

# COVID-19: FORCE MAJEURE AND YOUR IT PROJECT – SEVEN THINGS TO CONSIDER BEFORE PULLING THE TRIGGER

Date: 13 May 2020

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As the COVID-19 pandemic continues to create disruptions to economies and businesses across the globe, we have found many businesses are facing increasing, and changing, risks in projects they have on foot – and IT projects are no exception.

Traditionally, we would speak to the benefits of considering, and indeed running with, major IT projects during what has otherwise now become a "quiet" time for many businesses. However, as we are all increasingly aware, COVID-19 is creating challenges in project delivery that we are not accustomed to experiencing, and that project planning had not necessarily taken into account.

Our colleagues in [Australia](#) and [globally](#) have written of the utility of a contract's Force Majeure provisions in the current climate – and these provisions can certainly prove a powerful tool when it comes to IT projects.

In most instances, COVID-19 will fall under the definition of a Force Majeure Event, allowing you, or your suppliers, to trigger the Force Majeure provisions of your project contract(s).

Based on our experience, here are seven things you should consider before you go down the Force Majeure path:

## 1. IS COVID CAUSING A DELAY TO YOUR PROJECT? FROM SUPPLY CHAIN ISSUES, TO REMOTE WORKING ARRANGEMENTS

COVID-19 is raising hurdles in projects that could lead to delays in delivery, and these might not just be due to issues on the Supplier's side. Depending on what stage your project is at, you may find that you are in a position where you might need to invoke the Force Majeure clause due to delays you may be causing to the project. For example, your offices are closed due to quarantine measures, and face-to-face training cannot occur.

## 2. FORCE MAJEURE LOSSES LIE WHERE THEY FALL (GENERALLY)

If you are causing the delay, it may be more commercially viable to rely on a suspension or pause in your project under the Force Majeure provisions of your agreement, than incurring delay costs for which you may otherwise be liable.

## 3. STATUS CHECK

Before invoking, or allowing the supplier to invoke, Force Majeure provisions, assess where your project is at and if there are existing delays. Clearly demarcate these from any delays caused by COVID-19.

#### **4. UNDERSTAND WHAT THE FORCE MAJEURE CLAUSE REQUIRES TO BE TRIGGERED**

This is an area that is often too flippantly considered. Ask 'does the impact of the Force Majeure Event truly make the obligations under the agreement unable to be performed?' Yes, COVID-19 is a pandemic, and often falls within the definition of Force Majeure Event, but you still must be able to demonstrate why that prevents the performance of specific obligations. Precision is required here. It is not just that is harder than you thought it would be when you signed the contract.

#### **5. TIMING IS OF THE ESSENCE**

While COVID-19 has been declared a pandemic by the World Health Organization, contracting after this declaration, or having to perform contractual undertakings which may have had time to be mitigated since, may be deemed an assumption of the risks associated to the international crisis and therefore, could limit the potential to invoke Force Majeure.

#### **6. FORCE MAJEURE IS NOT NECESSARILY JUST A CONTRACTUAL MATTER**

While most international contracts will rely on their Force Majeure provision, some civil law countries interpret this concept as a public order measure which may not be limited by contract. True to its linguistic origins, it is notably the case in France where Force Majeure can be expanded by a contract, but not limited or other conditioned to a specific formalism (e.g. notification within a certain timeframe) if the surrounding circumstances do have the characteristics of Force Majeure, i.e. (i) extrinsic, (ii) unforeseeable and (iii) irresistible.

#### **7. BE CLEAR AND PRECISE IN YOUR REASONS FOR USING FORCE MAJEURE**

Large suppliers have a portfolio effect. Where possible, they want to avoid projects being suspended or stopped, leaving teams of personnel on the bench indefinitely. They will often take quite aggressive approaches to these arguments with litigation lawyers clearly crafting responses. Caution in communications is well advised.

The devil is always in the detail when it comes to Force Majeure, and indeed, successfully executing a trigger of a Force Majeure clause. Every contract has its own nuances and idiosyncrasies.

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