

LALIVE

CORONAVIRUS: A FORCE MAJEURE EVENT UNDER SWISS LAW?

INTRODUCTION

As the coronavirus epidemic continues to spread into Europe, businesses are trying to assess the impact on both their human resources and their commercial relationships with operators located in the most affected regions. The impact of this epidemic is all the greater in Switzerland as Swiss companies have traditionally built strong relationships with Asia, and the People's Republic of China (PRC) in particular. Recent evidence of this strong relationship can be found in Switzerland's signature on 29 April 2019 of a Memorandum of Understanding with the PRC to increase collaboration between the two countries as regards projects included in the Belt and Road Initiative – the PRC-led massive development and investment effort aimed at recreating the ancient silk road.¹

Many states and corporations have taken drastic measures to contain the rapid spread of the epidemic, and the corresponding confinement/quarantine measures affect economic operators around the world.² In many instances, parties will encounter difficulties whilst performing existing contracts: work force might be unavailable, distribution networks disrupted, and orders cancelled. The question is whether such epidemic and/or related government measures might in some circumstances constitute a valid excuse for non-performance under the *force majeure* doctrine. Contractual parties engaged in economic activities that may be impacted by the recent coronavirus outbreak will have to assess whether their contract specifically or implicitly addresses the issue of *force majeure* and whether it covers coronavirus-related issues. Parties to such contracts should carefully review governing law clauses, to ascertain under which law their contractual obligations, including any *force majeure* clause, will be interpreted. As many cross-border transactions and international contracts are governed by

¹ <http://country.eiu.com/article.aspx?articleid=1087995092>

² In Switzerland, see for e.g.: <https://www.rts.ch/info/suisse/11127134-dizaines-d-evenements-touchez-par-l-interdiction-des-manifestations-de-plus-de-1000-personnes.html>

Swiss substantive law, by agreement of the parties, Swiss law is of utmost importance as regards these issues.

Here are our four key recommendations, under Swiss law, to tackling this epidemic and its consequences efficiently (in addition to washing your hands often!):

1 RECOMMENDATION NO. 1: CHECK FOR A *FORCE MAJEURE* CLAUSE IN THE CONTRACT

Many contractual *force majeure* provisions will include a list of examples of *force majeure* events. However, from previous experience, *force majeure* clauses rarely include epidemic events on their own.

If epidemics are not explicitly listed in the *force majeure* clause, or otherwise addressed in the contract, operators must analyse whether such epidemic cases are covered by the general definition of *force majeure* events (which is to be found in the *force majeure* clause) or under another category of circumstances specifically mentioned. While the contract might not mention the epidemic, emergency measures to address or contain an outbreak may be listed or covered under general terms such as civil unrest, quarantines, lockouts, or governmental injunctions.

2 RECOMMENDATION NO. 2: CHECK THE STANDARD OF *FORCE MAJEURE* UNDER SWISS LAW

Under Swiss law, the debtor can be excused from liability for non-performance if it can prove an absence of fault on its part. Such absence of fault is constituted where the performance of the debtor's contractual obligation becomes "*objectively*" impossible by circumstances not attributable to the obligor.

In a nutshell, under Swiss law, an epidemic like the coronavirus-related one, despite its possibly higher mortality rate, may not necessarily amount to an objective impossibility. An objective impossibility requires that an entire segment of the economy or all operators in a given category be affected. That being said, should such an epidemic lead to state authorities issuing bans or prohibitions with a direct impact on an operator (or a defined category of

operators) to perform a contract, then a much closer analysis should be undertaken as to whether there would be an objective impossibility to perform.

3 RECOMMENDATION NO. 3: DOCUMENT YOUR CORONAVIRUS-RELATED PERFORMANCE ISSUES

In principle, parties to Swiss law governed contracts must continue to perform their obligations even though performance becomes more difficult or onerous because of the epidemic. Likewise, they are entitled to expect that all other parties to the contract continue to perform.

However, even in the absence of an event of *force majeure* affecting an entire segment of the economy or a category of operators, the “*subjective*” impossibility of one individual operator to perform a contract as a consequence of an epidemic, might not be sanctioned by damages if no fault can be attributed to it. Ultimately, it will depend on the terms and nature of the contract.

Thus, parties impacted by coronavirus-related restrictions on their activity and their ability to perform their obligations should document their inability to perform and liaise/communicate with their contractual partner(s), should performance become impossible for them, even if impossibility is only temporary. In the absence of a *force majeure* event, they might still be able to rely on their non-faulty incapacity to perform to excuse themselves from liability for non-performance.

4 RECOMMENDATION NO. 4: CHECK THE CONSEQUENCES OF THE *FORCE MAJEURE* CLAUSE

The consequences of a *force majeure* event will depend on what has been negotiated. Under Swiss law, in case of *force majeure* and unless otherwise stated in the contract, both parties would be immediately released from their respective obligations. In long-term international contracts, however, *force majeure* usually has a suspensive effect, at least initially. Indeed, many *force majeure* clauses stipulate that the right to terminate may only be exercised if performance remains impossible at the end of a fixed time limit. Such *force majeure* clauses generally suspend performance of both parties’ obligations. A drastic remedy for drastic situations.