

코로나19 관련 불가항력 Force Majeure 여부 및 국제거래, 무역거래 계약당사자의 실무

적 대응방안 Recommended Actions – 외국변호사의 영문버전 포스팅 소개



Force Majeure Test/Causation

A FM event is an objective event or situation which is (1) unforeseeable (at the time of entering into the contract), (2) unavoidable in terms of occurrence or impact and (3) impossible to overcome.

There must be a causal link between the FM event and the affected party's failure to perform (i.e., the affected party must establish that the FM event must have caused the non-performance). It's not necessarily required that the FM event must be the direct cause

immediately resulting in the non-performance. If there are too many steps between the FM event and the non-performance it will be difficult for the affected party to satisfy causation.

Recommended Actions

If, whether as buyer or supplier, you have entered into commercial contracts that have or may be affected by the outbreak, we recommend the following actions:

- Review each contract carefully, with particular regard to the governing law and FM provisions, including any time bars or other procedural requirements.
- Form a preliminary view on whether any FM provision is "open" or exhaustive in relation to the list of FM events and whether the outbreak and/or resulting government crisis measures are covered/excluded.
- If you may need to invoke a claim, consider your obligation to mitigate the effect on non-performance and what steps you can take. Starting a mindful dialogue with the counterparty may be an important part of the process.

- Consider any potential flow on effects from the invoking of a claim such as termination of the contract.

Aside from your legal position, there are generally going to be several other important matters of concern:

- For a counterparty who receives a FM claim they do not think is valid, there is the issue of enforcement of the contract, particularly if it does not provide for international arbitration.
- There are the reputational risks and potential damage to long-term supply relationships with foreign buyers and suppliers. Even where there is no legal basis for FM relief, parties who receive FM claims may wish to be flexible about amending or restructuring (e.g. by postponing deliveries) the contract to accommodate the affected party.
- Declaring FM or receiving a FM claim may impact on insurance arrangements.
- Buyers who are part of a chain of supply contracts may themselves need to declare FM in response to a supplier's declaration in order to avoid being in breach. Each contract in the chain may of course be on different terms or subject to entirely

different governing laws and this can create substantial challenges for the buyer, especially where their downstream contract has less favourable (or no) FM provisions. There may also be separate time bars or other procedural requirements as above.

Examples of steps companies might actively consider taking now (and seek to ensure that counterparties are taking) include: securing alternate supply streams in the event a supplier's operations are impacted; planning for how employees can continue working remotely, or how functions can be transferred to other locations, in the event of quarantines and business closures; and mitigating the impact of restricted travel both around the globe and within countries. Even if such steps are not successful in avoiding the need to declare a force majeure, a company's attempt to mitigate its risk in advance will be highly relevant to a court's determination of whether reasonable steps were taken to continue to satisfy contractual obligations, and whether performance was truly impossible. Affirmative measures to help ensure a company is prepared for the possibility of business interruption resulting from COVID-19 include a careful review of insurance policies that may cover such an event.

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