

Force Majeure and other Acts of God in IP and Technology Licenses

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What is the DESCAs model?

- DESCAs 2020 (Development of a Simplified Consortium Agreement) is a comprehensive Model Consortium Agreement for Horizon 2020. Initiated by key FP7 stakeholders and updated for Horizon 2020 in consultation with the FP community, it offers a reliable frame of reference for project consortia. DESCAs enjoys broad support within the FP community.
- The DESCAs Core Group is represented by ANRT, EARTO, KoWi, LERU, VTT, ZENIT and coordinated by Fraunhofer and the Helmholtz Association.
- The DESCAs Consultation Group, which provides vital expertise for the development of DESCAs, consists of more than 160 experts from Academia, Research and Technology Organisations and Industry from all over Europe, as well as from other countries involved in the framework programmes, e.g. Israel and USA.

Force Majeure in H2020

- According to GA H2020:
- 51.1 'Force majeure' means any situation or event that:
 - prevents either party from fulfilling their obligations under the Agreement,
 - was unforeseeable, exceptional situation and beyond the parties' control,
 - was not due to error or negligence on their part (or on the part of third parties involved in the action), and
 - proves to be inevitable in spite of exercising all due diligence.

The following cannot be invoked as force majeure:

- any default of a service, defect in equipment or material or delays in making them available, unless they stem directly from a relevant case of force majeure,
- labour disputes or strikes, or
- financial difficulties.

Any situation constituting force majeure must be formally notified to the other party without delay, stating the nature, likely duration and foreseeable effects. The parties must immediately take all the necessary steps to limit any damage due to force majeure and do their best to resume implementation of the action as soon as possible. The party prevented by force majeure from fulfilling its obligations under the Agreement cannot be considered in breach of them.

Force Majeure clause – DESCA PCA Model

Article 5.4 Force Majeure

- No Party shall be considered to be in breach of this Consortium Agreement if it is prevented from fulfilling its obligations under the Consortium Agreement by Force Majeure.
- Each Party will notify the competent Consortium Bodies of any Force Majeure without undue delay. If the consequences of Force Majeure for the Project are not overcome within 6 weeks after such notification, the transfer of tasks - if any - shall be decided by the competent Consortium Bodies.

Analysis of Force Majeure in H2020 Context

1. Both the grant and the PCA contain a reference to Force Majeure and its consequences.
2. The contract is subject to Belgian law, which will fill any gaps left by the contract.
3. The contract excludes certain situations from force majeure
4. Procedure is important: “formally notify... without undue delay”
5. Mitigation must be made: “immediately take all the necessary steps to limit any damage”

Force Majeure under Belgian law

- No mandatory Force Majeure rules
- 2 conditions under supplementary law:
 - (i) **Impossibility to perform** by debtor (*absolutely vs reasonably impossible*)
 - (ii) **No fault** of debtor (<-> *unforeseeable*)
- “*Genera non pereunt!*” => no Force Majeure for obligation to pay money
- Consequences:
 - Temporary impossibility: agreement suspended
 - Lasting impossibility: termination of agreement
 - Debtor: not liable
 - Creditor: released from obligations as well
- No general theory of Hardship (Imprevison)! (*to be changed under new Civil Code*)

Force Majeure Clauses in United States

- Does COVID-19 triggers Force Majeure rights under US law?
 - On 30th January, WHO declared COVID-19 a “Public Health Emergency of International Concern”
 - Its rapid spread and the resulting impact of the government actions have disrupted global business, commercial travel, supply chains, *etc.*
- Force Majeure clauses define circumstances beyond your control making performance under the contract too difficult or impossible
 - Typically, clauses provide a list of specific events
 - War, terrorist attacks, famine, earthquakes, floods, strikes, fire, epidemics, and government actions
 - Catch-all language broadly excusing performance based on significant events beyond the parties’ control
- To trigger a Force Majeure clause, a party may suspend, defer, or be released without liability
- Notice may be required to suspend or terminate performance
 - Failure to timely send notice may result in waiver or other adverse consequences
 - For sale of goods, the Uniform Commercial Code requires that the party in receipt of a force majeure notice respond within thirty days, or the contract will lapse with respect to deliveries
(See, e.g., N.Y. U.C.C. § 2.616; Cal. Com. Code § 2616; Tex. Bus. & Com. Code § 2.616; Fla. Stat. § 672.616)

State by State Force Majeure Law

- Litigating Force Majeure Clause in United States
 - If a party disagrees that COVID-19 constitutes a Force Majeure event, a court will decide the parties' rights and obligations
 - Force Majeure is an issue of contract interpretation, which is governed by state law
 - States vary in treatment of such clauses, but majority construe them according to their plain language
- New York interprets the clauses narrowly, focusing on the specific language of the clause
 - Clauses listing examples without a “catch-all” provision are limited to specifically listed examples
 - Even with a “catch-all” provision, NY may limit to events similar to the specifically listed events
 - You are required to (1) show the existence of the event and that you (2) were unable to fulfil your contractual obligation despite reasonable efforts
 - Not enough to claim you were unable to performance, you must show:
 - Event was (1) unforeseeable and (2) the direct cause of your inability to perform
 - A party seeking to invoke Force Majeure usually must also show that (1) there is no alternative means for performing under the contract
 - Increased costs or other difficulties is insufficient under NY law because Force Majeure clauses are not intended to buffer a party against normal risks of contracting

State by State Force Majeure Law

- California courts require a party to show it made “sufficient” or “reasonable” efforts to avoid the consequences, e.g., providing cover or 2nd source
 - Does not excuse a drilling company from its obligations for a tool supplier strike because it could buy tools from another supplier at an increased cost/expense even though strike was a listed event
- Texas will not excuse performance for events giving rise to increased economic burden; and typically evaluate the clause as expressly defined
 - Does not excuse performance when an event is foreseeable (even if not listed in clause)
 - No need to show “reasonable diligence” to avoid the disruption unless expressly required by the clause
 - Strictly construe the clauses, so exact language dictates what a party needs to or not to prove to escape liability for non-performance
- Florida, you must show “event” was unforeseeable, and it occurred outside your control
 - You must show that the event could not have been prevented, and was not caused by your fault or negligence
- Illinois, there is an implied duty to make an effort to resolve the event causing the delay or inability to perform before invoking a Force Majeure clause
 - This duty “of good faith” is read into all expressed contracts unless expressly waived

CONCLUSION

- Whether COVID-19 is a Force Majeure event under US law will largely depend on the:
 - Exact language of the Force Majeure clause and applicable state law
 - Nature and scope of the effect on your ability to perform under the contract,
 - Steps you took to avoid negative consequences (some states' laws)
- If a Force Majeure clause does not list epidemic or pandemic, consider triggering it for
 - Acts of governmental authority instituting lockdowns to prevent spreading
- Businesses seeking to invoke a Force Majeure clause will likely have strong argument that COVID-19 outbreak is an unforeseen event, unless:
 - You entered into the contract after the outbreak
- A force majeure declaration in one commercial contract requires an assessment of your legal obligations in all other agreements
 - Some agreements include representations or covenants to provide notice of material events outside of the ordinary course of business
 - Such events may also constitute an event of default in other agreements
- Finally, give careful consideration before triggering a Force Majeure event and weigh it against your long-term business relationship

Force Majeure in the Netherlands

- **Force Majeure (art. 6:75 Dutch Civil Code)**

- Requires that the debtor is not at fault
- *“A non-performance cannot be attributed to the debtor if he is not to blame for it nor accountable for it by virtue of law, a juridical act [contract] or generally accepted principles (common opinion).”*

- **Performance itself must be impeded**

- i.e. governmental measures to shut down businesses, if they make it impossible to perform under the contract.
- In principle, not: financial incapacity, illness of personnel.

- **Consequences**

- (temporary) relief of performance and no obligation to pay damage compensation
- subject to contractual agreements

Force Majeure in the Netherlands: alternatives

- **Principles of reasonableness and fairness (*redelijkheid en billijkheid*) (art. 6:248 DCC)**
 - All agreements are governed by these principles > The principles play a pivotal role in Dutch law.!
- **Unforeseen circumstances (art. 6:258 DCC)**
 - Request to modify or dissolve a contract
 - *“on the basis of unforeseen circumstances of such a nature that the other party, according to standards of reasonableness and fairness cannot expect the contract to be maintained unmodified”.*
- **Consequences:** depend on the circumstances, but can be:
 - duty to renegotiate
 - (partial) dissolution of the contract
 - modification of the contract; or
 - restriction to invoke specific clauses

Force Majeure in Luxembourg

- **What constitutes force majeure?**

- The situation where an external (i.e. outside the party's control), unforeseeable (at the time of contracting) and unavoidable event renders the performance of the obligation absolutely impossible.
- Parties may contractually agree on what constitutes force majeure.

- **Alternative options?**

- (i) The doctrine of unforeseen circumstances is not generally accepted if not included in the contract.
- (ii) Good faith and fair dealing (1134 Luxembourg Civil Code (**LCC**))

- **Consequences of force majeure**

- Temporary or permanent relief of liability for non-performance (1148 LCC).
- With the exception of reciprocal contracts entailing a transfer of ownership, a permanent force majeure will lead to the termination of the contract.

General Discussion - 1

- The definition of Force Majeure, or Act of God, will vary from one country's legal system to another.
- It is therefore important to check:
 - ✓ The legal system applicable to your contract
 - ✓ The existence of a force majeure clause, or a clause of similar effect.
- Many legal systems provide some kind of default definition of Force Majeure, if the contract is silent.
- Some legal systems (English law) will not provide any help, without a force majeure clause written in the contract.

General Discussion - 2

- Force Majeure and Licence Agreements
 - “Covid-19 badly impacts my production and/or my sales of licensed products. Do I still need to pay minimum royalties?”
- Force Majeure and Collaboration Agreements
 - “My laboratory was shutdown by government order (confinement); this has a knock-on effect causing extra costs for my consortium partners. Will my company be liable for these costs?”

CONCLUSIONS

- Force Majeure is not a standard, invariable legal concept.
- Include a Force Majeure clause in each contract
- Check the content of that clause
- Understand the relation between the Force Majeure clause and the law applicable to your contract
- Carefully follow the indications on how to claim for Force Majeure