

MARCH 2020

FORCE MAJEURE IN COMMERCIAL CONTRACTS AND THE CORONAVIRUS (COVID-19)

The coronavirus outbreak has caused a lot of economic hardship to businesses globally. Many businesses are finding it hard to fulfil their contractual obligations to customers, suppliers and other stakeholders like employees.

Many companies and individuals in business are wondering whether the coronavirus (COVID-19) outbreak is a force majeure event that can allow them to be temporarily or permanently excused from performing their contractual obligations. The question that needs to be answered is what is a force majeure event and has one occurred with this outbreak?

What is Force Majeure

Force majeure is a legal concept under civil law jurisdictions usually set out in their civil codes. However, under English law, force majeure does not have a recognised meaning. The term has not been defined under statute law nor case law. In the event of a dispute relating to a force majeure event, courts will look at how the parties in the contract defined the term. The concept of force majeure cannot, therefore, be implied into a contract.

Generally, a force majeure event is defined as the occurrence of events outside the control of the parties in a contract. Most contracts include a specific and closed list of events which constitute a force majeure event. These events include natural disasters, wars, government action, industrial action terrorism etc. Depending on the type of definition provided in your contract, recent action by governments across the globe to impose restrictions on travel and movement of goods may constitute a force majeure event.

Relief Under Force Majeure Clauses

It is the responsibility of the party relying on a force majeure event to prove that the force majeure event has prevented, delayed or affected the performance of its obligations under the contract. Generally, the performance of certain obligations will be suspended for a specific period in the event of a force majeure event. In other instances, contracts will provide for termination of the contract and this could be in cases where the force majeure event has continued to occur for a long period. Well drafted force majeure clauses will outline steps to be taken in the event of force majeure events.

A party relying on a force majeure clause seeking to be excused from performing its obligations must demonstrate that:

- a) The force majeure event has prevented or delayed the performance of its contractual obligations.

- b) The force majeure event was beyond its control; and
- c) There are or were no reasonable steps the party could take to avoid the force majeure event and its consequences.

To avoid contractual disputes as a result of the COVID-19 outbreak or any other force majeure event, the party affected by the event needs to use reasonable efforts to mitigate the effects of that event. If alternative modes of fulfilling contractual obligations are available, then the affected party should take reasonable steps to perform its obligations to avoid any disputes. Well drafted force majeure clauses will provide for notice mechanisms where the affected party will notify the other party of its inability to perform as a result of the force majeure event.

The impact of the COVID-19 outbreak in performance of contractual obligations must be assessed based on each case. Legal advice must be taken before taking any action or invoking the force majeure clause in your contract. This is a good opportunity for businesses to review their existing contracts to identify potential risks and mitigation solutions should another force majeure event occur.

For any further information or if you would like a free consultation on force majeure clauses in commercial contracts, please write to Bryan Yusuf at byusuf@bryanyusuf.co.ke.

By Bryan Yusuf



Bryan is the Managing Partner at [Bryan Yusuf Advocates](#). He is an experienced corporate commercial lawyer with expertise in general commercial and corporate matters, banking and finance, real estate and intellectual property. He is also a Certified Professional Mediator and advocates for mediation as an alternative dispute resolution mechanism. Bryan is passionate about startups and small businesses and provides them with consultancy and legal services.

Legal Disclaimer: The material contained in this article is provided for general information purposes only and does not contain a comprehensive analysis of each item described. Before taking (or not taking) any action, readers should seek professional legal advice specific to their situation. No liability is accepted for acts or omissions taken in reliance upon the contents of this alert.