
WHEN A VIRUS AFFECTS COMMERCIAL AGREEMENTS: FORCE MAJEURE CLAUSES AND REMEDIES



As we all unfortunately know, the effects of the **coronavirus (SARS-CoV-2)** are increasing in Europe and across the world, with **disruptive consequences** over our financial, economic, legal and social systems.

The threat of production's stops and of **interruption of supply chains** is now a serious risk even for companies that do not produce or purchase goods in Asia. While governments are struggling to limit the epidemic, we would like to point out some **legal aspects** that should be taken into account in the event of a disruption of existing relationships.

1. **Relevance for your company as a supplier or a purchaser of goods**

The consequences of the coronavirus may affect your business if this relates to **supplies as purchaser of goods** and such supplies cannot be executed. On the other hand, the legal implications of the current epidemic can also become crucial for your company should it be subject to **delivery obligations** that cannot be fulfilled (e.g. in case production's facilities must be close or deliveries from suppliers cannot arrive on time anymore). In both scenarios, the

question arises whether existing delivery obligations will cease - especially with regard to **force majeure** - and what specific measures need to be taken.

2. What is “force majeure”?

It is a **contractual clause** or a **law provision** which **regulates the effects that an extraordinary event** (usually referred to as an “act of God”) may have on a binding contractual relationship. Essentially force majeure clauses/law provisions state that if such an **extraordinary event** prevents one or both parties from fulfilling their obligations under the contract, they are entitled to **invoke a “force majeure”**.

Force majeure is generally intended to cover only events that are beyond the reasonable control of a party: this means that a force majeure clause/provision cannot be invoked when such an event *(i)* could reasonably have been expected at the time of the conclusion of the contract; and *(ii)* could reasonably have been avoided or overcome by the parties.

This, for example, is the definition of “force majeure” given by the UN Convention on Contracts

for the International Sale of Goods (“**UN Sales Convention**”).

3. Lapse of delivery obligations due to force majeure

Triggering force majeure remedies depends primarily on contractual provisions set forth by the agreement entered into by the parties. International supply contracts often include force majeure clauses according to which the supplier is **released from his/her delivery obligations for the duration of an event of force majeure**.

It should therefore be checked whether the respective supply contract provides a force majeure clause and whether it covers events like epidemics, which is likely to be the case (often referred to as “diseases” or “plagues”). Please note that standard clauses – like those drafted by the ICC (International Chambers of Commerce) – expressly include epidemic among circumstances entitling a party to trigger a “force majeure clause”.

It should also be considered whether the force majeure clause is drafted in a way to impose on the

defaulting party **obligations to act to be fulfilled within a certain periods as it occurs when one party is contractually burdened with an obligation to serve a written notice to the other about the occurrence of the event.**

This kind of obligations should be met in any case to avoid disadvantages and the raise of exceptions by the other party.

What are the most common **consequences** in case a force majeure event occurs? Again, the answer is (or should be) in the **contractual clause**. **Standard practice** usually provides for a period of **suspension** of the mutual obligations arising from the contract. During this period each party should seek and adopt all the possible/reasonable measures to limit the other party's damages. After this period of suspension, the parties are allowed to invoke – as a last resort – the **termination** of the agreement.

If the relevant supply contracts do not contain a provision regarding force majeure, it must be checked whether delivery obligations may cease under the applicable statutory provisions and

further, what other legal consequences arise from the applicable law. In this context, it must at first be checked **which national law regulates the contractual relationship.**

On the one hand, should **Italian law** be applicable, it is quite **possible that the delivery obligations no longer exist** (at least for the duration of the delivery impediment): this means that the failure to deliver will therefore not be considered as a contractual breach that could result in a damage claims.

Since the assessment of force majeure is very much dependent on the circumstances of each case, it will be decisive to verify what kind of material impediments/obstacles exist and whether they can be removed adopting reasonable measures. Should the impacts of the coronavirus not make a delivery completely impossible, but lead to a considerable increase in costs, the Italian Civil Code also provides for an **adjustment of the contract** (*eccessiva onerosità sopravvenuta*) or – if this solution is not acceptable for a party – a termination of the contractual relationship.

The legal framework is pretty much the same even if **German law or the UN Sales Convention** is applicable.

On the other hand, consequences may be different if the contract is governed by **US or English law**. According to these legal systems, force majeure can only be invoked in case the contract contains a corresponding provision.

Numerous **Chinese** (and by now also **Italians**) companies have **stopped deliveries** (or, even worse, purchases) in recent days by referring to force majeure. It is interesting to note that the Chinese Chamber of Commerce is currently issuing so-called **force majeure certificates** to the companies concerned upon request. The aim behind such certificates is to facilitate the chance to invoke force majeure clauses, even if such a certificate does not necessarily bind international courts in the event of a dispute.

Whilst the epidemic continues to spread all over the globe, it seems quite obvious that a progressively growing number of companies from different

countries will try to invoke force majeure clauses or remedies to protect their business interests.

4. Further key points

A) It is worth noting that force majeure remedies are applicable only when **unforeseeable event/impediment** beyond the reasonable control of the parties occurs. This means that if you signed (or going to sign) an agreement during this period of epidemic spread you won't probably be entitled to invoke such a remedy. For this purpose, **late February** can be considered as "**a point of no return**" for European markets.

B) Some jurisdictions require that the delay or failure of the delivery must be **notified without delay**. As mentioned above, such an obligation to notify the contractual partner may also arise from contractual provisions (like those drafted by the ICC). It is therefore advisable to contact the contractual partner as early as possible (and for evidence purposes in writing) and to point out existing or expected impediments that might delay the delivery or make it impossible. In that case you may also be

required to provide evidence that you adopted **measures to minimise potential damages**. Courts also take into account statements and recommendations of official entities when assessing force majeure. Therefore, it is also recommendable to collect and keep corresponding statements that may be used as evidence for the existence of force majeure in the event of a legal dispute.

This information is intended to give you an **overview** of possible legal impacts that coronavirus may have on existing supply relationships. Whether force majeure can be assumed in a specific constellation depends on various legal (contractual provisions, applicable law, jurisdiction) and factual factors and, therefore, it requires a detailed assessment of the specific circumstances occurring in a certain case.

Should you have any question, please feel free to contact us at any time: we are available and would be pleased to assist you.

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