

23 March 2020

COVID-19 - Legal and Contractual Implications



COVID-19 has been characterised as a global pandemic by the World Health Organisation (“WHO”). Countries are in lock down, travel and freight have ground to a halt and stocks have plummeted, but what does this mean for contracts? Below we consider the relevant key contractual provisions when negotiating or attempting to exit contracts and provide a risk checklist for parties to consider.

Given the speed with which the COVID-19 situation is evolving, any measure implemented must be kept under regular review. This alert is published on 23 March 2020.

Force Majeure

Circumstances outside a party's reasonable control which prevent that party from fulfilling its contractual obligations are often considered force majeure events under the contract or at law.

Establishing that a force majeure event has occurred may give a party the option to either:

- terminate the contract;
- refrain from performing the contract;
- suspend performance of the contract; or
- claim for an extension of time for performance.

CURRENT CONTRACTS:

If a party wishes to invoke force majeure, firstly, it is important that the party ascertains, and retains evidence demonstrating, that they are unable to meet their contractual obligations. If it is simply harder or more expensive to meet the contractual obligations, subject to the governing law and wording of the contract, the relevant circumstances may not be considered a force majeure event.

Secondly, a party must demonstrate that the circumstances are considered a force majeure event at law or under the contract. If a party wishes to allege COVID-19 or its consequences are a force majeure event, contractual wording which indicates ‘pandemics’ as force majeure events will no doubt assist.

Thirdly, there must be a causal link, i.e. the claimant is likely to be required to prove that the force majeure event (in this case COVID-19) caused the loss it is claiming. Where there are competing events, a Court or Tribunal is likely to find that a defendant is entitled to relief for the period of delay caused by the force majeure event, notwithstanding the concurrent effect of the other event.

The Laws of the Middle East

If the contract **does not** expressly provide a force majeure clause, mandatory provisions of law may imply the principle of force majeure into the contract:

- **Article 273 of UAE Federal Law Number 5 of 1985 the Civil Code** sets out that force majeure in bilateral contracts will arise if performance of the obligation is impossible;
- **Article 188 of Qatar Law Number 22 of 2004 Regarding Promulgating the Civil Code** sets out that in circumstances of force majeure beyond the reasonable control of a party, such that performance of an obligation becomes impossible, shall relieve that party from carrying out the obligation;
- **Article 172 of Oman Sultani Decree Number 29 of 2013 Omani Civil Transactions Law** sets out that in bilateral contracts, if force majeure occurs and performance becomes impossible, the contract will be revoked;
- **Article 215 of Kuwait Decree Law Number 67 of 1980 Promulgating the Civil Code** sets out

that if an obligation of one party becomes impossible from a cause beyond the reasonable control of that party, then such obligation will be extinguished;

- **Article 161 of the Libyan Civil Code of 1954** sets out that if an obligation becomes impossible to carry out, that obligation will be extinguished and the contract rescinded; and
- **Saudi Arabia** does not have a codified civil code and, instead, follows the principles of the Sharia. Parties may be able to allege force majeure under the **Sharia concept of 'Gharar'** which includes hazardous or risky transactions.

Although the above statutory provisions may assist, they do not provide an exhaustive list of what may or may not constitute a force majeure event. This ambiguity provides opportunity for parties to allege force majeure in the face of COVID-19 and the practical consequences of COVID-19. No doubt this point of law is likely to be tested in each of the above jurisdiction's courts and arbitral tribunals.

If the contract **does have** a force majeure clause, this should carefully be considered; clauses which expressly refer to a 'pandemic' or COVID-19 like events will, we suspect, be particularly decisive. If not, parties must consider the practical events which are preventing their performance of the contract and establish whether they fall under the wording of the contract and, specifically, whether these events have actually caused the delay or non-performance.

NEGOTIATING CONTRACTS:

Parties should ensure express wording, which covers COVID-19/pandemic events, is incorporated into force majeure clauses. If such wording cannot be agreed, parties should consider including broadly worded force majeure clauses which may cover COVID-19 type events.

STANDARD FORM CONTRACTS:

If you have a standard form contract, pandemics may or may not be considered a force majeure event. For example, the FIDIC contracts (yellow and red) do not expressly list pandemics as constituting a force majeure event, but do state that other events outside the ones listed in the contract may be considered a force majeure event.

In the shipping industry, COVID-19 is considered a force majeure event in SUPERMAN 2016 and

NEWBUILDCON 2007 since it can be classified as an "epidemic". It is important to note that even if the clause covers COVID-19, it is still subject to other conditions in the contract being satisfied, including compliance with notification, duties of the parties to minimise delay and whether the parties could not have reasonably avoided the effect of COVID-19 on contractual performance.

Change in law

Often, a contract will contain a change in law clause which will entitle the parties to terminate, renegotiate or amend the contract if there is a change in the law that will make it impracticable or impossible for one of the parties to perform their contractual obligations.

Parties should check whether this is a separate clause or whether change in law is of itself one of the force majeure events under the contract, which may sometimes be the case.

CURRENT CONTRACTS:

Most jurisdictions have so far released governmental guidance, which may not be classed as a change in law if the definition in the contract is limited in scope so as to only cover legislative measures and/or rulings of the court of the applicable jurisdiction. However, we are already starting to see some governments announce emergency legislative measures designed to combat COVID-19, including the UK and the US.

Parties must also consider whether the clause only relates to the governing law of the contract or whether it refers to "Applicable Law", the latter being wider in scope. These matters will be a question of interpretation of the contract.

NEGOTIATING CONTRACTS:

Broad scope clauses are recommended so that any governmental and intergovernmental policies, advices and guidelines as well as any laws, rules and regulations have the potential to be captured by the clause. If specific wording is necessary, references to pandemics should be included.

Contractual Notices

Contracts usually require a party invoking contractual provisions to give written notice to the other party. Notice clauses must be adhered to strictly by the parties, particularly as regards force majeure events

which often provide for strict time limits within which claims for relief must be made. Parties are usually required to notify of the date when the delay commenced, the cause of the delay and an estimated duration of how long the event may last. The claimant is also often required to give further notice once the delay has ended.

Insurance

Insurance obligations and policies should be reviewed to determine if COVID-19/pandemics are covered. In particular:

- Cover will depend on the specific wording of the policy; therefore, read it carefully;
- Certain policies, such as event cancellation, may expressly exclude communicable diseases. It might expressly refer to a previous outbreak, such as SARS or Swine Flu, and may contain a 'sweep clause' excluding losses relating to "any other" disease, in which case, cover would not be available;
- Where there is coverage, it is important to ensure that the cause and quantum of losses as well as actions of mitigation showing corporate decision-making are documented; and
- Remember that the interpretation of a policy (even where identical or similar clauses appear) may depend on the particular jurisdiction; therefore, a company should seek advice from insurance representatives and local lawyers.

Also, insurance policies could be purchased now, including Business Interruption, but it is important to note that they may now expressly exclude COVID-19, coronaviruses and/or any other pandemics. Again, the wording should be carefully considered.

Mitigation

It is important to remember that a party who has suffered loss has to take reasonable action to minimise the amount of loss suffered. The same applies to circumstances arising from a force majeure event. That is, the party seeking to rely on the force majeure event and associated delay must show that they have taken reasonable steps to avoid the force majeure event. This is particularly important where there may be concurrent delay events.

Risk Checklist

Below, we summarise a checklist of what a company should be doing to minimise future risks:

- **Review the contract:** Review the force majeure clause to ensure compliance with notice provisions and time limits. While this alert seeks to inform parties of how force majeure may provide relief from contractual obligations, it is important to note that it may not be the only option in the contract or at law. A company should seek advice from local lawyers to review all of its contractual options and exit strategies to liabilities/rights at law before taking its preferred action.

For options relating to commercial contracts governed by English Law, please [click here](#).

- **Business continuity plans ("BCP"):**
 - BCP should be assessed by trialling current arrangements with employees, which include working from home, opting for video/call conferences instead of face-to-face communications and ensuring sufficient ICT infrastructure is in place to support remote working. Much of this action has already taken place globally. For further information relating to working remotely, self-isolation and sick pay, please [click here](#).
 - Keep up-to-date on government guidelines in jurisdictions where the company operates as well as advice from the WHO.
 - Communicate with subcontractors to ensure they are able to satisfy contractual obligations and discuss contingency plans.
- **Records:** Keep records of all documentation evidencing measures taken to justify any corporate actions/decisions should they give rise to any future disputes. As set out above, it is important that a company is doing all that is reasonably required to mitigate any potential losses (financial or otherwise) resulting from COVID-19.
- **Evidence:** Gather documents (e.g. progress records, site reports and communications) to support the occurrence of the force majeure event and specifically how you might allege that COVID-19 has caused the delay. This may mean instructing experts to prepare a critical path analysis.

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- **Health:** Promote effective hygiene practices within the workplace to educate employees about how to prevent the spread of the infectious disease.
 - **Communication:** Procedures should be in place for reporting any illnesses, travel arrangements, face-to-face plans with external parties/clients and alternative working arrangements to support all teams within the company.
 - **Other risks:** It is important not to overlook the consequences that can result from a global crisis, such as inadvertent data loss, phishing emails and use of less secure laptops and devices at home by ensuring organisations take practical steps to guard against such risks.

Conclusion

It is crucial to take proactive steps to mitigate the impact of losses caused as a result of COVID-19. Contractual obligations should be considered and future commercial activity should be carefully planned. In any event, it is vital that notices are issued, data is captured and losses are tracked.

Our team has extensive experience in advising clients on the performance of commercial contracts and has already provided a significant amount of advice on the implications of COVID-19. Please therefore do not hesitate to contact any of the team below should you have any questions or require advice.

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