relating to impossibility, impracticability, change in circumstances, prevention, etc.

To add some certainty, parties will often include in their contracts a boilerplate force majeure clause that sets outs the elements for an event to be force majeure, as well as specific qualifying events that may be presumed to be force majeure.

While there are variations based on the jurisdiction or the express wording of the clause, generally, an event will be considered force majeure if (i) it prevents the affected party's performance, (ii) it is beyond the reasonable control of the affected party, (iii) it was not reasonably foreseeable, and (iv) it could not have been avoided.

The qualifying events often include "acts of God", which generally or specifically refer to natural events (e.g. hurricanes, earthquakes, and floods), and "acts of Man", which generally or specifically refer to non-natural events (e.g. war, terrorism, and riots).

Is COVID-19 an Act of God?

Maybe. Boilerplate clauses do not always specify terms that may directly apply to COVID-19, such as "epidemic" or "pandemic". Even where "epidemic" is specified (as in some boilerplate clauses), whether COVID-19 would qualify is not straightforward, as a distinction may be made in respect of whether COVID-19 is an "epidemic" or a "pandemic".

"Epidemic" is defined as "a widespread occurrence of an infectious disease in a community at a particular time".[1] On the other hand, "pandemic" is defined as a disease "prevalent over a whole country or the world",[2] or more simply defined by the Center for Disease Control (CDC) as "a global outbreak of a disease".[3] On 11 March 2020, WHO characterized COVID-19 as a "pandemic",[4] followed by the CDC on 14 March 2020.

The distinction between an "epidemic" and a "pandemic" may not seem significant, but it may have legal significance to one seeking to rely on COVID-19 as a qualifying force majeure event.

Take, for example, a major project where the relevant contract specifies "epidemic" but not "pandemic" as a qualifying force majeure event. If there are no confirmed COVID-19 cases in the project's immediate and surrounding regions, COVID-19 might not be characterized as an "epidemic" in the project's *community* and hence not contractually qualify as a force majeure event, even if it is characterized as a "pandemic" prevalent over the whole of the country and/or the world.

Thus, even where a contract specifies "epidemic", how COVID-19 falls under the ambit of force majeure is uncertain. Yet, more often than not, contracts do not specify either as qualifying force majeure events. Without such specific references, depending on the legal jurisdiction and language in the contract, a party seeking to use COVID-19 as the basis of force majeure may need to persuade its counterparty, an arbitral tribunal, and/or a court that COVID-19 falls under the usual generic events described, such as "natural disaster".

More importantly, one must also consider the actual "event" that is preventing performance. Is it COVID-19 itself (e.g. the workforce has fallen ill and is unable to work)? Or is it a restrictive government order enacted due to COVID-19? Or is it a company's own internal precautionary measure? Or is it something else (directly or remotely) related to COVID-19?

1 https://www.lexico.com/en/definition/epidemic
2 https://www.lexico.com/en/definition/pandemic
3 https://www.cdc.gov/coronavirus/2019-ncov/summary.html
4 https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen

Then Are COVID-19-related Issues Acts of Man?

Governments across the globe have been vigilant in enacting protective and/or containment measures in response to COVID-19. The same is true with many companies (including most law firms) implementing internal policies to help in this cause.

So what happens when a government enacts COVID-19-related directives that prevent the performance of contractual obligations, such as preventing ships from docking at ports to offload cargo? What happens when a company implements an internal policy that prevents the performance of contractual obligations, such as demobilizing or requiring its entire workforce to work remotely, which prevents certain direct labor obligations? What if a company decides to limit or stop certain business activities due to the drop in demand from COVID-19-related fears, which consequently impacts related contractual obligations?

The answers to these questions require a close look at the relevant contracts. Some contracts may specify that government actions preventing performance qualify as force majeure. Some contracts may instead specify that such events are at the risk of one of the parties. Some contracts may even be silent on such events, as contracts usually are in respect of a company's own internal policy or business decisions in connection to a force majeure event.

One may even look beyond the contract and its parties, as COVID-19-related government actions that affect contractual performance and expectations may give rise to potential investment treaty violations.

Therefore, the potential options and consequences in pursuing and/or defending force majeure claims based on COVID-19 can differ drastically based on the relevant contract, as well as the law applicable to the contract, transaction, and/or project.

Careful Consideration Before Invoking Force Majeure

The global economy has been significantly impacted by COVID-19, particularly in respect of international travel, commerce, and projects. Many of those financially suffering from the economic downturn and resulting drop in demand may be tempted to rely on COVID-19 as force majeure for relief from their obligations.

In these uncertain times, everyone should aspire to amicably share the burden caused by COVID-19 and related issues. However, those entertaining the idea of unilaterally invoking force majeure based on COVID-19 should seek and carefully consider sound legal advice on the potential consequences. Likewise, those whose counterparty is entertaining such an idea should also seek legal advice regarding potential options and remedies.

The remedies for force majeure cover a broad range and may be limited in a contract to allowing late performance or as radical as rescission of the entire contract. As the different types of remedies may result in drastically different consequences, parties should be careful to invoke or react to force majeure events before fully exploring and understanding the relevant remedies and implications associated with the relevant contract and applicable law.

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