Brief information on Force Majeure and Covid-19

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As a result of the ongoing Covid-19 outbreak* many businesses will not be able to fulfil all of their contractual obligations, which may lead to delay penalties and liability for damages. If the Covid-19 situation can be considered an event over which the contracting party has no control or is unable to compensate for by, for example, buying from another supplier, it may be possible to avoid liability as a result of Force Majeure.

General Information

Force Majeure is an exemption rule which in certain situations may lead to the suspension of one or both parties' obligations under an agreement, fully or or in part. There are rules similar to Force Majeure in some Swedish legislation, e.g. Section 27 of the Sale of Goods Act regarding compensation for damages in the event of delay. However, this Act only applies to purchases of movable property and it only applies if the parties have not agreed otherwise.

There is no general statutory rule in for example the Contracts Act regarding Force Majeure. There is also no general international Force Majeure regulation and circumstances that are considered to be Force Majeure abroad may not be in Sweden – and vice versa. For example, some jurisdictions take the view that Force Majeure can only be invoked if a specific clause regarding this has been included in the contract. Other jurisdictions distinguish between Force Majeure and "Acts of God", where the latter refers to circumstances beyond human control, such as earthquakes and similar events. There are thus no consistent regulations.

Contractual Force Majeure Clauses

In many agreements the parties have explicitly regulated the issue of Force Majeure. The situations that would then involve Force Majeure depend on what has been agreed since the main principle of Swedish law is that there is freedom of contract. It is for example possible that the clause would include a full listing of events that

should exclusively be considered to constitute Force Majeure under the agreement. It is also possible that the clause has been formulated in such a way that there must be an absolute obstacle, e.g. in the form of an official decision that makes it impossible to fulfil the agreement, in order for the clause to be invoked. The choice of law is also very important for the interpretation of a Force Majeure clause. A thorough review of the agreement's Force Majeure clauses is therefore required in each individual case. It is not possible to generalise.

In the Absence of a Force Majeure Clause

Since there is no general legal provision regarding Force Majeure, it is not completely clear what happens if the parties have not agreed on a Force Majeure clause. In such situations it is our understanding that Force Majeure should still be invoked, but it is not possible to say in general to what extent and under what circumstances. However, as a general rule the requirements set out below in section "**To Take into Account**" would need to be met. The absence of a Force Majeure clause would, however, always involve a certain degree of uncertainty and require an assessment of each individual case.

Force Majeure Clauses and Consumers

In respect of consumer contracts, what has been agreed regarding Force Majeure must not contravene mandatory consumer law legislation (e.g. the Consumer Sales Act). The clause must also not be too strict towards the consumer. Force Majeure clauses that are too strict or unilateral can be modified or disregarded under Section 36 of the Contracts Act. In principle, businesses can also claim that an agreed Force Majeure clause is too strict (or generous) and therefore should be modified or disregarded under Section 36 of the Contracts Act, but the scope for applying Section 36 of the Contracts Act is significantly smaller in contractual relationships between businesses.

Force Majeure Clauses and Tenancies

For both residential and commercial tenancies it is common that the lease contains unilateral Force Majeure clauses for the benefit of the landlord (for example in the Swedish Property Federation's standard agreement). The Landlord's main obligation is to make the apartment/premises available to the tenant, which should not be affected by Covid-19. Since the most common Force Majeure clauses do not release the tenant from fulfilling its obligations under the lease, the clauses become relevant primarily if the right to a reduction of rent, damages, repair and termination exists. That could be the case if the availability of the apartment/premises or the conditions for the tenancy should change as a result of decisions made due to Covid-19. A general Force Majeure assessment may then become relevant, see below in the section "**To Take into Account**".

To Take into Account

The situation caused by Covid-19 is unique, which makes it difficult to provide any general points of reference for the assessment of Force Majeure. But in the absence of differing contractual regulations, the following requirements should as a minimum be met in order for a party to be able to rely on Force Majeure:

a) a contractual performance must have been prevented; and

b) the obstacle must be a circumstance beyond the party's control; and

c) the party cannot not reasonably have been expected to have anticipated or taken the circumstance into account at the time the agreement was entered into; and

d) the consequences of the circumstance could not reasonably have been avoided.

For the assessment of these circumstances it is important to bear in mind what type of agreement is affected, whose performance is prevented, who the parties are, what the obligation in question is, etc. What constitutes Force Majeure in one agreement does not have to constitute Force Majeure in another. As long as the banks are open there is for example no formal obstacle against making payments through bank transfers, but it is undoubtedly difficult to provide travel to countries with entry bans. A major global group of companies may also be in a better position to handle a certain situation than an individual business.

Specifically about Force Majeure and Covid-19

Epidemics and pandemics occur at regular intervals (for example swine flu, SARS, MERS, Ebola, etc.). Virus outbreaks as such must therefore not necessarily be considered unforeseeable, i.e. such that a party could not reasonably have been expected to anticipate or taken into account at the time the agreement was entered into. But the very extensive spread of Covid-19 can certainly be a Force Majeure event within the context of many agreements, in particular if the agreements were concluded prior to December 2019 (when the virus became known).

Even if the Covid-19 event would constitute Force Majeure, then precisely that disease must be the event that is the cause of the non-fulfilment of the contractual obligation. The obstacle caused by the event could also not reasonably have been avoided. It is thus in general not enough to be in a financially worse position as a result of the event or that it will be difficult to fulfil the agreement in order to invoke Force Majeure. For example, it may be necessary to hire extra staff or make use of other suppliers if the prevented party is unable to fulfil the contract itself, even if it involves a considerable cost increase.

The starting point must be that Force Majeure is a relatively narrow exemption rule and that a contracting party must expect to have to fulfil its obligations under the agreement even if the financial circumstances change. The main rule in Swedish law is also that agreements must be kept. In principle, payment difficulties are rarely sufficient grounds for claiming Force Majeure, even if it cannot be entirely excluded in extraordinary situations.

The time aspect is also important to take into account. As indicated above, Covid-19, with the current spread, may be a Force Majeure event within the framework of an agreement concluded prior to December 2019 when the new corona virus and the disease became known. It does not, however, mean that Covid-19 necessarily would constitute Force Majeure in relation to an agreement that is entered into in mid-March 2020. At this time the virus had already gained the status of pandemic and its far-reaching consequences are known. Covid-19 would now be considered as a circumstance that should reasonably be expected in contract negotiations. When new agreements are entered into during the period when the virus outbreak is ongoing, the parties must thus be extra careful to regulate how Covid-19 should be dealt with in the agreement.

Consequences of Force Majeure

If Force Majeure is in effect, the affected party is generally released from its contractual obligations during the period when the Force Majeure event is ongoing. Therefore, in most cases it is just a delay of the party's obligations under the agreement. As soon as the obstacle has been removed, the parties shall fulfil the agreement. In addition, an exemption from liability usually exists during the period the Force Majeure event is ongoing. In the event of permanent obstacles, the agreement will, however, in principle cease to apply and the parties' performances shall be returned.

It is important to bear in mind that Force Majeure does not necessarily mean that the opposite party's right of cancellation is lost. In many cases the opposite party should therefore be able to cancel the agreement if the delay goes on for too long. It could thus be the case that the Force Majeure clause explicitly stipulates a right to cancel the agreement if the obstacle lasts for a certain period of time, for example a quarter. If the agreement is cancelled the performances delivered shall be returned. For example, any advances paid shall as a rule be repaid.

Notification

When invoking Force Majeure the opposite party shall be given clear notice of this as soon as the obstacle has become known. The notice must include information about the obstacle and how it affects the contractual performance. It is also important to secure evidence of the measures taken in order to try to overcome the obstacle and why these measures have failed.

Insurance

In conclusion, you should check your insurance coverage. Most companies have taken out a so-called Business Interruption Insurance and sometimes with the addition of Epidemic Interruption Insurance. These insurance policies can offer some protection in the current situation but since it is not a standardised product in all respects, it is not possible to comment in general.

Check List

Below follows a few general points for what should be taken into account if you consider yourself affected by Force Majeure:

1) Check that your agreements include a Force Majeure clause and read it carefully to understand whether you, or your contractual party, can invoke the clause. Also check which country's law will apply to the agreement. DLA Piper is of course able to assist with this in Sweden and abroad, we can be found nearly all over the world.

2) If your agreement does not include any Force Majeure clause, it may be still be possible to invoke such objection.

3) If you wish to invoke Force Majeure, then give the opposite party a clear written notice that includes information about the consequences you foresee. The notice should be given in close connection to when the obstacle was discovered, otherwise the opposite party may for example object that you intentionally delayed it in order to be able to speculate in market development in the meantime. You should check specifically whether your Force Majeure clauses include any agreed deadlines or other rules that must be complied with, for example rules concerning notifications.

4) Document the measures you have taken in order to avoid the obstacle and why these have failed. You should also gather evidence that Force Majeure may be deemed to exist. It is important to secure evidence.

5) Even if you can invoke Force Majeure, it does not mean that you have *carte blanche* for not delivering or paying. Force Majeure is usually just a protection against the opposite party's delay penalties, but the opposite party's right of cancellation may be preserved.

6) Check your insurance coverage.

7) Regulate explicitly how Covid-19 should be dealt with in the agreements concluded during the period when the virus outbreak is ongoing.

Our recommendation is that the specific situation should be carefully analysed with the help of lawyers before a Force Majeure clause is invoked. We would be pleased to help with this and you are welcome to contact your regular contact persons at DLA Piper.

Alternatively you can contact our Corona Task Force directly which consists of:

Karl-Oscar Dalin (Processer, skiljeförfaranden och utredningar)

Johan Sundberg (Arbetsrätt)

Jonas Premfors (Rekonstruktion)

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* WHO has decided that Covid-19 is the official name for the disease caused by the new corona virus SARS-CoV-2. Covid-19 stands for Corona Virus Disease 2019.