

Change in law clauses might be more appropriate and useful than *force majeure* in certain contracts affected by the coronavirus disease 2019 (COVID-19) restrictions.

The wording of the particular clauses in the context of the particular contract is all important. The intersection of change in law and *force majeure* could produce interesting results.

Typical *force majeure* clauses excuse non- or delayed performance due to events beyond the party's control, usually including governmental action. Change in law clauses typically enables a contractor to recover the increased cost, and the principal to recover the decreased cost, in performance due to a change in law. Depending on the definitions, governmental action in the *force majeure* clause may be the same as a change in law under that clause, or they may be different. Even if they are the same, the effects might be different and the *force majeure* clause might encompass the effects as well the cause.

Questions

When faced with effects of the COVID-19 restrictions being implemented around the globe, parties should be considering the following questions in assessing their rights:

1. Precisely what events does the *force majeure* clause cover, precisely what effect must it have on performance, and precisely what relief does it provide?
2. Precisely what changes in law does the change in law clause cover, precisely what affect must it have on performance, and precisely what relief does it provide?
3. Is the effect of the change in law one of the events covered by the *force majeure* clause?
4. Does the inclusion of a change in law clause impliedly exclude the operation of *force majeure* from the changes in law as defined?
5. Is a change in law provision to be found in the variation provisions?

The questions are best answered by examining typical *force majeure* and change in law clauses. There are many variations, and answers are text, context and fact dependent, but typical clauses are:

Force Majeure	Change in Law
Any unforeseeable event or occurrence that is beyond the reasonable control of a party, including: (a) extreme weather events (including but not limited to cyclones, typhoons, hurricanes, storms, floods, snow or ice); (b) fires or explosions; (c) terrorism; (d) wars or hostilities; (e) strikes; (f) blockades; (g) cyberattacks; (h) power blackouts; (i) governmental action; (j) imposition of Sanctions; and (k) earthquakes.	The contract price shall be adjusted to take account of any increase or decrease in cost resulting from a change in the laws of the country (including the introduction of new laws and the repeal or modification of existing laws) or in the judicial or official governmental interpretation of such laws, made after the base date, which after the contractor in the performance of obligations under the contract.
A party will be excused from performance of its obligations under the contract if prevented or delayed by a <i>force majeure</i> event, but only if that party complies with this clause.	If the contractor suffers (or will suffer) delay and/or incurs (or will incur) additional cost as a result of these changes in the Laws or in such interpretations, ... the contractor ... shall be entitled to: (a) an extension of time for any such delay if completion is or will be delayed; and (b) payment of any such cost, which shall be included in the contract price.

Assumptions

Let us assume that we are engaged in mining services and all relevant governments have forbidden foreigners from entering their borders, have enacted safe distancing measures, and require their citizens to be quarantined for 14 days on re-entry. As a result, a smaller workforce is available, they must work longer shifts, they cannot leave site when their shift ends, they work slower because of safe distancing and cleaning, extra accommodation must be found on site, workforce costs are higher and production is lower.

Comparison of Clauses

We can compare the clause in light of the events covered, the performance affected and the relief granted in the following table.

	Force Majeure	Change in Law
Events Covered	Government action	Introduction of new laws
Performance Affected	Prevention	Cost increase or decrease
	Delay	Delay in completion
Relief Granted	Excused from the affected obligations	Price increase or decrease Extension of time

Events Covered

In this example, both clauses are engaged by the events that have occurred, but they apply to different effects on performance.

Performance Affected

For *force majeure*, it is enough if performance of obligations is prevented or delayed. For change in law, additional cost is required or a delay in completion, not merely prevention or delay of obligations. Of course, the latter may lead to a delay in completion, but not necessarily. Prevention in *force majeure* does not mean permanent prevention. Performance may be prevented for a period sufficient to qualify for *force majeure* without delaying completion. In this example, *force majeure* is engaged at a lower threshold of delayed performance than change in law.

Force majeure is not engaged merely by additional cost. Unless the clause expressly or impliedly covers increased cost, the general law is that *force majeure* does not apply to financial hardship. The requirement in this particular clause that the event be beyond the “reasonable control” of the affected party may import an obligation to incur reasonable expense to overcome the prevention or delay before it can claim *force majeure*. Other clauses refer more explicitly to the affected party taking reasonable efforts to overcome the event, which would usually require additional expense. If that expense enables the prevention of delay to be overcome, the affected party cannot claim *force majeure*. It may be able to claim cost under a change in law clause if the event was a change in law, or caused by such a change.

In contrast, the change in law clause here entitles a party to claim the increased cost of performing its obligations whether or not its performance has been prevented or delayed. The expense does not need to be incurred to overcome some supervening event that prevents or delays performance. It can simply be the additional cost of complying with changed laws.

Relief Granted

Force majeure simply excuses non- or delayed performance of the affected obligations. It prevents the unaffected party from asserting the affected party has breached the contract and from claiming liquidated or other damages. If the date of completion is affected by the *force majeure* event, the affected party would be excused from complying with the obligation to complete by that date.

Change in law in this example enables the affected party to claim the increased cost of performance and to an extension in the date for completion only, not an excuse of delay in the performance of other obligations.

Application

In this example, the event covered by the clauses is the same but the clauses operate on different effects on performance and provide different remedies. The *force majeure* clause operates on performance that is prevented or delayed, while the change in law clause operates on performance that is more or less costly and delays completion. They also provide different relief. The *force majeure* clause excuses the prevented or delayed performance only during the *force majeure* period. The change in law clause increases or decreases the price and extends the time for completion.

These clauses operate independently of each other and can be invoked at the same time. If the mining service company in our example was able to supply workers but at a slower rate and at higher cost, it would be excused from timely performance by the *force majeure* clause and would be able to claim the increased cost under the change in law clause. If the contract only had the *force majeure* clause, it would not be able to claim to be prevented from performing by increased cost but might be able to argue that the nature of the regulations and the situation that provoked them was so unusual as to entitle it to compensation (the general rule being that, all things being equal, a contractor bears the risks of usual, reasonable, foreseeable changes in law).

If there were no *force majeure* clause and only the change in law clause, the contractor would be able to claim the increased cost of performance and any delay to completion, but not an excuse from delayed performance. A consequence may be that the contractor would be entitled to spend and recover more to ensure there was no delay in performance as a delay would open it to allegations of breach.

Conclusion

Change in law clauses may be more useful than a *force majeure* clause in the current COVID-19 situation, where the contract can still be performed but there is delay and increased cost due to compliance with government regulations.

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