

Junichi Horie

‘What is *Force Majeure*?’

For all commercial and contractual agreements, the rule of thumb for all parties is to respect and uphold their contractual obligations to the best of their ability and capacity. However, there are circumstances or events which could prevent this; *force majeure* events.

Force majeure is French for “superior force”.

Definition

“*Force majeure*” means the occurrence of an event (“*force majeure* event”) that prevents or impedes a party from performing one or more of its contractual obligations. If and to the extent that the party affected by the impediment (“the affected party”) proves that: a) such impediment is beyond its reasonable control; and b) that it could not reasonably have been foreseen at the time of the conclusion of the contract; and c) that the effects of the impediment could not reasonably have been avoided or overcome by the affected party.

Most commercial contracts include a *force majeure* clause. Even though the specifics of each clause can vary, they commonly share similar principles.

Contracts that do not contain a *force majeure* clause will by default be governed by the applicable law. Not all jurisdictions recognise *force majeure* and different legal systems provide different remedies on the occasion such an event would occur.

If one or more parties to a contract successfully invoke the *force majeure* clause, within reasonable a timeframe, they are generally exempt of: the duty to perform the contractual obligations hindered by the *force majeure* event; and any liability to pay damages for the non-performance or “breach of contract”.

Does Covid-19 qualify as an event that invokes the *Force Majeure* clause?

Covid-19 was classified as a pandemic by the World Health Organisation on 11 March 2020.

With relation to *force majeure* clauses, many contracts make explicit reference to “pandemics” as a *force majeure* event. In this instance, it is very likely that the relief provided for under this clause will apply to the Covid-19 pandemic.

- If there is no specific reference to “pandemics” in a *force majeure* clause, it is most likely there will not be relief from contractual obligations or damages. However there is a possibility to seek relief under another clause of the contract that pertains to the interruption of trade/business/other activities due to the unprecedented exercise of government powers (Federal and State) to curb the spread of Covid-19.
- Contracts without a *force majeure* clause often cannot rely on an implied *Force Majeure* concept under many common law jurisdictions. For contracts governed by laws in many civil law countries there may be an implied *force majeure* notion.