



IIBLP - Annual Survey West 2020

Force Majeure, Closure & Trade Finance
The Impact of COVID-19

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What is Force Majeure?

- An *unforeseen* event *outside of the reasonable control* of the party claiming the force majeure. It arises as a term in the contract (except in certain civil law jurisdictions where it may arise under statute).
- Claiming a force majeure is a defence. If successful, it will release a party from its contractual obligation to either perform a contract, or for any liability for delay in performing a contract, due to the force majeure event.
- Some force majeure clauses / statutes operate to suspend performance or extend time for performance. Others will allow either party to end the contract. However, exercising the wrong option or wrongly claiming force majeure may itself be a breach of contract and entitle others to avoid their obligations. So use caution.
- As a result of plain language drafting principles, the term “force majeure” is less common and instead reference is made to “unforeseen events beyond reasonable control”.

What is Force Majeure?

- The party affected by a force majeure event is required to notify the other party and provide proof within a reasonable period as to any steps taken to prevent, or mitigate the impact.
- The question as to whether an event can be claimed to be a force majeure is critical as to whether the defence will be successful. Is COVID-19 a force majeure? Recent court cases have varied significantly and are very dependent upon the facts. In June 2020, is COVID impact still *unforeseen*?
- It is widely accepted that a force majeure should not be grounds for release of a monetary obligation. More typically, it will permit a reasonable grace period/extension period to repay the outstanding indebtedness.
- However, it's important to examine the specific force majeure contractual term or statute as to its effect. For trade and trade finance it's important to consider the impact of the ICC rules, which impose certain contractual force majeure terms.

Government Claims or Declarations of Force Majeure

- In January / February, the *China Council for the Promotion of International Trade* (CCPIT) advertised that distressed PRC businesses could apply to CCPIT for “force majeure certificates”. This initially caused concern in the industry, but did not seem to have significant impact. It is worth noting that CCPIT is not a court or governmental authority, and certificates issued by it only reflected its own views – hence the view is that legally determinative as on their own as evidence of force majeure under PRC law.
- In March 2020, the France government declared COVID-19 to be a force majeure event. Despite the apparent authority of this statement, the public declaration does not supersede French law and the requirement under the relevant statute that certain conditions be met to successfully raise the defence. To date, the Court of Appeal has agreed that COVID-19 can be raised as a force majeure event, whether it can be successfully raised will be determined on a case by case basis.

What about Government Closures or Holidays

- What has been more frequent than government declarations of force majeure, are government closures of all or specific businesses. These closures become factual circumstances to consider in determining whether a force majeure event has impacted a contractual obligation.
- Typical questions that need to be considered in determining whether a closure creates a force majeure:
 - ❖ Are banks or other businesses shut by government order or due to lack of staff / restrictions on staff movement?
 - ❖ Are services which support the trade or performance readily available? For example, are courier services operational?
 - ❖ Is the closure unexpected?
 - ❖ What are the details of the closure? Is it only an extended bank holiday?

Force Majeure & Closure Provisions in ICC Rules

- A force majeure clause in an underlying contract will not necessarily impact an ancillary contract or trade instrument.
- However force majeure type clauses are included in ICC rules for Demand Guarantees, Standby Letters of Credit (SBLC), Documentary Credits (DCs), and Collections and so these instruments may be impacted directly. Each clause has a different legal impact and none refer directly to disease or pandemic.
 - ❖ **UCP 600, Article 36 – DC’s:** “a bank assumes no liability or responsibility for the consequences arising out of the *interruption of its business* by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, or by any strikes or lock-outs or any other causes beyond its control”. A bank will not upon resumption of its business, honour or negotiate under a credit that expired during such interruption of its business”.
 - ❖ **URR 725, Article 15 – Bank to Bank Reimbursement:** “a bank assumes no liability or responsibility for the consequences arising out of the *interruption of its business* by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, or by any strikes or lock-outs or any other causes beyond its control”.

Force Majeure & Closure Provisions in ICC Rules

- ❖ **URC 522, Article 15 – Collections:** “Banks assume no liability or responsibility for the consequences arising out of the *interruption of its business* by acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, or by any other causes beyond its control or by strikes or lock-outs”.
- ❖ **URDG 758, Article 26 – Demand Guarantees** - (extract/summary) If a demand cannot be made before expiry date due to a force majeure, the expiry date is extended by 30 days. The issuer must inform the instructing party and any counter-guarantor of the force majeure and the extension as soon as possible.
- ❖ **ISP 98, Rules 3.13 and 3.14 – Standby letters of Credit** (extract/summary)
 - Rule 3.13 (*Expiration Date on a Non-Business Day*) – if the last day for presentation is not a business day for the place of presentation or a nominated bank, the time for presentation is extended to the first following business day.
 - Rule 3.14 (*Closure on a Business Day and Authorization of Another Reasonable Place for Presentation*) – if the place of presentation is closed on the last day for presentation for any reason, presentation can be made within 30 days of re-opening after that closure.