

LEGAL UPDATE

Force majeure and supervening impossibility of performance

19 March 2020 5 min read

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Introduction

One of the major legal issues arising from the recent outbreak of the COVID-19 virus has been the inability of parties to perform their obligations in terms of agreements to which they are party and the extent to which such failures can be excused, either in terms of contractually agreed provisions or South Africa common law principles.

Force Majeure clauses

Unlike many civil law jurisdictions (such as France and Germany) where the term "force majeure" is legislatively defined, the term force majeure is foreign to South African common law¹. Notwithstanding this, parties often include a force majeure clause in their South African law governed agreements.

A force majeure clause excuses a party (usually for a specified time) from performing some or all of its obligations under an agreement should certain defined circumstances (a force majeure event) arise, which prevent that party performing its obligations under that agreement. Parties include force majeure clauses to modify the common law position in respect of impossibility of performance which, as explained below, requires the performance to be objectively impossible for the party to be excused from its obligations and, if applied, may result in the extinguishing of the agreement between the parties. For this reason, force majeure clauses may allow for a suspension of performance, where such performance is not necessarily objectively impossible and may allow for the suspension (rather than extinction) of the agreement for the duration of the applicable force majeure event.

Although there are some force majeure events which might be considered "market-standard", force majeure clauses are often heavily negotiated. Accordingly, in order to determine whether a specific force majeure clause would cover non-performance arising from the COVID-19 virus outbreak, the provisions of that clause would need to be carefully analysed.

Whilst force majeure clauses generally apply to the impossibility of performance of obligations which are enforceable, some agreements may include a "material adverse change" clause which would apply to obligations under an agreement that has not yet become effective. For a further analysis of material adverse change clauses and the COVID-19 virus outbreak see [Mac Clauses](#).

Common law position

In the absence of a force majeure clause, the common law position will apply. In terms of a South African common law doctrine known as "supervening impossibility", each party's obligation to perform in terms of an agreement and their respective rights to receive performance under that agreement will be extinguished in the event that the performance by a party of its obligation becomes objectively impossible as a result of unforeseeable and unavoidable events, which are not the fault of any party to that agreement. Such events are known as *vis maior* ("major force") or *casus fortuitus* ("accidental occurrence").

Performance of an obligation will not be objectively impossible if that performance has merely become more onerous, difficult or costly. Nevertheless, absolute factual impossibility is not required; performance may still be objectively impossible if such performance is factually possible, but illegal or it has become so difficult or burdensome that the party cannot reasonably be expected to perform. The standard of conduct generally acceptable in business dealings in the particular community will determine whether performance is objectively impossible; performance might in law be regarded as impossible while still factually possible. Conversely, if a party has guaranteed performance, then the fact that performance subsequently becomes factually impossible does not absolve that party of liability.

In terms of the application of the doctrine of supervening impossibility, the Supreme Court of Appeal in *Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* (quoting older authority) held that in order to determine whether the doctrine applies, it is necessary to look at factors such as the nature of the contract, the relationship of the parties, the circumstances of the case and the nature of the impossibility. Accordingly, any analysis of whether a party would be able to rely on the defence of supervening impossibility in respect of its inability to perform its obligations in terms of an agreement as a result of the COVID-19 virus outbreak must take into account all of the surrounding circumstances of that case.

Conclusion

In summary, any analysis of whether a party may rely on an applicable force majeure clause or (in the absence of an applicable clause), the common law doctrine of supervening impossibility in respect of non-performance as a result of the COVID-19 virus outbreak is fact-specific and can be complex. Parties who intend to rely on either force majeure clauses or the common law doctrine of supervening impossibility are advised to obtain expert legal advice prior to doing so.

1. The term *force majeure* is a direct French translation of the Latin *vis maior*, which is part of the South African common law and is dealt with below.