The convergence of COVID-19 and *force majeure*

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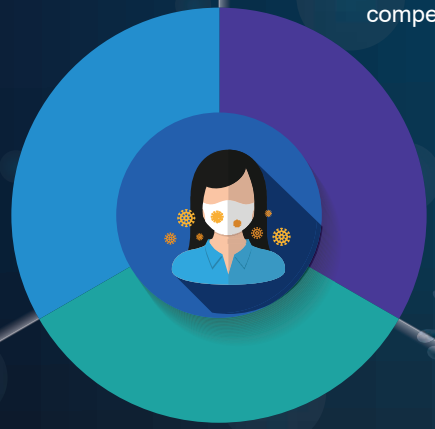
Introduction

On 11 March 2020, the World Health Organisation ("WHO") characterised COVID-19 as a pandemic pursuant to an assessment by WHO. As the global community is grappling with COVID-19 and its ramifications, parties to commercial agreements have not been spared from panic in respect of the adverse effects of COVID-19 on commercial agreements.

The rapid spread of COVID-19 has led to certain countries taking drastic measures in an attempt to curb the outbreak, such as imposing travel bans, closing schools and institutions of higher learning. In certain instances, companies have decided to close operations completely whilst other companies have encouraged their employees to work remotely, where permissible, to foster social distancing.



Force majeure

Force majeure is a legal mechanism which may be relied upon by parties who are under a legal obligation to carry out specific performance, but are unable to carry out such specific performance pursuant to an exceptional event or circumstance which is beyond the control of those parties bearing a legal obligation.

COVID-19 has the potential of preventing parties to commercial agreements from performing their obligations as provisioned in commercial agreements which could trigger default events and lead to substantial losses being suffered as a result of the non-performance.

In commercial agreements where force majeure is provided for, parties to such commercial agreements would need to consider the manner in which *force majeure* has been defined in order to determine if such a definition can be interpreted in a wide manner to include COVID-19 and excuse specific performance.

In *Joint Venture between Aveng (Africa) (Pty) Ltd and Strabag International GmbH v South African National Roads Agency SOC Ltd and Another [2019] 3 All SA 186(GP),* the court in its obiter dictum remarked that the agreement which was concluded between the parties compelled the parties to take steps to resolve disputes should disputes arise. The court in considering the matter, adopted an objective test in determining what constituted "*force majeure*" as provided for in the agreement and held that the circumstances relied upon by the applicant could be overcome and therefore, could not objectively be deemed to constitute "*force majeure*". The court held that the applicant's refusal to return to the site, on which it was contracted to perform work, and its subsequent cancellation of the agreement on the basis of *force majeure* had no legal basis. It appears that it is not sufficient for the party alleging that a *force majeure* event or circumstance has occurred, to reserve its rights and take no measures to mitigate the *force majeure* event or circumstance.

Conclusion

As the number of reported infections and deaths increases, the global community led by WHO remain on tenterhooks as a result of the COVID-19 outbreak. Parties to commercial agreements need to carefully consider what constitutes "*force majeure*" in order to determine if COVID-19 outbreak could be interpreted as a *force majeure* event or circumstance in those commercial agreements.

Furthermore, the procedures which may be provided in commercial agreements in respect of the notification to the other party would need to be adhered to fully. Parties are further encouraged to take reasonable steps to mitigate *force majeure* events and circumstances, where permissible, failing which, parties may not be successful in relying on *force majeure* as a mechanism to be excused from specific performance.

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