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Invoking force majeure in the COVID-19 crisis: Some practical tips

Designated by the World Health Organization (WHO) as a Public Health Emergency of International Concern (PHEIC), the ongoing COVID-19 pandemic continues to throw supply chains into turmoil on an unprecedented scale. Governments worldwide are increasingly imposing stringent measures impacting the movement of people and goods to contain its rapid spread, whilst factory shutdowns, staff shortages and border restrictions cast a heavy shadow on supply chain operations. The knock-on effect on companies' ability to comply with their contractual obligations raises the question of *force majeure* – an oft-used clause found in many commercial contracts which may excuse the delay or non-performance of one's obligations in the occurrence of certain specified events. Some major logistics companies are already invoking *force majeure* clauses to temporarily relieve them of their contractual obligations.

Where such clause is present, much turns on its wording and the specific set of circumstances in question; there is no singular definition of force majeure. However, some overarching principles tend to apply within the analysis:

1. Does your contract contain a *force majeure* clause, and can COVID-19 trigger it?

On 25 March 2020, CEVA Logistics released a declaration of force majeure stating: "The COVID-19 virus and the necessary response measures being taken by governments are entirely outside the control of CEVA Logistics. As they were unforeseeable, they fall within the definition of 'Force Majeure' - the principles of which are universally recognised in business and enshrined in law".

As stated above, force majeure is a legal conception that refers broadly to the occurrence of certain pre-specified events which are beyond the control of the contracting parties. For example, the Customs Brokers and Forwarders Council of Australia (CBFCA) standard trading conditions specifically cite a list of force majeure events in Article 21(f). A common phrase often found in such clauses is 'act of God', referring to natural and extraordinary disasters such as floods, hurricanes, tornadoes. This is unlikely to extend to COVID-19. However, clauses specifically referencing events to the effect of 'pandemic', 'epidemic', or 'public health crisis' are likely to cover COVID-19. In addition, clauses referencing 'government action', or 'stoppage or restraint of labour' as found in the CBFCA and the British International Freight Association (BIFA) conditions may also cover actions taken by



governments to contain the spread of the virus, such as the closing of borders, public lockdown or quarantine measures.

Furthermore, many force majeure clauses make reference to catch-all provisions that make reference to any unforeseen event beyond the control of the parties that hinders performance. For example, the FIATA Model Rules, Article 4 states:

“If at any time the Freight Forwarder’s performance is or is likely to be affected by any hindrance or risk of any kind... not arising from any fault or neglect of the Freight Forwarder and which cannot be avoided by the exercise of reasonable endeavours, the Freight Forwarder may abandon the carriage of the Goods under the respective contract...”

A similar clause exists in Article 6.2 of the FIATA Multimodal Bill of Lading which excludes Freight Forwarder liability for loss, damage or delay not caused in any way by the fault or neglect of the Freight Forwarder, nor his servants or agents.

Where such catch-all provisions are concerned, it may be that they cover the COVID-19 pandemic, insofar as a direct causal link is found, involving no fault or neglect of the party seeking to invoke the clause. It should be noted that courts tend to err on the strict side of interpretation, taking into consideration factors such as the intention of the parties during the drafting of the contract. A party seeking to invoke a force majeure clause should therefore be prepared to demonstrate that such events and consequences were beyond its reasonable control, and that it had taken steps to mitigate the effects.

Notwithstanding the above, it is also worth considering other applicable laws and standards that may influence the interpretation and applicability of any force majeure clause. For example, do local standard trading conditions apply as between the parties, and what do they cover? Does the applicable jurisdiction permit force majeure under the circumstances?

2. Must performance have become impossible, or merely impracticable?

Force majeure clauses will often stipulate a certain standard of performance to trigger operation of the clause, establishing in all cases a direct causal link between the triggering event and the inability to perform. In some cases, it will be required that it must be ‘impossible’. Others may require a lesser standard such as being ‘impractical’, or in the case of the FIATA Model Rules, merely ‘affected by any hindrance or risk’. In general, unless the clause specifically states otherwise, case precedent indicates that performance must have become physically or legally impossible, rather than simply economically unviable or inconvenient¹. The fact that freight forwarding has been declared an essential service in many jurisdictions may also be a potential consideration. If airports and seaports continue to be open for cargo, at least officially, will this count as *force majeure*? It is worth noting that precedent suggests that if there are alternative modes of performing the contract, *force majeure* may not apply. This strictness is based on freedom of contract and the presumption in favour of performance.

¹ Chuah, p. 85, see e.g. *Agrokor AG v Tradigrain SA* [2001] 1 Lloyd’s Rep. 2497



In addition, parties should take note of exactly what the clause excuses in the event of a valid *force majeure* event. Will it excuse non-performance, or merely delayed performance, for example? Will it provide a company with greater flexibility to defer payments? Or, common to contracts where it is unsuitable to cancel the contract, does the clause provide for renegotiation of the contract? For example, in the CEVA Logistics example, some of the consequences of invoking *force majeure* include reserving the right to “*modify all or part of its services, to change its working procedures and any previously agreed rates and prices, to levy surcharges...*”², in relation to all CEVA services including air freight, ocean freight, ground freight, rail, customs brokerage and contract logistics. Similarly, DHL Global Forwarding’s declaration of *force majeure* enables it to modify its services as necessary in light of the prevailing circumstances. The latter has been stated to be a protective measure as part of its business continuity planning in the event that DHL finds itself without available capacity.³

Moreover, who is responsible for the associated costs and charges? For example, the FIATA Model Rules states that in such event:

*‘the Freight Forwarder shall be entitled to the agreed remuneration under the contract and the Customer shall pay any additional costs resulting from the above-mentioned circumstances.’*⁴

These are crucial factors to take into consideration when making the commercial decision of how to handle the effects of COVID-19 in the course of one’s business. Companies should therefore analyse the clause carefully to determine exactly what is expressly covered.

3. Notice requirements

Many *force majeure* clauses have specific requirements governing the timing and form of the notice of a triggering event in order to trigger operation of the clause, and this may often be a crucial step in order to ensure eligibility to invoke *force majeure*. For example, must the notice be in writing? Must the notice be provided within a certain number of days of the triggering event? Companies should pay close attention to the events or circumstances they allege within the notice, to ensure that it complies with the clause requirements.

Conclusion

Force majeure clauses, where present in a given contract, may be a saviour for some companies grappling with the effects of the coronavirus outbreak. However, companies should review their contracts, together with any other applicable laws and standards, thoroughly to determine the exact scope of such clause, where one exists. In this vein, it is worth bearing in mind that most trade association and other standard terms and conditions contain a paramount clause stating that its

² CEVA Logistics, ‘COVID Crisis Declaration of Force Majeure’

³ Supply Chain Dive, ‘DHL Global Forwarding declares force majeure, reserving the right to modify services’, *Supply Chain Dive*, 20 March 2020, <https://www.supplychaindive.com/news/dhl-global-forwarding-force-majeure-services-covid/574565/> (accessed 29 March 2020)

⁴ FIATA Model Rules for Freight Forwarding Services, Art. 4



conditions will be subject to other compulsorily applicable national legislation and international conventions⁵. As such, international conventions such as the Hague Visby Rules may also apply, depending on the jurisdiction and contractual clauses present.

Courts take a narrow stance to the doctrine of *force majeure*, so it is important to ensure one's contracts are watertight. Companies should be prepared to provide appropriate documentation and evidence to demonstrate that such events and consequences were beyond their control, and that they took reasonable steps under the circumstances to mitigate their effects. Now is the time to be prepared and ensure that you have a comprehensive paper trail. Seeking sound legal advice is key.

At the same time, commercial relationships and trust still remain paramount in the competitive economic world of today. Before invoking a *force majeure* clause, companies should thoroughly consider its consequences from a sound commercial perspective, noting the future impacts it may have on the relationship with their partners. In addition, it is worth reviewing insurance coverage to determine whether invocation of a *force majeure* clause would preclude a company from later seeking damages via a business interruption claim due to COVID-19.

Even if a given contract lacks an applicable *force majeure* clause, companies may also look to other legal provisions and doctrines to determine if they may be protected in another way. For example, under US law, section 2-615 of the Uniform Commercial Code protects a seller in the event of delay in performance or non-performance where delivery is 'impracticable'⁶. In addition, companies may consider using the doctrine of frustration as an alternative route in relieving them of their contractual obligations. A more difficult hurdle, frustration occurs when performance is rendered impossible by extraordinary and unforeseeable circumstances caused by no fault of the parties⁷. This is rarely permitted by courts, however, and may be less likely to produce the intended results. Thus, *force majeure* clauses are likely to be key.

⁵ See e.g. FIATA Model Rules for Freight Forwarding Services, Art. 20; Standard Conditions (1992) governing the FIATA Multimodal Transport Bill of Lading, Art. 7; BIFA Standard Trading Conditions, Art. 2(B); CBFCFA Standard Terms and Trading Conditions, Art. 2(B)

⁶ U.C.C. § 2-615

⁷ Chuah, p. 79