

The Second Wave of the COVID-19 Pandemic and Force Majeure

Guest post by Franz Kaps, Attorney at law at DLA Piper, Frankfurt am Main

The resurgence of COVID-19 (Coronavirus) cases has been observed in countries around the world after COVID-19 outbreaks were successfully curbed earlier this year. To flatten the curve of the second wave of the pandemic governments again closed “non-essential businesses”, restricted travel and imposed “lockdowns” and “stay-at-home orders”. Beyond the health and human tragedy of the pandemic, it caused the most serious economic crisis since World War II, which also affected commercial contracts. In cases where the COVID-19 virus or government measures have affected commercial contracts, it is necessary to carefully analyse the state of affairs to determine the appropriate remedy.

The ICC Force Majeure Clause

Whether a force majeure clause is applicable in a particular case, and what its consequences would be, depends primarily on the wording of the clause. Courts have held that force majeure clauses are to be interpreted in a narrow sense and that performance under a contract is ordinarily excused only if the event preventing performance is explicitly mentioned in the force majeure clause. However, the state-of-the-art ICC Force Majeure Clause (Long Form) 2020 in Paragraph 3 (e) only presumes an epidemic to be a force majeure event but does not cover pandemics such as COVID-19. The difference between an epidemic and a pandemic is that an epidemic is a disease happening in a particular community. A pandemic, in contrast, is a disease that spreads over a whole country or the whole world. Due to its global spread, COVID-19 is classified as a pandemic.

In order to invoke the force majeure defence Paragraph 1 ICC Force Majeure Clause additionally requires that the party affected by the impediment proves that the following three conditions are met:

1. the impediment is beyond its reasonable control; and
2. the impediment could not reasonably have been foreseen at the time of the conclusion of the contract; and
3. the effects of the impediment could not reasonably have been avoided or

overcome by the affected party.

The events enumerated in Paragraph 3 ICC Force Majeure Clause which are presumed to fulfil conditions a) and b) under Paragraph 1 ICC Force Majeure Clause do not explicitly cover pandemics. Consequently, a party claiming a force majeure defence as a result of the COVID-19 pandemic must prove all three conditions.

Whether the impact and governmental measures triggered by COVID-19 are beyond the reasonable control of the parties depends on the specifics of each case. In many cases of mandatory governmental measures it will be relatively straight-forward for a party to argue this successfully.

With regard to the second condition - the reasonable foreseeability of the COVID-19 pandemic according to Paragraph 1 (b) ICC Force Majeure Clause - the point in time when the parties have concluded their contract is crucial. In October 2019, the effects of COVID-19 were less foreseeable than in December 2019, and in any case, as of March 2020, it was at least foreseeable that the COVID-19 virus would in some way interfere with the performance of contractual obligations.

In 2020, countries adopted differentiated approaches to combat the COVID-19 pandemic. These approaches included stay-at-home orders, travel restrictions, closure of non-essential businesses and lockdowns. It is also not yet possible to foresee which government measures will be taken to ensure a flatter curve for the second COVID-19 wave in winter of 2020 and beyond. This is particularly true as countries previously known for their laid-back COVID-19 policies are currently considering changing their policies and are willing to adopt stricter measures in response to the second wave of the COVID-19 virus. Sweden, for example, which was known for its special path without restrictions, mandatory requirements to wear masks, or lockdowns, has now introduced COVID-19 restrictions to contain the spread of COVID-19 and does not rule out local lockdowns. In the US, too, it is very probable that tougher COVID-19 measures will be implemented by the government at the latest when President-elect Biden takes office in January 2021.

Besides government COVID-19 measures, it is difficult for the parties to foresee specific effects of the COVID-19 virus on global supply chains and the performance of their obligations.

With regard to the second wave or further waves of the COVID-19 pandemic, it is

therefore difficult for a party to foresee the exact impact of the Covid-19 virus in the individual countries and the various measures taken by the respective governments.

The third requirement under Paragraph 1 ICC Force Majeure Clause, that the effects of the impediment could not reasonably have been avoided or overcome by the affected party, again lacks legal certainty and is subject to the specificities of the case at hand - particularly regarding the reasonable remedies available to the party to eliminate and overcome the consequences of the COVID-19 pandemic.

Only if the conditions set out above are fulfilled can a party successfully invoke the force majeure defence pursuant to Paragraph 5 ICC Force Majeure Clause and be relieved from its duty to perform its contractual obligations and from any liability in damages or from any other contractual remedy for breach of contract.

State-of-the-Art Force Majeure Clause

This legal uncertainty regarding the impact of COVID-19 under the modern ICC Force Majeure Clause as well as under other force majeure clauses requires parties to first clarify whether their clause generally covers pandemics. Secondly, in light of the second wave of COVID-19, parties should consider amending their force majeure clauses to include or exclude the novel COVID-19 pandemic as a force majeure event in order to provide legal certainty as to whether a contract must be performed and whether a damage claim for non-performance of contractual obligations exists.

When pandemics are included in a force majeure clause as a force majeure event, an affected party under Paragraph 3 ICC Force Majeure Clause needs only to prove that the effects of the impediment could not reasonably have been avoided or overcome. Parties should therefore consider reviewing and updating their clauses and contemplate including pandemics as a force majeure event. In our globalised world, the next pandemic will spread sooner or later - therefore a *lege artis* force majeure clause must cover pandemics as a force majeure event. Where a pandemic is included in a force majeure clause, parties should refer to an objective criterion such as a pandemic declared by the World Health Organization to define when pandemics trigger the force majeure consequences. By linking a pandemic to such an objective criterion, disputes as to whether a pandemic in the sense of the force majeure clause exists can be avoided.

Besides updating their force majeure clause parties should consider temporarily modifying their clauses in light of the current second wave of the COVID-19 virus. Parties, when amending their force majeure clause, may decide either to introduce a clause ensuring that effects and governmental measures due to the ongoing COVID-19 pandemic are not covered by their clause, or opt for a clause encompassing the current COVID-19 pandemic. Which option a party should select is a policy question and depends on the characteristics of the case. A party affected by the COVID-19 pandemic in the performance of its contractual obligations - because, for example, it depends heavily on international supply chains easily disrupted by the effects of the COVID-19 pandemic - should, on the one hand, ensure that the parties incorporate a force majeure clause encompassing the COVID-19 pandemic as a force majeure event. On the other hand, if the risk of non-performance of contractual obligations as a result of the COVID-19 virus is primarily in the risk sphere of the other party, a party may contemplate excluding the COVID-19 pandemic from the scope of the force majeure clause. In any case, a good starting point for future "tailor-made" force majeure clauses - which take into account the parties' specific needs - is the balanced ICC Force Majeure Clause.