

CORONAVIRUS AND FORCE MAJEURE

We have been advising across our network on numerous force majeure claims, following the coronavirus outbreak and the consequential restrictions and controls introduced by governments. Our view is that it is important this advice takes into account other applicable contractual mechanisms as well as the wider project structure and context.

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

1. Is pandemic/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.

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 sometimes included in definitions of force majeure?
2. Can both parties claim force majeure relief or only one? There may be scenarios where a party cannot provide access, equipment, etc. for performance to take place.
3. Foreseeability tests – some contracts exclude events which could have reasonably been provided against, avoided or overcome. 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 it 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. Even if it is concluded that there is no force majeure relief under the contract, it is always important to consider if there are any supervening principles of local law that may apply regardless of the governing law of the contract – many Civil Law countries contain codified provisions covering force majeure and economic hardship relief.

What is a force majeure clause?

A “force majeure” clause is normally used to describe a contractual term by which one or more of the parties is entitled to suspend performance of its affected obligations and/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.

8. Consequences – commonly in contracts:
 - (1) establishing force majeure will lead to relief from performance (avoiding the risk of a default termination) and an extension of time to target dates.
 - (2) 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.
 - (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 early rather than close to the deadline. It may be preferable for these to be withheld on a without prejudice basis.
9. 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 (for both time and cost) , although often this relief is restricted to changes in law in the host country.
10. Frustration – many jurisdictions allow for contracts to be brought to an end where performance is rendered impossible. The bar for this is usually very high (and would not usually cover higher costs or delayed performance, for example) although, in principle, it may need to be more carefully considered where a contract doesn't provide any other relief for Coronavirus.

As mentioned, our view is that analysis of force majeure entitlements benefits from consideration of wider implications, for example:

- other potential scenarios arising under the contract, including suspension, breach/prevention, change in law and frustration claims;
- the risk of supply chain failures giving rise to worse delay and bigger issues – for example arising from arrested payments and denied claims (however correct the contractual analysis of such claims); and
- the consequential impact of delay on other contracts and finance documents and whether this will trigger other defaults;

For both new and existing deals, we have been negotiating bespoke Covid-19 force majeure/suspension periods in which the Parties have agreed a solution that takes in account these wider considerations. Claims for force majeure are often viewed through an adversarial lens but, where possible, we believe there may be some merit in clients being on the front foot in proactively and collaboratively working with their counterparties to agree a managed solution offering mutually beneficial outcomes in these largely unprecedented circumstances.

CONTACT



David Metzger
Partner, Global Head of Construction
London
T: +44 20 7006 4240
E: david.metzger@
cliffordchance.com

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C H A N C E

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www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street,
London, E14 5JJ

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