When Coronavirus Forces Force Majeure

A Webinar for Companies at All Stages of the Supply Chain

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19 March 2020
Agenda

1. Effects of COVID-19 on Supply Chains
2. The Legal Framework
3. Tips for Common Force Majeure Scenarios
4. Tips for Making Your Contracts Fit for the Future
Effects of COVID-19 on Supply Chains

• Most common direct effects of COVID-19 on companies:
  – Government-forced shutdown
  – Management-forced shutdown
  – Manpower shortage due to illness or quarantine of staff
  – Manpower shortage due to fears of staff
Effects of COVID-19 on Supply Chains

• Effects on the supply chain:
  – Supply shortages despite stable or increased demand
  – Companies running out of stock
  – Force majeure certificates by Chinese agencies
  – Force majeure declarations between companies

• Question: Who must pay for the damage, and what immediate relief is available?
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The Legal Framework (1)

• Relevant questions:

  1. Is a contract partner entitled to invoke force majeure?
  2. Did the contract partner do what is required to invoke force majeure?
  3. What are the consequences of force majeure?
  4. Is emergency relief available?

• The answers are found:

  1. Primarily in the contract
  2. In the applicable law
  3. The procedural law of the forum
The Legal Framework (2)

• Force majeure does not apply to every contract

• Relevant legal concepts under different governing laws:
  – Force majeure (e.g., CISG, French, Chinese and U.S. law)
  – Impossibility to perform (e.g., Swiss, German and U.S. law)
  – *Clausula rebus sic stantibus* / change of circumstances (e.g., Swiss, German, French, Chinese and U.S. law)
  – Frustration (e.g., U.S. and English law)
The Legal Framework (3)

Typical requirements of force majeure (depending on the contract / governing law):

1. Impediment beyond the party’s control
   → Important: the specific effect of COVID-19
2. Impediment not foreseeable at time of contract
3. Impediment cannot be avoided or overcome
   → Real efforts required, at higher cost
4. No fault of the party invoking force majeure
5. Prompt notice
The Legal Framework (4)

• Consequences of force majeure (depending on the contract / governing law):
  – Excuse of non-performance (temporary or final)
  – Sometimes: contract adjustment and/or termination

• Often uncertain: How to allocate reduced production output?
  – Contracts often silent, law often unsettled
  – *Pro rata* allocation?
  – Reasonableness and fairness test?
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Tips for Common Force Majeure Scenarios

• Common force majeure scenarios in a supply chain:

  – COVID-19 affects your own production

  – COVID-19 affects your suppliers, thus your supplies

  – Lack of supplies affects your own production
Tips for Common Force Majeure Scenarios (1)

1. Identify and document the cause of the supply problem:
   – Collect the evidence of your own problem
   – If you receive FM notice: Ask for details before responding

2. Does the specific cause constitute force majeure?
   – Which allocation of risk?
   – In sup-supplier situations: Assess each contract separately
Tips for Common Force Majeure Scenarios (2)

3. Issue the required notices:
   – Choose language of FM notice carefully
   – Do not accept supplier’s FM in your own FM notice
   – When appropriate, object to FM notice

4. Make and require efforts to overcome the problem:
   – Efforts to supply or procure replacement goods, …
   – Determine legally required level of efforts
   – Importance of documenting all efforts
Tips for Common Force Majeure Scenarios (3)

5. Allocation of reduced supplies:
   – Risk analysis under contract and applicable law
   – Ask how your supplier allocates remaining stock
   – Consider requesting interim relief in important cases

6. As time moves on:
   – Provide or request updates
   – Lift FM once its effects can be overcome
   – Check right to modify the terms or terminate the contract
Tips for Common Force Majeure Scenarios (4)

7. Manage disputes over damages proactively:
   – Proper dispute management facilitates efficient resolution
   – Constructive discussions with contract partner
   – **In parallel:** Protect your legal and evidentiary position
   – Consider Early Case Assessment by outside counsel
   – Effective escalation of the dispute
   – Dispute resolution clause in your contract
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Tips for Making Your Contracts Fit for the Future

• Have a Plan B:
  – Diversify your supply chain
  – Prefer suppliers with different production sites

• Update your force majeure clauses:
  – Address common problems caused by pandemics
  – Address allocation of reduced supplies

• Update your dispute resolution clause:
  – Neutral and effective forum with enforceable decision
  – Compatible dispute resolution clauses within a supply chain

• Check your insurance coverage
Q&A

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