Grotius Chambers
International · Law · Different · Experience

Dr Kuyperstraat 5 | 2514 BA The Hague | Netherlands
+31 (0)70 250 0098 | info@grotiuschambers.com
www.grotiuschambers.com

COVID-19, International Organisations and Force Majeure

Marine Veissiere
Partner | Attorney-at-law
T: +31 (0)70 250 0098
E: marine.veissiere@grotiuschambers.com

Thomas John ACIArb
Partner | Barrister | International Legal Consultant
T: +31 (0)70 250 0098
E: thomas.john@grotiuschambers.com

On 11 March 2020, the WHO declared the spread of COVID-19 a pandemic. At the time, 114 States had reported cases. In a bid to halt the spread of the virus domestically and internationally, many States started winding back public life: curfews; ban on gatherings in public; travel bans; cancellation of events such as conferences; and other measures, some of which are unprecedented in times of peace. They all have one purpose: to slow the spread of the virus.

Many States affected by the pandemic host International Organisations (IOs) – which are, despite the immunities they usually enjoy, not "immune" to the measures States have taken. Thus, IOs decided that Staff must work from home and they deferred or cancelled all travel. They may also defer or cancel in-person meetings and conferences, affecting venue reservations and catering contracts. Or they had contracts deferred or cancelled on them, perhaps because a supply chain of the counterparty was interrupted.

While a deferral or cancellation of private contracts, both through the IO as well as through a counterparty, is presently perchance unavoidable, it is fundamental that IOs understand their rights and obligations in this exceptional situation. If not handled properly, significant costs and reputational damage can be the result of the IOs actions.

Managing risks: IOs invoke force majeure

The principle of *pacta sunt servanda* keeps the parties to the contract they concluded. The actual or anticipatory non-fulfillment of any obligation under a contract is considered a breach. Breaches attract remedies, including in form of damages.

In some limited circumstances, the non-fulfillment of obligations may be excusable, with a delay of the performance of those obligations, or even a termination of the entire contract, possible. If so, the obligations are at least temporarily suspended and the remedies for a breach of contract are not available.

Whether these circumstances exist, is highly context driven. Thus, when faced with the prospect of not being able to perform obligations under a contract, IOs must carefully assess whether the prerequisites for an excusable non-fulfilment exist. If they do, the non-fulfilment will have no ramification for the IO; if they don't, the IO breaches the contract with all its consequences.

The crucial question: can the IO rely on force majeure?

Whether force majeure is available, and if so, which criteria the IO needs to fulfill to invoke it, depends on the law that applies to the contract. The contract may include an express choice of the applicable law. Alternatively, the choice may need to be implied based on the contract itself as well as any surrounding circumstances. This inquiry can be complex, but it is an essential "fork in the road" task because once the applicable law is established, the criteria will flow from the contract itself, as well as from statute, from common law or from international principles.

Dr Kuyperstraat 5 | 2514 BA The Hague | Netherlands
+31 (0)70 250 0098 | info@grotiuschambers.com
www.grotiuschambers.com

So, where should IOs start?

The starting point is the contract. Not only will it assist in ascertaining the applicable law, but it will also answer whether the parties agreed a so-called force majeure clause. If so, this clause will set the first criteria, including, possibly, a list of force majeure events. Importantly, even if an epidemic or a pandemic are included expressly as force majeure events, the IO may still not be excused from performing its contractual obligations. Also, there are several other criteria before force majeure may be properly invoked. Much will depend on the applicable law; the respective circumstances of the contract; and early legal advice is crucial to protect the IOs' interests.

And if the contract does not include a force majeure clause?

If the contract does not include a force majeure clause, or the force majeure clause is not effective, then statutory, common or international law and principles may provide the criteria that must be fulfilled. These sources of law may allow to invoke force majeure under statute, or they provide avenues for an IO to excuse a non-performance based on legal doctrines such as impossibility, the removal of the basis of the transaction, or the frustration of the contract. Each of these doctrines has its own criteria and resulting legal consequences which depend on the law applicable to the contract.

If on legal advice, the IO forms the view that it wishes to invoke force majeure, or an alternative avenue, to suspend obligations or terminate the contract, then it must notify the counterparty accordingly. The notification must follow the notification requirements set out in the contract and must include sufficient information to satisfy the applicable burden of proof.

Managing risks: a counterparty invokes force majeure

If an IO receives a notification that a counterparty wishes to invoke force majeure, similar considerations as above apply. It will be crucial to review the notification and assess how satisfactory the explanations are. These explanations must measure against the applicable criteria and again, it will be important to identify the law applicable to the contract. Obtaining legal advice will assist here and answer whether invoking force majeure or an alternative doctrine is supported by the applicable law.

Other important considerations

While obtaining appropriate legal advice concerning the legality of invoking force majeure or other legal doctrines relating to the actual or anticipatory non-performance is fundamentally important, there are other important considerations which IOs must ponder. These include financial considerations including a comparison between the value of the contract and the presumptive costs of potentially complex legal disputes. Moreover, IOs must consider the resource implications of such disputes and whether States would compensate any damages and costs the IO would be ordered to pay.

More questions? Then contact us!