

COVID-19: A FORCE MAJEURE EVENT?

Following the outbreak of the novel coronavirus and the consequential surveillance and controls introduced by a number of governments including the Luxembourg government, it may become essential to determine whether these events may be considered as force majeure events under Luxembourg law.

Following the outbreak of the novel coronavirus, one question arising with regard to contracts is whether this outbreak and its consequences, especially also taking into account the measures taken by different governments, including amongst others confinement measures, closure of the borders, possible closure of companies, etc. - may be considered as a force majeure event. This may be envisaged from two perspectives.

Firstly, there may be a force majeure clause in a given agreement. Such a 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. Whether or not the outbreak of the novel coronavirus will constitute force majeure in a contract is very much a case of interpretation of the relevant wording in the contract, and such clauses would need to be analysed in detail.

Secondly, according to general Luxembourg civil law principles, a force majeure event may be raised by a party responsible of having breached its contractual obligations in order to be discharged from its liability.

According to Luxembourg case law, a force majeure event has to be (i) external to the liable party, (ii) unpredictable and (iii) irresistible.

(i) With regard to the external nature, it has been held that the origin of the force majeure event must be external to the responsible party's sphere of influence. This may be the case for the outbreak of the novel coronavirus and its consequences on the economic situation in general due to the public health situation as well as governments measures. It is however not completely clear whether events affecting the parties' health are considered as external to the parties or not. It is however possible for the parties to provide in their agreement that future health problems would be considered as force majeure events.

(ii) With regard to the unpredictable nature, Luxembourg case law has held that the force majeure event had to be unpredictable on the date on which the contract was definitely formed. For example, according to legal writing, if an illness exists on such date, it may be impossible to predict its future evolution. However, this also means that the debtor has to make sure that he avoids any predictable consequences. In a sense, this type of reasoning could be transposed to the wider consequences of the outbreak of the novel coronavirus

and the date of conclusion of the contract may become important in order to evaluate whether the outbreak and/or its consequences were foreseeable at such date.

(iii) With regard to the irresistible nature of the force majeure event, Luxembourg case law is particularly demanding. The District Court has held in 2011 that, in contractual matters, the irresistible nature of the event causing force majeure consists of an impossibility of performance, which must be distinguished from a simple difficulty of performance or even from performance becoming more expensive than expected. Additionally such impossibility must be complete and permanent and not only temporary or partial (please see our Luxembourg Legal Update September 2011, p. 17)

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