

Introduction

The economic impact of the Pandemic COVID 19 all over the world has disturbed the political, social, economic, and financial structures. Existing contracts - global and intra country are not being fulfilled, due to lack of products, wastage of products as well as stoppage of the source of the supply. Contractual agreements are not being honoured involuntarily as the concept of Force Majeure recedes in the face of non-willful defaults. Thus, here we see an analysis of six different countries made with the help of our associate professionals in respective country to understand the measures adopted by each government during the pandemic.

What is the Force Majeure and doctrine of frustration?

Generally, a force majeure event is an event that is beyond the affected party's reasonable control, and could not have been foreseen, or, if the event could have been foreseen, is an event that was unavoidable and Frustration is an act outside the contract due to which the completion of a contract becomes impossible.

COUNTRIES ANALYSED:

UNITED STATES OF AMERICA

Is there any specific legislation on agency contracts and distributions to regulate the problems arising from the health emergency we are facing?

Even though USA has declared Covid-19 as a pandemic, there is no specific legislation that has been taken out in USA regarding the Agency and Distribution contracts.

Does this jurisdiction imply a concept of Force Majeure into commercial contracts, or do the parties need to negotiate the provision?

The force majeure clause is not implied under the United States law with respect to most contracts and the parties are required to negotiate this provision along with its definition i.e. what comes under a force majeure event, the notice obligations and other relevant provisions. For Sale of Goods contracts, concepts like the Force majeure clause can be implied.

For a contract without a Force Majeure provision, what options has a party have where its ability to perform its obligations has been affected by COVID-19?

Most state jurisdiction follow common law principles of frustration of purpose, prevention by

government regulation or impracticability in absence of a Force Majeure clause in a contract. Under the doctrine of Impracticability, the parties' contractual obligations maybe discharged if after the contract is made, the parties performance becomes impracticable. The doctrine of frustration is also available as a defense to contracts.

How are the courts likely to assess whether COVID-19 qualifies as a Force Majeure event?

The courts will see the specific definition of Force Majeure used in a contract. A change in economic conditions is almost never sufficient, standing alone, to constitute a Force Majeure event. Onus of the burden lies on the party stating the existence of a force majeure event.

GERMANY

Is there any specific legislation on agency contracts and distributions to regulate the problems arising from the health emergency we are facing?

Germany has passed "The Law on Mitigating the Consequences of the COVID-19 Pandemic in Civil, Bankruptcy and Criminal Procedure Law" in lieu of the Pandemic.

What is the legal basis for this with regards to contract law and what is the scope of the implied provision?

The new and temporary Art. 240 § 1 of the German EGBGB(German civil code) , provides a right to refuse performance for consumers and micro-businesses (companies with less than 10 employees and a maximum annual turnover of EUR 2 million) until June 30, 2020. These apply to essential long-term contracts which have been concluded before March 8, 2020 as it includes compulsory insurance, contracts for the supply of electricity and gas or telecommunications services and for water supply and disposal. The moratorium is limited to June 30, 2020. An extension option (up to a maximum of September 30, 2020) has already been created in the law. The exercise of the right to refuse performance is excluded if the contractual creditor cannot be reasonably expected to exercise it. In this case, the micro-

entrepreneur has the option of being released from the contract.

For companies which are not micro enterprises and do not have the clause of force majeure (since Germany does not imply the concept of force majeure into contracts):

If the contract is impossible to perform, then the contractual obligation is extinguished, pursuant to section 275 of the German Civil Code (BGB). Where it is possible to perform a contractual obligation, but to do so would now be significantly more difficult or uneconomical, section 275 BGB provides for a right to refuse performance. However, Section 313 BGB can lead to an adjustment of the contractual provisions, if an adjustment of the contract is not possible or not reasonable, then the contract can be terminated. Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) may assist a seller to avoid liability, providing CISG applies (based on the facts) and has not been explicitly excluded in the contract.

PRC- CHINA:

Does this jurisdiction imply a concept of Force Majeure into commercial contracts and If implied, what is the legal basis for this and what is the scope of the implied provision?

PRC implies a concept of Force Majeure into commercial contracts. The PRC Contract Law also respects the principle of freedom of contract. Force Majeure is codified in Article 180 of the General Rules of the Civil Law of the PRC.

How are the courts likely to assess whether COVID-19 qualifies as a Force Majeure event?

Although government statements and local court notices are not binding to all cases, they may be persuasive. The First Civil Division of Higher People's Court of Zhejiang Province is also reported to have issued a notice stating that a Force Majeure could be established if: (i) the failure of performance is directly caused by administrative measures taken by the government to prevent the COVID-19 pandemic; or (ii) it is fundamentally impossible for a party to perform its obligation due to the COVID-19 pandemic.

In case Force Majeure cannot be established, the court may consider applying the principle of fairness and the principle of circumstance change if it is apparently unfair for a party to continue performing its obligations, or the contract purpose cannot be realized due to COVID-19.

What are the recent developments regarding Force majeure certificate?

On 30 January 2020, the China Council for the Promotion of International Trade ("CCPIT"), a quasi-government trade body, announced that in view of the impact brought by COVID-19 and in order to preserve the legitimate interest and to assist in minimizing loss of companies, it will issue a force majeure certificate to companies who failed to perform their contractual obligations due to COVID-19.

SINGAPORE:

Is there any specific legislation on agency contracts and distributions to regulate the problems arising from the health emergency we are facing?

The Singapore government passed the COVID-19 (Temporary Measures) Act on 7 April 2020. The Act seeks to offer temporary relief to businesses and individuals who are likely to have been hit hardest by COVID-19. The Act will prohibit a contracting party from taking certain legal actions against a defaulting party, including the commencement of court and insolvency proceedings. However, the Act only covers certain types of contracts prescribed by the Act. Commercial Contracts are not covered by the Act. The COVID-19 (Temporary Measures) (Control Orders) Regulations, 2020 and Regulatory Response to COVID-19 i.e. "The pandemic appears tailor-made for Singapore's managerial and interventionist style of governance" are also issued by the Singapore Government.

What is the procedure for obtaining relief?

A party who wishes to obtain relief under the Act should serve a notification for relief on the other party or parties to the contract and any guarantor or surety for its obligation in the contract.

As a safeguard against unfair outcomes, assessors will be appointed by the Minister Of Law to resolve disputes arising from the application of the Act. They will decide if the inability to perform contractual obligations was due to COVID-19 and

will have the power to grant relief that is just and equitable in the circumstances. The assessors' decisions will be final and not appealable. The process is proposed to be affordable, fast, and simple. No party will be allowed to be represented by lawyers and each party must bear the party's own costs for proceedings before an assessor.

Force majeure and frustration:

The ability to take an action pursuant to an applicable force majeure clause in a contract or the Frustrated Contracts Act remains unaffected by the provisions of the Act providing temporary relief for the inability to perform contractual obligations. Therefore, businesses should analyze their contracts for any force majeure clause and consider if the COVID-19 pandemic constitutes a force majeure event within the ambit of such clause.

Temporary relief for financially distressed businesses due to COVID-19

During the prescribed period, the Act temporarily increases:

- a. the monetary threshold under the Companies Act (Cap. 50) for which a company is deemed to be unable to pay its debts from \$10,000 to \$100,000; and
- b. the statutory period to pay a demand from a creditor from three weeks to six months.

The Act does not require that these debts were incurred on or after 1 February 2020.

In addition to the offence under the Companies Act the Act introduces a safe harbour provision to enable the company to carry on trading while insolvent by temporarily relieving the officers from the remit of this provision if the debts are incurred in the company's ordinary course of business during the prescribed period and before the appointment of a judicial manager or liquidator of the company.

ENGLAND AND WALES :

Is there any specific legislation on agency contracts and distributions to regulate the problems arising from the health emergency we are facing?

Even though England has declared Covid-19 as a pandemic, there is no specific legislation that has been taken out in England regarding the Agency and Distribution contracts.

For a contract without a Force Majeure provision, what options has a party have where its ability to perform its obligations has been affected by COVID-19?

There may be contractual provisions that allow a party affected by COVID-19 to amend or delay its contractual obligations. Also, the affected party may rely on the doctrine of "frustration" to argue that it no longer needs to perform its future obligations because the purpose of the contract has been frustrated. If this option do not assist, the affected party is likely to be in breach of contract unless it can renegotiate or vary its terms, or assert that other contractual provisions apply, which may excuse future performance under the contract.

How are the courts likely to assess whether COVID-19 qualifies as a Force Majeure event?

The court will consider the specific wording of the clause, and whether the current situation entitled the party seeking to rely on the clause to do so. To interpret what the parties intended when entering into the agreement, the court will also consider the context of the clause. A court will also want to consider whether the event relied upon is the sole cause of a party's inability to perform its obligations; if not, and there are other causes, case law suggests that the clause cannot be relied upon. Unless the party can renegotiate or vary the terms of the contract, it is likely to be in breach of contract. This may allow the counter party to terminate the contract and/or seek damages or other contractual remedies.

BRAZIL:

Is there any specific legislation on agency contracts and distributions to regulate the problems arising from the health emergency we are facing?

Brazil like other nations has declared Covid-19 a pandemic but the country has not yet taken out any specific legislation in this regard. There is a Draft Bill No. 1,179/2020 that awaits approval from the legislative branch. It does not change any existing legal rules but suspends the operation of some current rules.

Does this jurisdiction imply a concept of Force Majeure into commercial contracts and If implied, what is the legal basis for this

and what is the scope of the implied provision?

According to Article 393 of the (Brazilian Civil Code), it is open to the parties define the liability for Force Majeure. In summary, they are only liable to the risks expressly assumed in the contracts. An event can be caused by acts of nature or acts of people, and the contractual obligation must be impossible to be fulfilled the parties are relieved from performing the contractual obligation affected by the Force Majeure, since the contracts do not refer to the said events.

For a contract without a Force Majeure provision, what options has a party have where its ability to perform its obligations has been affected by COVID-19?

Besides a Force Majeure claim, the parties may be discharged from their obligations, depending on the effects of the event, based on several arguments, such as (i) rebus sic stantibus rules that allow for the termination or the revision of the contracts to reestablish the contractual balance.

(ii) the principle of good faith, which is an open-textured rule that obliges the parties to act with honesty and loyalty during the contractual relationship, stated in Article 422 of the Civil Code;

(iii) the impossibility of debtors be considered in default if no act or omission can be imputed to them, established in Article 396 of the Brazilian Civil Code etc.

How are the courts likely to assess whether COVID-19 qualifies as a Force Majeure event?

The Brazilian courts will consider COVID-19 as a Force Majeure event, since this pandemic is inescapable, and its effect remains unpreventable and uncontrolled.

However, the contractual obligation being considered by Courts as affected by COVID-19, and consequently as a Force Majeure event, will also depend on the specific circumstances involved in every single case.

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