

NJORD Latvia: COVID-19 – is it force majeure?

COVID-19 has already affected many businesses in Latvia while tourism, restaurants, entertainment, logistics, financial and manufacturing sectors have taken a hardest hit. Due to restrictions imposed by the states following the outbreak of COVID-19, many companies are forced to delay shipments, in certain circumstances the execution of the contracts has become impossible.

The virus introduces a question of whether it can be considered a force majeure event in contractual relationships.

What is force-majeure?

Generally, force majeure is defined as an external and unexpected event which cannot be averted, and which prevents a contracting party from fulfilling its contractual obligations. Typical examples of cases where force majeure will be particularly relevant include outbreaks of war, rebellion, fire, and riot, etc.

In order to constitute force majeure, it is necessary that:

1. the event could not be foreseen at the time when the agreement was concluded;
2. the event must have such an impact on the contractual obligations that there is no possibility to fulfill such obligations.

If all elements are present, but fulfillment of the obligation is theoretically possible, even if very difficult, these circumstances will not be considered by the court as force majeure.

The occurrence of force majeure shall not give rise to an automatic ground for termination of the contract.

What if there is no force majeure clause in the contract?

The fact that there is no force majeure clause in the contract does not mean that force majeure cannot be invoked. In this case, a general principle of force majeure applies.

If the contract does not contain force majeure clause, the breach of the contract by virtue of the coronavirus may be justified by the 1980 United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention).

If you are currently planning to enter into an international contract of sale, you should consider including a force majeure clause. When drafting this paragraph, take into account the Model Clauses of the International Chamber of Commerce and of course, don't forget to add COVID-19 to the list

Who must prove the impossibility to perform?

The main issue here is to prove that coronavirus and/or relevant actions of governments are causing the service in question to be undeliverable. The party invoking force majeure must be able to prove that it has been impossible to fulfil the contract as a result of the virus. Therefore, it is not sufficient that, for instance, the supply of goods has become more costly or more time-consuming.

It is appropriate to observe and be able to document the required measures that have been taken to reduce the impact caused by the outbreak of the virus.

In this context, it may be necessary, for example, to be able to document employee reports on the disease and actions related to reducing the impact of the virus.

Obligation to notify

The party invoking force majeure is obliged to notify its contracting party that the agreed service cannot be provided because of force majeure.

The obligation to notify is normally included in the contract. Still, even if there is no such clause (or there is no written contract at all) it also follows from the general duty of acting in good faith which contracting parties are subject to under Latvian law.

Because of the coronavirus outbreak, the companies affected should check their contracts to determine their rights and obligations in the event of epidemics. In some contracts, it is a condition to be able to invoke a force majeure event, that a contracting party is notified, within an agreed deadline, that the contract cannot be fulfilled due to force majeure. It is crucial to respect such deadlines, as they are often relatively short (e.g. 3 days or even less).

Failure to comply with these procedures will allow the other party to refuse to recognize force majeure as a ground for relief (either temporary or permanent depending on the contract terms) for non-performance.

How to confirm the occurrence of force majeure?

A Party that is unable or has failed to fulfill its contractual obligations due to force majeure shall contact the competent authority of the State where the force majeure occurred, to request a certificate from the national authority, including the Chamber of Commerce.

While everyone is aware of the existence of the coronavirus, if you intend to refer to it, we recommend that you document the occurrence of force majeure so that it can be used as evidence.

Is there a liability for non-performance?

The recovery of a fine or loss on the other hand is generally unlikely, since the party is entitled to relief from liability for the entire period of force majeure.

At the same time, a party may claim damages:

if the other party has not notified (or failed to do so in due time) the circumstances of force majeure and their effect on the performance of the contract;

if the counterparty has failed to take all reasonable steps to minimize the damage caused to the affected party.

Is it possible to terminate the contract in case of force-majeure?

Yes. But only if the contract allows it. These might be termination clauses related to force majeure as well as other clauses allowing termination with immediate effect. In the absence of such clause, the termination is difficult to accomplish, and such termination might cause the claim for damages from the counterparty.

As was already mentioned, the occurrence of force majeure does not normally terminate the contract, but merely extends it.

As one of the options, a party might try to prove that it is no longer interested in performing the contract - and request termination on that basis.



SERGEI PETROV
ATTORNEY AT LAW,
PARTNER

(+371) 67 313 315

SP@NJORDLAW.LV