



Covid-19 Impacts of Force Majeure clauses in General Commercial and IT/ Tech contracts

On March 11, 2020, the World Health Organization (WHO) assessed COVID-19 (coronavirus) as a pandemic.

With no end to the outbreak in sight, businesses worldwide have been forced to navigate the challenges brought on by the rapid spread of COVID-19, and some may be considering whether they can (or should) rely on force majeure clauses or material adverse alteration of circumstances clauses* as legal options to mitigate their business impacts or otherwise support them in a legally sustained excuse from continuing to perform in an onerous contractual performance scenario.

For companies that are considering issuing a force majeure notice, or those anticipating that their contractual counterparties may do so, our effort is to contribute to clarify certain key aspects of the discussion at sight.

Force majeure

The purpose of force majeure is to protect the parties from unforeseen, unpredictable events beyond the reasonable contemplation and control of the parties that they could have not reasonably anticipated and have no means to adequately control and/or mitigate so as to reinstate performance and make it possible.

A force majeure event – as it is taken care of in our jurisdiction – impacts contractual parties so severely that fulfillment of an obligation becomes impossible no matter the means, resources and efforts used by a party to try and recover or reinstate performance.

In order to be excused from the fulfillment of certain obligation, a party affected by force majeure will have to successfully demonstrate that the event has occurred, that it has caused a direct impact on him/her and on his/her ability to perform, despite all means, resources and efforts having had been used.

If successfully invoked and demonstrated, the occurrence of force majeure will excuse a party's performance of its obligations under the contract, thereby avoiding consequences from breach.

Eventually the contract may be terminated in light of certain main obligations therein no longer being possible to fulfill.

The interpretation of the effect of COVID-19 and the application of any force majeure clause is a question of contractual interpretation.

It will be up to a court to finally resolve on the legal pre-requisites of a force majeure clause whether in this context we are living or otherwise.

Force Majeure Clauses in IT Contracts

To the extent included in IT contracts, there is no standardized form of the force majeure provision. There is, however, a noticeable influence of common law drafting, whereby force majeure clauses appear more as a hybrid between force majeure and material adverse changes to contract clauses, rather than force majeure specific.

One may easily find force majeure clauses in licensing, support and maintenance, and IT development contracts, each one of them being exposed to force majeure risks differently.

Where contracts are silent on force majeure clauses, the Portuguese Civil Code contains a provision that generally applies to all contracts (artº 790º CC) - entitled as objective impossibility (“impossibilidade objetiva”).

Scope of Force Majeure Clauses

Some of the typical circumstances identified in a force majeure clause are the acts of God covering for the human unrelated events such as natural disasters being most common to have a basket clause in IT contracts that cover for everything that was “beyond the reasonable control of the parties”.

In certain IT supplies with a human factor, whether by project teams, human support teams or otherwise, it is also common to have certain human-related force majeure events such as general strikes, epidemics and other disease events.

Notwithstanding the fact that force majeure clauses are interpreted restrictively, in light of the recent classification of COVID-19 as a “pandemic” by the WHO, the COVID-19 outbreak would surely be covered by those force majeure clauses that include “pandemic” and even “epidemic” or “disease” in their scope.

Still, the party invoking a force majeure event would have to prove that such force majeure event indeed falls within the scope of the contractual clause, that the party was directly impacted by the COVID-19 - as a force majeure event - and hence, that the fulfilling of its contractual obligation is no longer possible despite all means, resources and efforts used, rather than merely more difficult to perform or more onerous. In this type of clause, it is also very common to foresee an obligation of providing information about the occurrence of the force majeure event, to be performed in a very short period of time after one is aware of such event.

Given the common “basket” clause we just mentioned above, one must consider that certain collateral implications from the COVID-19 outbreak such as government-decreed shut-downs and declaration of Emergency (like the one we are experiencing in Portugal) may also be covered by IT force majeure clauses.

Obligation to Use all Means, Resources and Efforts to reinstate performance

The party seeking to be discharged from an obligation due to force majeure is under an obligation to demonstrate and prove that it has used all means, resources and efforts available for use (not only the commercially available ones) to reinstate performance and bring it to “possibility” level without success though.

COVID-19's rapid escalation tied to the constant evolution of related governmental directives and restrictions taken to safeguard the wellbeing of citizens and certain economic stability also tied to the uncertainty of a future evolution - both locally, regionally and at a global scale - make it difficult for anyone to control the sequence of events so that (i) a clear identification of all means, resources and efforts available is now possible and remains stable for usage in the short-term (ii) there will be consistent ways of proving that the means, resources and efforts that were indeed available were used. Indeed strong arguments could be made in the future that other means and resources, efforts were available and could have been used.

For instance, IT operations in a certain jurisdiction or site may not be easily migrated although migration is generally available; physical infrastructures may be left with no means of on-site support due to lack of staff despite general availability or existence of people that could perform the job (in a subcontracted basis for instance); disaster recovery sites and plans may be impacted and even remote assistance may fatally fail without a chance of recovery notwithstanding the uncontested ascending spread of remote collaborative applications, solutions and services.

The impacts of COVID-19 (including shut-downs and related governmental directives and restrictions) on your business should be centrally documented, as should steps taken to mitigate those impacts.

In addition to forming a record for a force majeure claim, such records are likely to serve other beneficial purposes, such as a general record in support of claims under any eventual business recovery programs that may be made available from various governments or under business interruption insurance.

Impossibility of Contractual Performance

A party claiming force majeure for its non-performance would need to show that performance has been truly prevented, and not merely impacted (even if severely impacted).

Jurisprudence in Portugal has consistently refused to excuse contractual performance simply because the force majeure event has severely impacted performance whilst performance is still possible although more burdensome or expensive.

By way of example, if the contract requires supplies to be obtained from a high-risk area that is currently subject to shut-down and no alternatives are available, the requisite is more likely to be met. Similarly, a manufacturer with a sophisticated line in a jurisdiction that has mandated the shut-down of commercial plants may be able to show that performance has been prevented during this period, since the manufacturer's plant is required to be closed. However if such same production or supply is possible from another partner (even if competitor) and in a not attractive economic balance, the force majeure legal pre-requisite may not be achieved.

Practical Implications

Before suspending performance in reliance upon a force majeure clause, or to otherwise understand one's exposure under a force majeure clause, parties should carefully review their key agreements and consider:

- the governing law applicable to the contract;
- the definition and scope of the applicable force majeure provision and whether the event in question falls within such scope;
- the force majeure legal requirements;
- whether the impacted obligations became actually impossible rather than merely more expensive or onerous;
- whether all means, resources and efforts were used to reinstate performance and make it by any means "possible";
- how force majeure relates with other similar clauses such as those pertaining to material adverse changes to contract.

Risk management measures

As a general note, in addition to measures taken to slow the spread of COVID-19, attention must be paid to certain risk management measures:

Self-Organization and Assessment

The identification and assessment of all core IT and Tech agreements applying to Your critical operations and systems should be made. Review commercial contracts to assess what force majeure rights, remedies and requirements may apply and cross such information with the Disaster Recovery and Back-Up Plans You have in place at the organisation.

Manage Information

Keep up to date with details of the affected areas through WHO's Disease Outbreak News and Your local broadcasters.

Monitor Your workforce and measure impacted people/parts/facilities.

Ensure proper training and provide information and education on the virus for the workforce, including how the virus spreads, how to prevent contracting the virus and how to dispel myths, fears and misconceptions

Account mitigation efforts or efforts to comply with contract terms.

Understand Your obligations and rights

Monitor new regulatory actions taken in response to COVID-19 to determine if You have to act in a certain way or do benefit from certain benefit, discharge or delay in the performance of Your obligations.

Consider the effects of a force majeure in other agreements and legal obligations.

Certain IT/Tech Contracts have other agreements associated, such as lease, loans or escrow agreements.

Check representations, covenants to provide notices and avoid litigation or anticipated loss outside Your ordinary course of business should You be impacted and actually prevented from complying with an obligation.

ADDRESS THE FUTURE Positively

Insert express infectious disease/epidemic wording into new contracts.

COVID-19 outbreak requires a fact-specific analysis of a company's business and contractual relationships. Management should proactively review with their counsel the rights and obligations provided in the company's commercial contracts, and under applicable law.

* Pbbbr Flash News on material adverse alteration of circumstances clauses to follow.

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