ALDAHBASHI GRAY

EFFECTS OF COVID-19:

CROSS-BORDER CONTRACTS AND ADG'S DEDICATED ADVICE HUB

CONTENT

ADG LEGAL

The following article considers the treatment of force majeure and other forms of relief under contracts in numerous key jurisdictions around the world. While it is to be hoped that these unique circumstances lead contracting parties to find workarounds such that neither benefits or suffers more than the other, there will inevitably be occasions when a party relies upon its legal rights – regardless of the social considerations in play.

As the coronavirus outbreak continues to wreak havoc on markets and industries, businesses are now confronting significant and unique challenges. Successful navigation of these challenges will require thoughtful and comprehensive planning for the conduct of all activities by business and institutions, from the administration of justice, the exercise of individual freedoms, the performance of existing contracts, to the continuation of business operations.

Al Dahbashi Gray is providing in-depth advice to clients on the adverse effects on their businesses due to the occurrence of COVID-19. Through our core team of lawyers and our associated firms, we are well-placed to cover – directly or indirectly – many jurisdictions, including UAE and GCC, Egypt, UK, US, Australian, Russian, French, Italian, most African, and many others

ADG Online Hub

To assist clients to navigate this crisis, ADG has set up a Special Purpose Hub enabling clients and potential clients to contact a member of the team to obtain preliminary or in-depth advice. The Hub can be accessed by directing enquiries to the following email address dedicated to cases of business disruption due to COVID-19: covidqa@adglegal.com.

The Hub is particularly aimed at those industries which are facing delayed or aborted corporate transactions, disrupted supply chains, sharp decreases in corporate earnings, concerns over the commercial viability of contracts, major event cancellations or a fall in customer numbers because of the pandemic

Guidance on Navigating the Effects of COVID-19 under Cross-Border Contracts

Many supply, construction, privatization, infrastructure, aviation, transportation and oil and gas agreements are already significantly affected by the occurrence of a catastrophic event which is unprecedented.

Energy and natural resources contracts are generally characterised by lengthy durations and often have international components, as with commodity contracts (including iron ore, coal and copper), LNG contracts, shipbuilding contracts, supply contracts for textiles, foodstuffs and mechanical equipment, contracts for electrical equipment and electronic components and medical equipment manufacturing contracts.

Due to the long-term nature of these agreements, they are highly vulnerable to changes of circumstances within political, economic, legal and even technical spheres. In such cases, comprehensive contracts have proved to be the best shield against the intervention of harsh, sudden and unforeseen contractual distortions and imbalances. Hence, hardship clauses have been developed and inserted in many types of contracts, including power purchase agreements (PPAs), SWAP agreements, concessions, public-private partnerships (PPPs) and sale agreements

The disruption caused by material shortages, the impossibility for specialized work-forces to reach affected countries, lack of coordination on-site and lack of financing granted by banks, will inevitably mean that contracts need to be reviewed and possibly amended to deal with these circumstances, whether or not a force majeure has been triggered.

If your agreement does not provide for renegotiation through a hardship clause, it may be possible to make a case for impossibility of performance or to rely on a force majeure clause (discussed below)..

Governing Law and Force Majeure

Most of the contracts referred to above are indeed cross-border contracts, with parties located in different jurisdictions. The choice of governing law for those contracts is highly material, and particularly so for parties established in jurisdictions (such as many in Africa) that lack legislation or an advanced body of case law for dealing with events that may trigger force majeure, hardship and other similar doctrines.

The difference in approaches to these questions can cause great confusion for contracting parties who are called upon to perform certain obligations in jurisdictions that have been more severely affected by the pandemic (with different government responses) and whose legal systems may deal with the consequences more or less favourably to them than the governing law under the contract. This brings significant risk if parties take steps under a particular contract without consideration to the likely position under associated contracts.

Depending on the governing law nominated, the treatment of such a pandemic (force majeure or otherwise) can be radically different. For example:

The UAE and GCC Countries

If there is the permanent impossibility of performance in a bilateral contract, this will lead to automatic cancellation under Article 273. According to the jurisprudence of the Court of Cassation, the relevant event must have been unforeseeable.

- If there is the permanent impossibility of performance in a bilateral contract, this will lead to automatic cancellation under Article 273. According to the jurisprudence of the Court of Cassation, the relevant event must have been unforeseeable;
- For partial impossibility, the relevant part is severed, and the affected party may elect to terminate;
- Where performance is not rendered impossible but seriously more onerous - or if the impossibility is only temporary – the court or tribunal may adjust the obligations of the parties to relieve hardship. However, establishing entitlement to additional costs may be difficult to navigate due to the general principle under the code that the other party will not be responsible for making good the other party's loss if he played no part in it.

For those contracts governed by DIFC and ADGM law, the position will be similar to English law as discussed below.

Similarly, all GCC countries recognize the legal doctrine of force majeure in some form, when an obligation under a contract is rendered impossible to perform due to an external event. In certain circumstances, even where an event is not a force majeure event, the laws of most GCC countries permit the court to reduce (but not necessarily fully excuse) a parties' liability where the imposition of a contractual obligation would be onerous due to unforeseen circumstances.

Europe, France and Italy expressly have in their respective civil codes a well-defined concept and procedure for the declaration of force majeure. Germany, however, does not. Rather, force majeure must be construed by reference to other statutes and vast case law.

Common Law Countries, e.g. the UK and the US

In most common law countries, there is no recognised legal doctrine of force majeure and hardship; these are merely creatures of contract. It is therefore up to the parties to negotiate any force majeure provision, the definition of a force majeure event, the notice obligations, and other relevant provisions.

Neither the UK nor the US has any specific legislation dealing with force majeure and hardship. However, certain statutory provisions operate in a similar manner. For example, concerning contracts for the sale of goods, in certain circumstances concepts similar to the force majeure concept may be implied.

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. It provides that a party is not liable for a failure to perform any of its 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) in the US 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.
Further, the common law doctrine of frustration may be relevant, although under English law is still very difficult to establish. It requires an unforeseen subsequent event outside the control of the parties, rendering it impossible to perform, or so radically different from that intended that it would be unfair to hold the parties to it. The fact that performance has been made more difficult or costly is not enough. Even if it can be established, frustration would rarely be commercially desirable because its effect is to bring all parties under the contract immediately to an end.

For this reason, many English law contracts (and those governed by similar systems) contain force majeure clauses. However, these are variable in quality and breadth and may be construed against the drafting party in “standard terms” cases.

Asia

Hong Kong

Following English law, 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.

People's Republic of China

The PRC can, to a certain extent, be considered a civil law country. Under PRC General Provisions of the Civil Law (promulgated in March 2017), force majeure is generally recognized as an excuse for not performing civil obligations. Force majeure exists as a doctrine under Article 180 of the General Rules on the Civil Law and Articles 117 and 118 of the PRC Contract Law. The regime applies automatically to commercial contracts governed by PRC law where the contract contains no force majeure provisions.

If a contract does not include a force majeure provision, it will be implied. If a contract includes a force majeure provision, a party can rely on the force majeure provision or resort to the protection offered by the general law if the scope of the contractual remedy is considered to be limited. To be eligible for force majeure protection under PRC law, the affected party must demonstrate that the relevant situation is unforeseeable, unavoidable and cannot be overcome, and also that it is the cause of the affected party's inability to perform its obligations.

However, under the Contract Law, force majeure does not apply: (1) where the contract is entered into after the force majeure event; (2) to non-performance of monetary payment obligations; or (3) if the force majeure event occurs after the affected party delays performance.

The China Council for the Promotion of International Trade has been issuing force majeure certificates to companies that claim they are unable to meet their contractual obligations to protect them from potential breach of contract claims by counterparties. These certificates would not automatically satisfy the "test" for force majeure for a contract governed by English, PRC or another law; these certificates would at best provide evidentiary support for the affected party's force majeure claim, but the specific requirements of the force majeure provision must still be satisfied.

We understand that there is pressure on the China International Trade Commission to stop issuing force majeure certificates for companies as the Chinese Government is keen to revive the economy as soon as possible. State-owned enterprises have been instructed to resume operations and recall all employees back to work. While these orders may be resisted in some instances, it is widely thought that without governmental support, there will likely be fewer force majeure claims made by Chinese companies. Numerous force majeure claims involving a Chinese buyer or supplier have already been reported in the worldwide media and it seems likely that claims with a wider ambit will follow as the ripple effects of the outbreak spread globally.

Practical Steps for Contracting Parties

Despite the potentially different outcomes under the different governing laws, it is possible to devise a course of action that should be followed to not only react to but to pre-empt the different permutations as the situation continues to unfold.

We recommend that parties consider the following:

- Carefully review your contract to determine whether the contract includes a force majeure provision and, consider:
  - The definition of a force majeure in that contract to determine whether events such as pandemic situations are included and, if not, whether the general language is sufficient to include COVID-19 and its consequences;
  - The nature of the triggering event and the effects necessary for it to be triggered;
  - The procedure for any renegotiation and the desired outcome;
  - The remedies available if renegotiation fails (these might include resorting to a judge or arbitrator, or termination of the contract);
  - The conditions that must be met to resort to termination.
- Consider whether the contract provides any form of partial relief from obligations, even if force majeure cannot be invoked;
- Review financing or other related agreements to determine whether there are cross-clauses and notice provisions that must be complied with concerning anticipated or actual force majeure or hardship claims;
- Determine whether insurances, such as business interruption insurance or force majeure insurance, may cover any of the expected losses;

- Consider whether you have taken steps to mitigate the effects, such as substitutions in supply;
- Identify all notice provisions and review whether you have promptly given those notifications and are updating them as the effects evolve.

If in doubt on any of these matters, we suggest immediately taking legal advice. Questions can be submitted to covidqa@adglegal.com.

Further details of our expertise, countries of qualification and geographical coverage are available on our web site at www.adglegal.com.

Written by Roberto Cornetta, Josh Kemp and Shams Elkodama

CONTACT

+971 4 441 3365

+971 4 441 2031

info@adglegal.com

adglegal.com

ALDAHBASHI GRAY