

Fulfilling contractual obligations - when force majeure applies, and when it doesn't

As the consequences of the near-worldwide Covid-19 lockdown retain their relentless grip on global and local supply chains, some South African parastatal companies are invoking "force majeure" as a provision for not being able to fulfil client-service provider agreements.

This, in turn, further constricts the ability of local supply-chain and logistics firms to deliver, with challenges and detrimental impacts mounting.

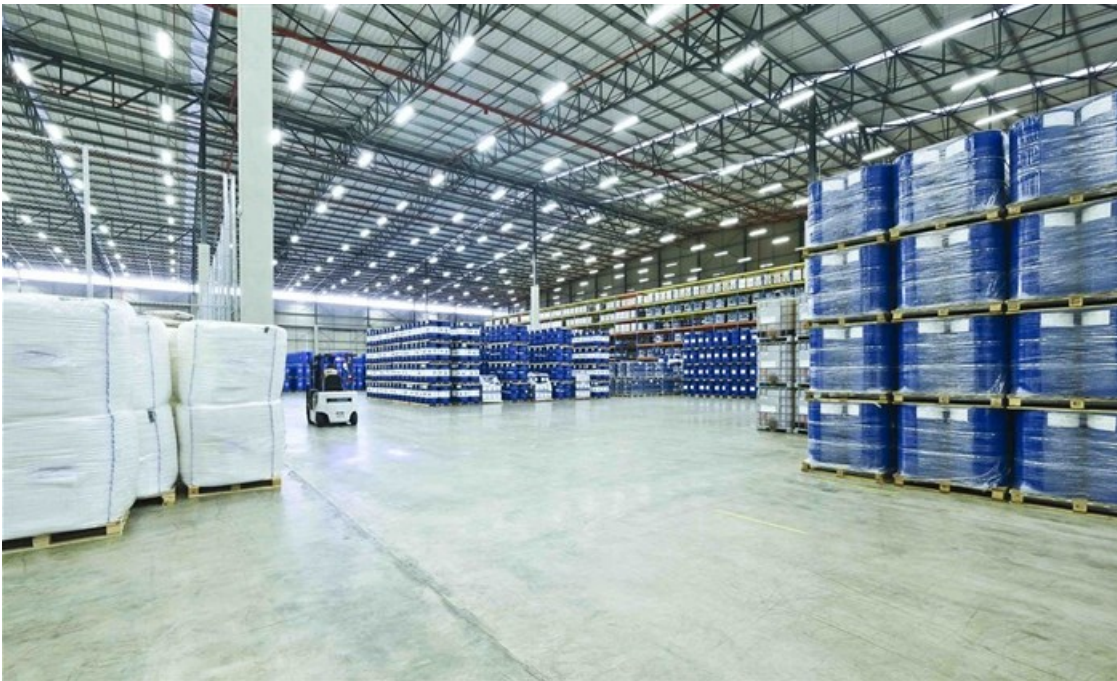


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"Force majeure" is a common clause in contracts that covers extraordinary events or circumstances beyond the control of either client or service provider, such as a war, a strike, an "act of god" (a natural hazard, such as an earthquake or tsunami) or, indeed, an epidemic, which make it impossible for either to fulfil their contractual obligations.

"We're seeing disruption across various stages of the supply chain process because of lockdown restrictions," says Advocate Christo Erasmus, head of legal at Bidvest International Logistics. "Harbours and their functionaries, for instance, are battling to operate because certain goods are prohibited from moving because of regulations. The same applies to ground transport: it might be illegal, again because of regulations, to move goods, so delivery is interrupted."

Sector challenges

Despite a very slow easing of restrictions, the challenges seem to be mounting. With harbours not performing properly, the movement of certain goods has ground to a halt, or slowed to a snail's pace, while unnecessary extra demurrage costs are increasing.

Airports are running out of space as clients are unable to distribute goods, making warehouse storage and physical space a real problem. At the same time, supply-chain/logistics firms' warehouses are filling up as goods remain undelivered.

"What many don't realise is that the forwarding company or logistics service provider is often the party that has performed its part of the agreement and paid for freight, duties, VAT and other statutory land-side charges on behalf of the client, regardless of where the goods are currently sitting," notes Erasmus, "and this just compounds our difficulty to operate at capacity."

Some are questioning the boundaries of an obligation to fulfil payment terms during force majeure, and Erasmus emphasises that force majeure comes into effect only when it is objectively impossible, not just difficult, burdensome or economically onerous, for either party of the agreement to fulfil their obligations – "And the party needs to prove this by providing a direct link to the pandemic and explain why it is or was impossible to fulfil their obligations."

When assessing whether to invoke force majeure or not, Erasmus notes that this will depend largely on the interpretation of the client-service provider agreement. "Always refer to it, as it's your roadmap between you and the other party for the transaction in question."

In some instances, where the force majeure clause isn't specified in an agreement, a party may be able to rely on the common-law principle of "supervening impossibility of performance". "But, again, the same applies," notes Erasmus: "you need to prove that it is or was impossible to fulfil your obligations by providing a direct link to Covid-19 and why it prohibited your ability to fulfil your obligations."

In establishing whether force majeure applies to your circumstances, Erasmus advises looking at four aspects:

1. First, ask yourself if it is objectively impossible (not just difficult) to perform your duties.
2. Then try to establish to what extent the impossibility can be attributed to Covid-19.
3. Then look at how long your inability to perform will last, and at short-term solutions such as a repayment plan, amended obligations or an extended performance timeline.
4. And, finally, work out if there are any other avenues available to mitigate your or the other contracting party's loss.

Erasmus stresses the fact that a party's obligations may change through the various stages as the country moves from level 4 to level 1. In some stages, performance might be illegal and impossible, while in others it may not be, so continual re-evaluation is needed to assess whether force majeure can be invoked.

How long after the pandemic parties can continue to invoke force majeure remains to be seen, Erasmus says.

"Once Covid-19 is over, and we're allowed to go back to normal, whatever normal may be, Covid-19 will no longer prevent a party from performing its obligations. But the question then should be, if Covid-19 is over, but as a result of its impact on a party's business, the party is unable to perform its obligations, will force majeure still apply?

"There's no blanket approach, and this is something that will have to be assessed on a case-by-case basis."

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