

THE IMPACT OF CORONAVIRUS DISEASE 2019 (COVID-19) ON CONTRACTUAL ARRANGEMENTS – APPLICABILITY OF *FORCE MAJEURE* CLAUSES

1. Introduction

We consider below the implications of COVID-19 and how failure of performance of contractual obligations may be excused on the basis of a force majeure event.

2. Nature and Operation of Force Majeure Clause

- 2.1. The term 'force majeure' is derived from French law – meaning superior or greater force. A force majeure means an act of God or any event or circumstance that can be neither anticipated nor controlled and that adversely affects performance by a party of its obligations under a contract.
- 2.2. The rationale for the force majeure clause is that it would be unfair on the non-performing party to be expected to fulfil its obligations to a contract when there is an event or circumstance beyond the party's control which makes it impossible to act. The courts have held that impossibility must be absolute or objective as opposed to relative or subjective. Accordingly, protection offered by a force majeure clause generally flows when a party is objectively and absolutely unable to perform under a contract.
- 2.3. In the South African context, in instances where a contract contains no force majeure provision, the event or circumstance could be considered to be a supervening impossibility of performance if the performance is or has become objectively impossible (not merely burdensome or more costly) and there is no fault attributable to the non-performing party.

3. COVID-19 as a Force Majeure Event

- 3.1. Considering the nature of COVID-19 and the directives issued by various governments around the world, it is likely that COVID-19 will constitute a force majeure event in most contracts. There is judicial precedent to support this proposition in the context of prior pandemics. However, it is still necessary to conduct specific analysis of each contract. Such analysis would determine the legal consequences under each contract, particularly on the following specific issues:
 - 3.1.1. the scope of the force majeure clause and whether or not COVID-19 falls within the scope of 'force majeure events' contemplated in that specific contract;
 - 3.1.2. the objective assessment of the impact of COVID-19 on the actual performance under that specific contract;
 - 3.1.3. the implications of COVID-19 if, objectively assessed, it constitutes a force majeure event under a specific contract. For instance, the specific contract may

provide for a reprieve in a form of suspension of performance for a limited period rather than an outright termination right;

3.1.4. the extent to which the party seeking reprieve would be excused from liability and any specific steps it is required to take in order to have the shelter of the force majeure clause. For instance, the contract may provide that the benefit of a force majeure clause should only be available where the affected party had taken all possible steps to avoid the event or the impact of its consequences; and

3.1.5. the discharge of notification obligations by the party seeking to invoke the force majeure clause and the timing of such notification.

3.2. Where a contract does not contain a force majeure clause, and where a party's performance has been impeded by the advent of COVID-19, that party may justify its non-performance on the basis that there is supervening impossibility caused by the outbreak of COVID-19. However, the defaulting party would have to show that it has used all its reasonable endeavours to prevent, or at least mitigate, the effects of the event that hinders performance of its obligations.

4. **Conclusion**

If a party to a contract has difficulty with performing under that contract as a result of COVID-19, it should immediately seek legal advice on that matter. With timeous legal advice, potential liability under that contract can be averted. If reliance is to be had on force majeure clauses, normally, timeous written notifications must be issued to the other party detailing the circumstances that impede the other party's performance under that contract. Where these notifications are not issued, that failure may result in the defaulting party not being able to rely on the particular force majeure clause.

The advent of COVID-19 raises various other legal issues which we have not covered in this note. ENSafrica has been advising clients on various legal aspects arising from the outbreak of COVID-19. Our legal experts across various disciplines are available to any person or business seeking legal advice on these issues.



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