

FORCE MAJEURE CLAUSES IN COMMERCIAL CONTRACTS AND COVID-19

The COVID-19 pandemic is undeniably having an unprecedented effect on countries and cities across the globe. Different countries are in different stages of attempting to control the spread of the virus, however the situation is evolving rapidly on a daily basis and governments are being forced to take drastic measures in order to curb the spread of the virus and 'flatten the curve'. Many countries, especially in Europe, are seeing complete social lockdowns which prohibit the population from venturing outdoors except for prescribed reasons. Many businesses have shut down entirely, major sporting events are either being postponed or cancelled altogether and the retail industry, amongst others, is seeing a massive downturn in business as a result. Affected parties are therefore attempting to seek redress in the 'force majeure' clauses in their contracts, if any.

Force Majeure

Force majeure is a French phrase which translates directly to "superior strength". These clauses are typically included in commercial contracts to provide the parties with relief in the event that an unforeseen or unavoidable event occurs which is out of their control and which, as a result, prevents either of them from fulfilling their obligations under the contract. Force majeure clauses will usually specify the particular events or scenarios which would qualify as a force majeure event and which the parties could rely on to relieve themselves of their obligations. Generally, events such as natural disasters (earthquakes, tsunamis etc), wars, riots, strikes and Acts of God are included in many force majeure clauses.

In common law jurisdictions force majeure clauses are not interpreted into the contract and so must be expressly included. Even then, the clauses are interpreted strictly and so care must be taken when drafting the clause to ensure it provides enough cover. In most cases, the force majeure clause falls into the category of 'boilerplate' clauses which are often overlooked and not as thoroughly scrutinised as the main commercial terms and so some parties may now find it difficult seek relief from the force majeure clause in their contract if the current pandemic does not fit into a provided scenario.

COVID-19

Would an event such as the present coronavirus pandemic be covered by a force majeure clause? This would largely depend on the drafting of the clause. Contracts are taken at face value and a court would interpret the provision using the ordinary meaning of the words. For example, Acts of God are generally interpreted as being uncontrollable events which occur without any human intervention (such as natural disasters); therefore, if a contract only lists Acts of God in its force majeure clause it may not cover a pandemic which relies heavily on human to human transmission. A balance must be struck between what the parties' intentions were when entering into the contract, what the

clause explicitly states and how the courts interpret the wording.

In all likelihood commercial contracts would not cater explicitly for the coronavirus pandemic. Parties seeking to trigger the clause would therefore need to rely on any other explicit event which may be provided for in the clause and which could cover the pandemic (e.g. epidemics, government actions, events beyond their control). The onus would be on the party seeking to rely on the force majeure clause to prove that the event has prevented them from carrying out their obligations under the contract and that the contract provides for a situation which covers the current pandemic.

Considerations

Legal advice should always be sought from any party affected by the current pandemic and who is contemplating triggering a force majeure clause in any active contract(s). Force majeure clauses would typically provide for the correct mechanism of triggering the clause, how the other party should be notified and any time limits in doing so and these should be adhered to in order to achieve a successful outcome.

It may also be useful to contact the other party before triggering the clause; many businesses are being equally affected by the pandemic and it may be that agreements can be reached between the parties which may temporarily suspend their respective obligations under the contract, thereby protecting the commercial relationship.

Signature Litigation is assisting clients in relation to various aspects of force majeure claims to best protect their positions. Please do not hesitate to contact us to discuss any issues.

GIBRALTAR

Signature Litigation

7 Governor's Street, Gibraltar GX11 1AA

E: info@signaturelitigation.com | T: +350 200 10 900