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新冠疫情下，贵公司可适用不可抗力条款吗？

To what extent can your company invoke force majeure as a result of the Corona virus?



冠状病毒（COVID-19）在最近几周迅速传播，感染发生在世界各地。世界卫生组织已经宣布了一场全球性卫生危机，人们担心局势将升级为大流行病。全面的预防感染措施已在全球范围内实施，一些公司在履行合同义务方面面临挑战。因此引发新冠疫情的影响是否可以视为不可抗力的讨论。

The Coronavirus (COVID-19) has spread rapidly in recent weeks, with infections occurring across the world. The World Health Organization has declared a global health crisis and there are fears that the situation will escalate into a pandemic. Comprehensive infection prevention measures have been implemented globally, and some companies are experiencing challenges in fulfilling contractual obligations. This has raised questions about whether the effects of the virus outbreak can be considered as force majeure.

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—— 修德 ——

不可抗力的概念

不可抗力是限制或排除因特殊情况而未能履行合同义务的一方提出违约要求的权利的法律依据。通常，商业合同将包含其自身的不可抗力条款，以规范什么情况构成不可抗力及其产生的影响。即使合同中没有特殊规定，通常也可以根据合同外部的法律规则援引不可抗力。这取决于哪个国家/地区的法律管辖合同。

新冠疫情是否构成不可抗力事件？

构成不可抗力事件的原因在不同合同之间会有所不同，具体取决于术语的定义。因此，必须根据不可抗力的合同定义，考虑是否可以将新冠疫情定义为不可抗力。例如，流行病和/或大流行病在定义中明确被提及作为该概念涵盖的情况之一的例子并不少见。我们认为，新冠疫情这样的严重的流行病将通常被视为不可抗力事件。

新冠疫情适用不可抗力条款的构成要件

关键是，是否应将新冠疫情爆发的后果作为不可抗力的基础，而该基础是否能成为合同履行免责的基础。常见后果包括，例如，员工被感染或隔离，实施旅行禁令，进口禁令或其他影响合同履行的可能性的公法禁令/法院禁令。如果需要以这些障碍作为免于赔偿责任的不可抗力基础，通常要求 (i) 当事人在订立合同时无法合理预见到相关的障碍，并且 (ii) 当事人不能合理预期会避免或克服障碍的后果。

当事人无法合理预见到相关障碍的条件，几乎不会引起在疫情爆发之前就签订的合同争议。对于疫情爆发并广为人知后签订的合同，则有所不同。在这种情况下，缔约方应该能够预见新冠疫情会使其难以履行合同义务。对于此类合同，很可能无法援引不可抗力。因此，对于在疫情仍未得到控制的情况下签订的新合同，应就因新冠疫情造成的合同履行障碍作出明确保留。

更难以评估的是能否合理避免或克服障碍。通常，并不要求物理上不可能绕开障碍。合同一方须采取何种措施避免或克服新冠疫情的影响

THE CONCEPT OF FORCE MAJEURE

Force majeure is a legal basis that restricts or excludes the right to make default claims against a party that fails to fulfil its contractual obligations due to exceptional circumstances. Normally, commercial contracts will contain their own force majeure clauses that regulate what situations constitute force majeure and what effects this will have. Even without a specific regulation in the contract, it will often be possible to invoke force majeure based on legal rules outside the contract. This will depend on which country's laws govern the contract.

DOES THE CORONAVIRUS CONSTITUTE A FORCE MAJEURE INCIDENT?

What constitutes a force majeure incidence will vary between different contracts, depending on how the term is defined. Therefore, the assessment of whether force majeure can be invoked as a result of the Coronavirus will always have to be considered based on the contract definition of force majeure. For example, it is not uncommon for epidemics and/or pandemics to be explicitly mentioned in definitions as examples of situations covered by the term. Our view is that such a widespread case of disease as the Coronavirus would generally have to be accepted as a force majeure incidence.

CONDITIONS FOR THE CORONAVIRUS TO BE INVOKED AS FORCE MAJEURE

The key question is whether the consequences of the virus outbreak should be accepted as a force majeure basis for freedom from liability with respect to fulfilment of contractual obligations. Current consequences include, for example, employees being infected or quarantined, and the imposition of travel bans, import bans or other public law prohibitions / injunctions that affect the possibilities of contract fulfilment. In order for such obstacles to be accepted as a force majeure basis for freedom from liability, it is normally required (i) that the party should not have foreseen the relevant obstacle at the conclusion of the contract, and (ii) that the party cannot reasonably be expected to avoid or overcome the consequences of the obstacle.

The condition that the party should not have foreseen the obstacle in question, raises few issues with contracts that were entered into before the virus outbreak became known. For contracts entered into after the outbreak became widely known, this will be different. In this situation, a contracting party should be able to anticipate that the Coronavirus can make it difficult to fulfil contractual obligations. For such contracts, one would most likely be unable to invoke force majeure. Consequently, for new contracts entered into while the outbreak is still not under control, explicit reservations should be made relating to impediments to performance as a result of the Coronavirus.

A more difficult assessment is whether the obstacle can be reasonably avoided or overcome. Normally it is not required that it is physically impossible to get around the obstacle. How far a party must go to avoid or overcome the effects of

响， 须根据具体情况酌情评估。 在这种评估中， 合同一方所需采取的措施需要与履行合同对客户所造成的损失进行权衡。

合同一方必须努力寻找解决方案， 尽力履行合同义务， 通常是通过以比其他方式更高的价格购买设备/材料， 或者寻找可以执行承包商工作的分包商。 此类措施将导致合同一方无利可图的事实本身， 并不足以成为适用不可抗力的充分理由。

新冠疫情可能会导致某些情况下需要在经济后果与潜在的个人和公共健康危机间做出权衡。 例如， 合同一方可能需要在疫情高发区开展工作， 即必须将感染的风险与推迟工作或在其他地点进行工作的经济后果进行权衡。 按照不可抗力的一般定义， 如果这意味着工作人员必须违反入境禁令， 当局的旅行建议或检疫命令， 则不可能要求合同一方继续履行合同。 在需要隔离的情况下， 则要求很大一部分劳动力必须被隔离， 才符合不可抗力的条件， 因为如果仅个别员工被隔离则与员工普通病假没有明显差别。

新冠疫情构成不可抗力事由的影响

当新冠疫情构成无法履行合同的不可抗力事由， 其对合同双方的影响会有所不同。 必须始终根据合同对不可抗力影响的规定， 或针对所涉及合同类型的不可抗力的相关法律来考虑这一点。 不可抗力最常见的影响总结如下：

告知：通常， 受不可抗力影响的一方应告知另一方， 由于不可抗力情况， 一方无法履行合同义务。 请注意， 发出此类告知的时间通常很短。 在规定的时间内未告知可能会导致该公司失去不可抗力的权利和/或对另一方因未及时告知而造成的任何损失承担责任。

有限的默认补救措施：如果因不可抗力而无法交付产品， 通常会造成客户无法要求延迟赔偿， 包括违约赔偿金。 反过来， 客户可能有权因对方无法交付而扣留付款。 在根据约定的工作时间表履行的合同中， 供应商通常也有权调整工作时间表。 请注意， 这种调整通常会有时间限制。 因此， 如果超过了这些时间限制， 则

the Coronavirus will then have to be decided on the basis of a discretionary and concrete assessment of what measures are proportionate. In such assessment, the requirement for efforts on the part of the contractor will have to be balanced against the consequences that a non-fulfilment of the contractual obligation in question will have for the customer.

Efforts must be made to find solutions that make it possible to fulfil the contractual obligation, typically by purchasing equipment/material at a higher price than one otherwise would, or finding subcontractors who can execute the work the contractor is prevented from performing itself. The fact that the contract will be unprofitable in the implementation of such measures is not in itself a sufficient reason for accepting the obstacle as force majeure.

Some situations may arise due to the Coronavirus where financial consequences must be balanced against potential health consequences, both at individual and public health levels. For example, a contractor may be required to perform work in areas where widespread Corona infection has been located. Here, the risk of infection will have to be balanced against the financial consequences of postponing the work or performing the work in an alternative location. With an ordinary definition of force majeure, it will hardly be required that the contractor's personnel carry out the work if this means that the staff must defy entry bans, authorities' travel advice or quarantine orders. In quarantine cases, a large proportion of the workforce will probably have to be placed in quarantine, as individual quarantine cases do not differ significantly from ordinary cases of sick leave amongst employees.

EFFECTS OF IMPEDING THE CORONAVIRUS CONSTITUTE FORCE MAJEURE

Where it is found that the impediments to performance constitute force majeure as a result of the Coronavirus, the effects between the parties will vary. This must always be considered on the basis of the contract's regulation of the effects of force majeure, or any background law regulation of force majeure for the type of contract in question. The most common effects of force majeure are summarised below:

Notification: Normally, the party affected by force majeure is required to notify the contractor that one has been prevented from fulfilling contract obligations as a result of a force majeure situation. Note that there are often short time limits for giving such notice. Failure to notify within the time limit may result in the company losing the right to invoke force majeure and/or becoming liable for any loss incurred by the contractor as a result of failure to give notice in time.

Limited default remedies: Where delivery is prevented by the force majeure situation, the customer will usually be prevented from claiming compensation for delays, including liquidated damages. The customer may in turn have the right to withhold payment with reference to the failure to deliver. In contracts relating to work to be performed in accordance with an agreed work schedule, the supplier will usually also

可能失去调整工作计划的权利。此外，一旦供应商在执行中受阻，调试和保修等保证工作有可能被免于执行，

合同终止：一般来说当因不可抗力事由造成的延迟构成重大违约时，另一方通常有权终止合同。在这种情况下构成重大违约的行为必须基于对特定合同及其周围情况的评估。例如，如上，如果适用不可抗力，合同允许调整工作时间表，则延迟并不构成重大违约。但是，合同的不可抗力条款通常会包含一个特殊的规定，即不可抗力情况必须在合同终止之前持续多长时间。

费用：除非合同另有规定，否则当事双方将必须承担因不可抗力造成的费用。

客户要求交付的权利：即使存在不可抗力障碍，客户也有权要求在约定的交付日期交付未完成的合同项目。如i. a. NTK 15挪威石油工业中广泛使用的制造合同。在这种情况下，NTK 15规定必须建立交货协议并颁发完工证明。此外，客户必须发出变更单（VO），以反映未完成交付的合同项目。这是为了减少由于未按照原始约定的规格交付合同项目而导致的任何缺陷索赔。

新冠疫情引发的障碍并不构成不可抗力

如果经过特定评估后得出结论，新冠疫情爆发的后果不符合不可抗力事由的要求，则合同当事方将有义务根据合同进行交付，除非合同中有其他特殊规定，给予合同当事方中止或取消交付的权利。

be entitled to adjust the work schedule. Note that there may be time limits for setting forth such requirements for adjusting the work schedule. Consequently, the right to adjust the work schedule may be lost if such time limits exceeded. Furthermore, correction or performance of other warranty work may normally not be required as long as the contractor is prevented from performing such work.

Termination: As a starting point, a party will normally have the right to terminate the contract where the delay due to the force majeure situation constitutes a material breach of the contract. What constitutes material breach in this situation must be based on an assessment of the specific contract and the circumstances surrounding it. For example, if, as mentioned above, the contract allows for adjustment of the work schedule in the event of force majeure, one will probably not be able to claim that the delay constitutes a material breach of the contract. However, the contract's force majeure clause will often contain a special regulation specifying how long the force majeure situation must persist before the contract can be terminated.

Costs: Unless the contract specifies otherwise, the parties will have to cover costs incurred in connection with a force majeure situation.

Right for the customer to demand delivery: Even if a force majeure obstacle exists, the customer may have the right to demand delivery of the unfinished contract item on the agreed delivery date. This follows from i.a. the widely used manufacturing contract within the Norwegian oil industry, NTK 15. In such situation, NTK 15 stipulates that a delivery protocol must be established and a certificate of completion issued. Furthermore, the customer must issue a variation order (VO) that reflects that the contract item is delivered unfinished. This is to cut off any claims for defects as a result of the contract item not being delivered in accordance with the originally agreed specifications.

OBSTACLES CAUSED BY THE CORONAVIRUS DO NOT CONSTITUTE FORCE MAJEURE

If, after a specific assessment, it is concluded that the consequences of the outbreak of the Coronavirus do not meet the requirements for a force majeure situation, the parties will be obliged to deliver under the contract, unless the contract in question contains other provisions giving the right to suspend or cancel delivery.

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