



Force Majeure

Contractual performance – Force Majeure clauses and other options: a global perspective

This legal update describes options that may be available to parties to contracts affected by COVID-19. In particular, we focus on the concept of *Force Majeure*, which translates from French roughly as “a major force”, and which may excuse a party from the performance of its contractual obligations.

The analysis must be undertaken on a contract-by-contract basis. Each party has a different set of objectives, each contract has different obligations that may be affected in different ways, and each jurisdiction has different applicable laws. While the concept of an excuse from performance of contractual obligations due to unexpected events is common in many jurisdictions, there are differences in its scope and operation. Businesses may need to be alert to these differences in laws in addition to carefully considering the specific wording of Force Majeure clauses when they appear in a contract.

Practical steps

Each situation is different, but in general, businesses should:

- Identify contracts that are likely to be affected by COVID-19.
- Review high-priority contracts to assess impact and potential relief available. Priorities might be set both on the importance of the relationship and the potential harm from COVID-19.
- Consider whether (in addition to Force Majeure) other legal avenues are available, such as [Material Adverse Change \(MAC\)/Material Adverse Effect \(MAE\) clauses](#), price adjustment clauses or the concept of “frustration” of contract.
- Comply with contractual notice requirements where beneficial, whether in Force Majeure or other relevant clauses. The giving of notice might begin the period of relief of performance

obligations or the beginning of insurance coverage.

- Identify and consider utilising governance provisions to make plans and work on joint solutions. Today, it is difficult to even get the attention of counterparties, and a contractual right to attention through a governance provision may help.
- Consider communicating with counterparties regarding potential difficulties with performance and possible solutions. For example, consider sending letters to potentially affected counterparties indicating your view that the Force Majeure clause does not apply and that they thus remain fully obligated to perform. This may convince them to fully perform or, at minimum, be good evidence in later litigation.
- Consider what steps could be taken to mitigate the impact of COVID-19 on performance, and how such steps fit with contractual and legal obligations. Many laws and contracts impose upon both parties an obligation to mitigate damages.
- Work closely with other parts of your COVID-19 response team so that steps taken (such as imposing a travel ban) to prioritise health and welfare are effected without violating contractual obligations. For example, be cautious about instructing individuals (or giving individuals the option) to work from home if you are contractually obligated to have those individuals working at a specific facility.

Guidance on a wide variety of relevant issues is available at [the Mayer Brown COVID-19 Portal](#). In particular, please refer to recent legal updates:

- [Contracts/COVID -19 and outsourcing Contracts: US legal rights and practical steps](#)
- [Supply chain/COVID-19- key English law considerations regarding supply chain impact](#)
- [Force Majeure- COVID-19: Construction, frustration, force majeure- what does contract law say?](#)
- [Contracts/Force Majeure- the lasting impact of COVID-19 on the global project development & finance market](#)

Reviewing a Force Majeure clause

The review of an express Force Majeure provision might include considering the following questions:

- Are we the affected party or the unaffected party?
- Is COVID-19 a type of event that triggers the relevant clause? Obvious possibilities include a "disease", an "epidemic" or a "pandemic". Some clauses include sweeping language such as "any event or circumstance beyond the reasonable control of the affected party" while others are limited to major events such as earthquake, war, explosion, fire and flood. Governmental action is another particularly helpful category for affected providers.
- Is the waiver of obligations limited to failures due to a Force Majeure event or only those that could not have been prevented through reasonable means (such as workaround plans)?
- Must performance be "prevented" (essentially impossible) or is it sufficient for performance to be "delayed" or "hindered" for the clause to excuse contractual obligations?
- What is the impact of the party's own actions in contributing to its inability to perform? For instance, if it has imposed a travel ban that has meant it is unable to perform, does that limit its ability to rely on the Force Majeure clause?
- When should notice be given? Should it be when there is an actual impact, or a possible impact? Does giving notice have adverse contractual effects, such as beginning a period for

correction and restoration of full performance?

- Is there an obligation to take steps to mitigate the consequences of the event? If so, which party has (or which parties have) that obligation? Are they described in the contract (such as a specific disaster recovery or business continuity plan)?
- Is there an obligation to report to the other party on a continuing basis as to the steps being taken and/or the expected impact of the event?
- Does either party have the right to terminate or delay performance of the contract if the clause has been invoked? If so, after how long?

Force Majeure: Key jurisdiction Q&A

In the following section, we answer some key questions about the options available to parties affected by COVID-19 in different jurisdictions, focusing particularly on the scope of Force Majeure.

ENGLAND & WALES

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

English law does not imply the concept of Force Majeure into commercial contracts. It is entirely up to the parties to negotiate whether or not there should be a Force Majeure clause in the contract, and if so, its scope and the circumstances in which it can be exercised.

2. If implied, what is the legal basis for this and what is the scope of the implied provision?

Not applicable.

3. For a contract without a Force Majeure provision, what options does a party have where its ability to perform its obligations has been affected by COVID-19? Is that different for contracts for services and contracts for the provision of goods?

There is no particular difference between contracts for services and contracts for the provision of goods. There may be contractual provisions that allow a party affected by COVID-19 to amend or delay its contractual obligations.

In addition, 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. However, for this doctrine to apply under English law, it must be impossible (not merely more difficult or uneconomic) to perform the contract, so there are likely to be relatively limited circumstances where it will apply in the current situation.

If these options 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 (for example, MAC or MAE clauses) apply, which may excuse future performance under the contract.

4. 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. In order to interpret what the parties intended when entering into the agreement, the court will also consider the context of the clause.

Where a clause contains a non-exclusive list of events, followed by general language such as "*any other cause beyond the party's control*", a court has found that for an event to fit within this general wording, it must be of a similar nature to the specific events listed (*Tandrin Aviation Holdings Ltd and Aero Toy Store LLC and others* [2010] EWHC 40).

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.

It is for the party seeking to rely on the clause to prove, on the balance of probabilities, that it was entitled to do so.

5. What are the potential effects of exercising Force Majeure rights?

This will depend on the specific wording of the clause, but generally it will entitle a party to suspend performance of its obligations without a penalty. The contract will determine whether this is for a particular period of time or indefinitely, and what the options are for the parties; this can include the right for one or both parties to terminate the contract if the Force Majeure event has continued for a specified period of time.

The clause may also require a party that has exercised a Force Majeure clause to take particular steps to mitigate the impact of the event or find a workaround.

6. If a party cannot rely on a Force Majeure clause or other legal option, what is the contractual position?

Unless the party is able to renegotiate or vary the terms of the contract, it is likely to be in breach of contract. This may allow the counterparty to terminate the contract and/or seek damages or other contractual remedies.

FRANCE

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

French contract law recognises a legal concept of Force Majeure, which courts apply irrespective of whether the parties have expressly provided for it in their contracts.

2. If implied, what is the legal basis for this and what is the scope of the implied provision?

The legal basis for implying the concept of Force Majeure into commercial contracts is set out in Article 1218 of the French Civil Code (FCC).

In order for an event to fall within the legal definition of Force Majeure, the following characteristics must cumulatively be present:

- it is beyond a party's control;
- it can be considered as reasonably unpredictable at the time the contract was entered into;
- its effects cannot be avoided by appropriate measures; and
- it prevents a party from performing its contractual obligations.

The parties are free to expressly agree the contractual definition of Force Majeure, for example, by expressly listing the types of events which fall within the definition of Force Majeure.

The concept of Force Majeure assumes the occurrence of an event which prevents a party from performing its contractual obligations. This should not be confused with that of "unforeseeable circumstances". This refers to the occurrence of a change of circumstances, unforeseeable at the time the contract was entered into, and which would make contractual performance "only" excessively onerous for one of the parties (and for which article 1195 of the FCC provides for the termination or revision of the contract by the court, in the absence of any express agreement between the parties).

3. For a contract without a Force Majeure provision, what options does a party have where its ability to perform its obligations has been affected by COVID-19? Is that different for contracts for services and contracts for the provision of goods?

Absent any express Force Majeure provisions, the liability of a party may be affected by COVID-19, if COVID-19 is considered to fall within the legal definition of Force Majeure.

There is no particular difference between contracts for services and contracts for the provisions of goods.

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

When considering whether a specific event is a Force Majeure event, the court will have regard for the circumstances in which the relevant event occurs and check whether the requirements of Article 1218 of the FCC are met.

As regards COVID-19 specifically, it is quite likely that the courts will consider it to be a Force Majeure event, in the event it is established that it prevents a party from performing its contractual obligations.

It is likely that the present COVID-19 outbreak falls within the characteristics (set out above) of Force Majeure, on the basis of: (i) the unpredictability of the event (save for those contracts concluded relatively recently); (ii) its irresistibility; and (iii) the imperative and binding measures taken by the public authorities, provided the effect is to prevent a party from fulfilling its contractual obligations.

5. What are the potential effects of exercising Force Majeure rights?

Force Majeure releases a party from any civil liability it may have. French law does not require a party to mitigate its damages in the event of contractual non-performance due to Force Majeure.

6. If a party cannot rely on a Force Majeure clause or other legal option, what is the contractual position?

A party which is unable to rely on Force Majeure shall be deemed to be in breach of contract.

Consequently, pursuant Article 1231-1 of the FCC, a party's civil liability may be engaged, the result of which being that it may be obliged to compensate the damage caused to the counterparty arising out of the non-performance. This may include a payment of damages plus interest.

In addition to a party's civil liability, the counterparty may avail itself of the other sanctions for non-performance of the contract, pursuant to Article 1217 of the FCC (such as forced performance in kind, revision of the price, termination of the contract).

Moreover, the party's non-performance would enable the counterparty to invoke the benefit of a plea of non-performance under Article 1219 of the FCC, and thus suspend performance of its own contractual obligations.

GERMANY

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

German law does not imply the concept of Force Majeure into commercial contracts. It is entirely up to the parties to negotiate whether or not there should be a Force Majeure clause in the contract, and if so, its scope and the circumstances in which it can be exercised.

2. If implied, what is the legal basis for this and what is the scope of the implied provision?

Not applicable.

3. For a contract without a Force Majeure provision, what options does a party have where its ability to perform its obligations has been affected by COVID-19? Is that different for contracts for services and contracts for the provision of goods?

In general, the following applies in general for the delivery of goods or workmanship/service contracts (other than employment contracts):

- If the contract is objectively impossible to perform, then the contractual obligation (e.g. the delivery of services or goods) is extinguished, pursuant to section 275 of the German Civil Code (BGB).
- Where it is not impossible 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. If the relevant contractual party is not responsible for the issue causing the disproportionality, the bar to refuse performance is lower.
- The party relying on section 275 BGB may, however, be exposed to a claim for damages if it (as the non-performing party) is responsible for the circumstances which have resulted in the contract being impossible or uneconomical to perform.
- However, if the obstacle to performance merely disturbs the equivalence of contractual obligations (e.g. excessive increase in procurement prices), section 313 BGB can lead to an adjustment of the contractual provisions, e.g. the price. Only if an adjustment of the contract is not possible or not reasonable, can the contract be terminated.
- In the context of an international sale of goods contract, 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 (which is often the case). While epidemics and state interventions are, in principle, covered by Article 79 CISG, its applicability will depend on the specific circumstances of the contract.

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

The question of whether or not the current situation would qualify as a Force Majeure event is determined by:

- the specific nature of the agreement;
- the wording of the clause; and
- whether the incident giving rise to the Force Majeure claim is addressed in the Force Majeure clause.

German travel law, for example, acknowledges 'epidemics' and 'diseases' as Force Majeure. When assessing the individual case, the statements of the Federal Foreign Office (Auswärtiges Amt) and the recommendations of the World Health Organisation are likely to have an indicative effect. Official measures (e.g. production restrictions or embargos) can also be classified as Force Majeure.

5. What are the potential effects of exercising Force Majeure rights?

The potential effects of a Force Majeure clause are determined by the wording of the clause itself.

Generally speaking, the affected party is entitled to suspend its performance for a period of time, provided it follows the contractually prescribed notification provisions. After a certain period of time either party may be entitled to terminate the contract; no additional damages claims will apply.

Although German law does recognise the concept of Force Majeure, it does not provide a statutory framework for it. Consequently, the effect of each Force Majeure clause will be determined by the explicit wording of the clause.

6. If a party cannot rely on a Force Majeure clause or other legal option, what is the contractual position?

See section 3 above.

HONG KONG

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

Hong Kong law does not imply the concept of Force Majeure into commercial contracts. It is entirely up to the parties to negotiate whether or not there should be a Force Majeure clause in the contract, and if so, its scope and the circumstances in which it can be exercised.

2. If implied, what is the legal basis for this and what is the scope of the implied provision?

Not applicable.

3. For a contract without a Force Majeure provision, what options does a party have where its ability to perform its obligations has been affected by COVID-19? Is that different for contracts for services and contracts for the provision of goods?

If the contract does not contain a Force Majeure clause, the affected party may seek to discharge the contract on the ground of "frustration" which, in practice, is far more difficult to establish. Frustration is a common law doctrine which applies when an outside event occurs without the fault of the party relying on it (such as the COVID-19 outbreak) rendering the affected party physically or commercially unable to fulfil the contract, or transforms the obligation to perform into a fundamentally different obligation from that undertaken at the point at which the contract was entered into. A contract will not be frustrated simply because it becomes more difficult or more expensive to perform, or that there is an economic downturn or a break in the supply chain.

The legal test for frustration is the same for all contracts, whether contracts for services or contracts for the provision of goods.

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

Courts in Hong Kong are generally reluctant to intervene in commercial arrangements and tend to interpret Force Majeure clauses narrowly. There must be express wording in the Force Majeure clause wide enough to cover the COVID-19 outbreak as a possible Force Majeure event (such as 'epidemic', 'pandemic' 'disease', 'acts of god' or 'events beyond a party's reasonable control'). It must also be shown that the "triggers", if any, set out in the Force Majeure clause are satisfied. For instance, Force Majeure events are typically qualified as those which "prevent" the affected party from performing the contract. In such cases, the affected party must prove to the court that the COVID-19 outbreak has rendered performance legally or physically impossible. An economic downturn (by itself) may not be sufficient.

5. What are the potential effects of exercising Force Majeure rights?

The effects of exercising Force Majeure rights depend entirely on the precise wording of the Force Majeure clause and the specific impact of the COVID-19 outbreak (if being a recognised Force Majeure event under the contract) on the affected party. For instance, under the Force Majeure clause, there may be a duty to mitigate (and continued performance to the extent not affected by the pandemic is thus necessary) and/or a duty to promptly notify the other party of the extent of impact suffered. It is important that the affected party must strictly follow the mechanism set out in the clause when exercising Force Majeure rights. A failure to comply may result in certain consequences which may compromise the affected party's claim.

6. If a party cannot rely on a Force Majeure clause or other legal option, what is the contractual position?

If the affected party cannot rely on a Force Majeure clause or other legal option, it is bound by its contractual obligations. It may therefore be necessary to seek to obtain a release or variation of the contract from the counterparty.

Further analysis can be found in [Contracts/Force Majeure – operation of force majeure in an epidemic](#).

PRC

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

PRC implies a concept of Force Majeure into commercial contracts. The PRC Contract Law also respects the principle of freedom of contract and it is very common for contracting parties to agree a contractual definition of Force Majeure.

2. If implied, what is the legal basis for this and what is the scope of the implied provision?

Force Majeure is codified in Article 180 of the General Rules of the Civil Law of the PRC and Article 117 of the PRC Contract Law, which define Force Majeure as “the objective circumstances that are unforeseeable, unavoidable and insurmountable”.

3. For a contract without a Force Majeure provision, what options does a party have where its ability to perform its obligations has been affected by COVID-19? Is that different for contracts for services and contracts for the provision of goods?

A party may claim Force Majeure under the aforementioned statutory provisions.

4. 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 following are some examples of recent statements and local court notices that could be considered:

- A spokesperson for the Legislative Affairs Commission of the National People’s Congress Standing Committee is reported to have stated on 10 February 2020 that if parties are unable to perform their contractual obligations due to the government measures relating to COVID-19, they should be allowed to claim Force Majeure relief in accordance with the PRC Contract law.
- 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 principal 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.

5. What are the potential effects of exercising Force Majeure rights?

The contractual provision will prevail. Further, there are two possible remedies under PRC Contract Law. A party impacted by a Force Majeure event may be exempted from performance as result of such Force Majeure event, and either party may terminate the contract if the contract’s purpose is

impossible to perform due to the Force Majeure event.

6. If a party cannot rely on a Force Majeure clause or other legal option, what is the contractual position?

A party may have rights under the statutory Force Majeure provisions as discussed above, if there is no Force Majeure clause in the contract.

In case a party cannot rely on the contractual clause or the statutory provisions (i.e. a Force Majeure cannot be established), a party may seek to obtain a variation of the contract based on the principle of fairness and the principle of circumstance change (a principle under PRC law which is similar to *rebus sic stantibus*) where it is considered unfair for such party to continue performing its obligation, or the contract purpose cannot be realized due to the COVID-19 pandemic. However, courts are generally more reluctant to apply such principles as compared to Force Majeure relief.

Where Force Majeure cannot be established and the court decides that the principles of fairness and change of circumstance are applicable, then the failure of (or delay in) performing certain obligations under the contract will constitute a contractual breach, unless the contract provides otherwise.

For further insights, please refer to the Firm's recent legal update "[Force Majeure with Chinese Characters](#)".

UNITED STATES

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

Under US law, a Force Majeure provision is not implied by law with respect to most contracts. Rather, it is up to the parties to negotiate any Force Majeure provision, the definition of a Force Majeure event, the notice obligations, and other relevant provisions.

With respect to contracts for the sale of goods, in certain circumstances concepts similar to the Force Majeure concept may be implied. For example, in contracts for the sale of goods between countries that are parties to the UN Convention on Contracts for the International Sale of Goods (CISG) (and if the CISG has not been excluded in the agreement), section 79 of the CISG provides a remedy similar to a Force Majeure clause. Section 79 provides that a party is not liable for a failure to perform any of his obligations if it proves that the failure was due to an impediment beyond its control and that it could not be reasonably expected to have taken the impediment into account at the time of the contracting. Similarly, contracts for the sale of goods under the Uniform Commercial Code (UCC) are subject to section 2-615 of the UCC, which excuses performance under a contract if performance, as agreed, has been made impracticable by the occurrence of a contingency, the non-occurrence of which was a basic assumption upon which the contract was made.

2. If implied, what is the legal basis for this and what is the scope of the implied provision?

As noted above, Force Majeure provisions are not implied into most contracts, but a similar concept is incorporated with respect to the sale of goods under the UCC and the CISG.

3. For a contract without a Force Majeure provision, what options does a party have where its ability to perform its obligations has been affected by COVID-19? Is that different for contracts for services and contracts for the provision of goods?

Even in the absence of contractual Force Majeure provision, common law principles of impracticability, frustration of purpose, or prevention by government regulation are available in most states and are incorporated into the Restatement (2d) of Contracts, which is followed in most state jurisdictions. Under the doctrine of impracticability, a party's contractual obligations may be discharged if, after the contract is made, the party's performance becomes impracticable due to the occurrence of an event that is:

- outside of a party's control; and
- a basic assumption on which the contract was made. Restatement (2d) Contracts § 261.

Similarly, under the doctrine of "Frustration" of contract, a party's contractual obligations may be discharged if, after the contract is made, the party's principal purpose is substantially frustrated:

- without the party's fault; and
- where the occurrence or non-occurrence of an event was a basic assumption on which the contract was made. Restatement (2d) Contracts § 265.

Parties may also be discharged from their obligations if the performance of a duty is made impracticable by having to comply with a governmental regulation or order, the non-occurrence of which was a basic assumption on which the contract was made. Restatement (2d) Contracts § 264.

Those defences are available to all contracts, including contracts governing the sale of services and those governing the sale of goods. In addition, as noted above, additional rights are available in the context of the sale of goods under the CISG (if not excluded by the terms of the contract) and the UCC.

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

For an event to constitute a Force Majeure event, courts will typically require the event to be outside the control of the party exercising the right and not foreseeable by either party. Contractual Force Majeure provisions are strictly construed, and will turn on 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. Further, the party asserting the existence of the Force Majeure event will bear the burden of demonstrating the existence of such event. Depending on the language of the Force Majeure provision, the exercising party must demonstrate that the Force Majeure event "prevented" the parties' performance, though some provisions may suggest a lower standard (e.g., "materially interfere" or "materially hinder" performance). Some courts will require such parties to demonstrate the steps they took in an attempt to complete performance.

Whether events related to COVID-19 will constitute a Force Majeure will turn on the language used in the agreement, the specific events that are being referenced, and the extent to which those events were foreseeable or under a party's control. For example, if an agreement defines a Force Majeure as

an “Act of God,” and the event triggering the Force Majeure is a voluntary directive to work from home, such directive may not sufficiently fall within the definition of Force Majeure. Similarly, in the event of a government-mandated business shut down, a party’s right to discharge its contractual obligation may be more naturally adjudicated under the doctrine of impracticability due to government regulation, rather than under a Force Majeure clause. On the other hand, if a Force Majeure provision specifically includes a pandemic, parties may have a better argument for relying on such provisions to excuse their contractual obligations.

5. What are the potential effects of exercising Force Majeure rights?

The effects on the parties’ performance from exercising a Force Majeure provision will depend upon the language of the Force Majeure provision. Some agreements may “excuse” performance or “discharge” obligations as a result of the Force Majeure event, in which case the remaining obligations in the contract may otherwise continue to exist. In other cases, the non-existence of a Force Majeure event may serve as a condition to formation of a contract, in which case exercising the right will mean that no contract is formed. In other cases, parties may agree that the existence of a Force Majeure event relieves both parties of their obligations to continue to perform.

Parties considering exercising their Force Majeure rights should carefully review the contract’s language to determine if a Force Majeure event (or non-occurrence thereof) is a condition to contracting, an excuse from performing certain obligations, or creates a mutual right for both parties to terminate their obligations. Further, parties should take care to note the procedural requirements to exercising the Force Majeure rights, as most courts will require rigid adherence to such procedural mechanisms.

6. If a party cannot rely on a Force Majeure clause or other legal option, what is the contractual position?

If a party cannot rely on a Force Majeure clause, and the other common law defences of frustration of purpose or impracticability are not applicable, parties then must consider whether non-performance can be justified based on any other contractual conditions in a contract. For instance, in the event of the emergencies triggered by COVID-19, it may be the case that contractual performance obligations for each party have become substantially more difficult, even if not amounting to a Force Majeure. Parties are well-advised to negotiate about potential revisions to their contract, or temporary amendments to their performance.

BRAZIL

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

According to Article 393 of the Law No. 10.406/2002 (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 may be classified as Force Majeure when the fact is inescapable and its effect cannot be either preventable or controlled. It can be caused by acts of nature (e.g., flood, earthquake, and

hurricanes) or acts of people (e.g., riots, strikes, and wars), and the contractual obligation must be impossible (not merely more difficult or uneconomic) to be fulfilled.

Under these circumstances, foreseeable or not, the parties are relieved from performing the contractual obligation affected by the Force Majeure, since the contracts do not refer to the said events.

2. If implied, what is the legal basis for this and what is the scope of the implied provision?

As noted above, Force Majeure provisions are established in the Article 393 of the Brazilian Civil Code and are implied into all types of contracts.

3. For a contract without a Force Majeure provision, what options does a party have where its ability to perform its obligations has been affected by COVID-19? Is that different for contracts for services and contracts for the provision of goods?

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, due to fundamental changes of circumstances and when their performances have become excessively burdensome to the prejudiced parties, according to Articles 317, 478, 479, and 480 of the Brazilian Civil Code, Article 81, VI, of the Law No. 13.303/2016 (State-Owned Companies Law), Article 65, II, "d", of the Law No. 8.666/1993 (Government Procurement Law and Policy), and Article 6, V, of the Law No. 8.078/1990 (Brazilian Consumer Defense Code); (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.

Under Brazilian law, there is no difference if a Force Majeure event affects contracts of services or contracts for provision of goods. In both contracts, clauses and deadlines may be declared unfair, due to COVID-19.

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

It is quite likely that 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 likelihood of a 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 (e.g., it will probably not prevail if an obligation is part of Essential Businesses, as defined by the relevant legislation, for which multiple governmental restrictions, imposed due to COVID-19, are not applicable).

5. What are the potential effects of exercising Force Majeure rights?

If a Force Majeure event is recognized under the contract, its clauses will not prevail and the parties will be relieved from performing their contractual obligation without any penalty.

Depending on the extension of the event and its specific impacts in a contract, the COVID-19 outbreak, based on the said *rebus sic stantibus* rule, may also vary the contract, postpone deadlines, force a financial adjustment to reestablish the contractual balance etc.

6. If a party cannot rely on a Force Majeure clause or other legal option, what is the contractual position?

If the affected parties cannot rely on a Force Majeure, they are bound by its contractual obligations and may not be excused from the contractual performance. However, they must consider the possibility to negotiate revisions and amendments to their contracts.

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