

CORONAVIRUS AND FORCE MAJEURE

We have started seeing a steady flow of force majeure claims across our network, following the outbreak of the novel coronavirus first reported in Wuhan, China on 31 December 2019 and the consequential surveillance and controls introduced by the Chinese and other governments.

Whether or not this will constitute force majeure in a contract is very much a case of interpretation of the relevant wording in the contract. That said, the following ten point checklist, whilst not constituting legal advice, may be of interest.

1. Is the epidemic specifically covered as a force majeure event in the contract? Even if so, it may still need to satisfy other requirements to constitute force majeure.
2. If not, is the event of a nature which would fall under general force majeure wording or has there been a government decision/administrative action preventing performance which meets the political interference language commonly included in definitions of force majeure?
3. Foreseeability tests – some contracts exclude events which could have *reasonably* been provided against, avoided or overcome. We have seen some suggestions that this could require comparison with actions taken after the main SARS coronavirus outbreak of 2003 – the word *reasonably* will need to be considered objectively in this regard.
4. Causation – the party seeking to rely on force majeure must then usually establish that the force majeure event has prevented or hindered them from performance of the contract. This is mostly a factual question but, again, will also turn on the exact wording in question. For example, some force majeure clauses require performance to have been rendered *impossible*, so the burden on (say) a contractor showing it could not have sourced staff/equipment/materials from elsewhere will be high. Generally, force majeure clauses are not usually so generous as to offer relief because services/goods will now simply be more expensive to perform/obtain.
5. Mitigation duties – the party claiming force majeure relief is usually under a duty to show it has taken reasonable steps to mitigate/avoid the effects of the force majeure event.
6. Notice requirements – parties will wish to consider whether prompt notification is a contractual condition precedent to relief or not.
7. Consequences (1) – in most contracts, establishing force majeure will lead to relief from performance (avoiding the risk of a default termination) and an extension of time to target dates.
8. Consequences (2) – Commonly, parties bear their own costs arising from any force majeure delay but there are exceptions where compensation may be payable after a certain duration and/or for certain costs from one party to another.
9. Consequences (3) – Extended periods of force majeure can lead to a right for one or more parties to terminate the contract. If the parties do not wish this to happen it is important to engage in discussions sooner rather than close to the deadline. It may be preferable for these to be withheld on a without prejudice basis.
10. Change in Law – in some contracts decisions or actions taken by Governments and public authorities in response to the virus may trigger change in law relief and compensation, although often this relief is restricted to changes in law in the project/host country.

What is a force majeure clause?

A “force majeure” clause is normally used to describe a contractual term by which one or both of the parties is entitled to suspend performance of its affected obligations or to claim an extension of time for performance, following a specified event or events beyond its control. It may also entitle termination of the contract, usually if it exceeds a specified duration.

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