

FORCE MAJEURE MEMO

1. INTRODUCTION

Norwegian law recognizes force majeure both as a statutory provision and as a contract term concerning relief from contractual obligations.

Force majeure is traditionally defined as an occurrence that prevents the fulfilling of a contractual obligation. The occurrence must be beyond the control of the affected party. A further provision is that the party could not reasonably have foreseen the occurrence when entering into the contract and could not reasonably have avoided or overcome it and its consequences. Traditional examples of force majeure events are war, insurrection, blockades, earthquakes, fires, strikes and lock-outs.

When force majeure occurs, the main effect is that the party's obligations under the contract are suspended as long as the force majeure lasts.

2. WHAT IS A FORCE MAJEURE EVENT?

Concerning statutory force majeure the conditions that must be fulfilled are defined in statutory law, i.e. the Norwegian Sale of Goods Act of 1988 which follows the provisions of CISG closely.

The Act, especially in the sections 27, 40 and 57, introduces the concept of "control liability". This is in effect a strict liability for a party's fulfillment of those contractual obligation that lie within the "control" of the party. Force majeure occurs when the fulfillment of a contractual obligation is considered lying outside the control of the party.

3. WHEN DOES A FORCE MAJEURE EVENT OCCUR ?

It is important to note that force majeure under Norwegian law may be a statutory term and a contract term.

The statutory term is defined in the Sale of Goods Act of 1988 mentioned above. As pointed out in 2 above, the Act has based its force majeure concept on whether a certain event that prevents the fulfilling of an obligation lies outside the control of the party.

The following conditions must be fulfilled for a statutory force majeure to occur:

Firstly the fulfillment of the obligation must have been prevented or made fundamentally more difficult to fulfil by an impediment or occurrence of a certain

seriousness or dimension. Typical examples are war, blockades, strikes etc.

Secondly the occurrence must not have been foreseeable at the time of entering into the contract.

Thirdly the party cannot reasonably have been expected to have avoided or overcome the consequences of the event. Both precautions taken to avoid such event and efforts made after its occurrence can be taken into account.

Finally, and the overriding condition, is that the event is outside the control of the party.

The statutory force majeure was a more rigid concept before the Sale of Goods Act of 1988. It has now become more like the main trend in contractual force majeure terms.

The concept of force majeure being an event “beyond the “control” of the party is used in many of the most frequently used standard contracts in Norway. Examples are Norwegian Fabrication Contract NF 15 art. 28 cfr. art. 1.8, Norwegian Total Contract NTK 25 art. 28 cfr. art. 1.8, Nordic Conditions for Delivery of Machines and other Equipment NL 17 art. 45-47 and ORGALIME S 2012 art. 41-43. There are few differences between these contractual terms and the statutory term described above.

4. STRIKES AS FORCE MAJEURE

Strikes are not uncomplicated as statutory force majeure events. If a strike is purely local, it is in a strictly logical sense not beyond the employer's control as he can always accept the strikers' demands. This kind of reasoning does not, however, reach very far under Norwegian law.

It has usually been accepted that a national strike or a strike affecting a whole branch of industry is beyond the control of an affected employer and therefore considered as force majeure. The same applies to so called "point strikes" where only a few of the employees are striking, but those few are key personnel for the employer. Even local strikes may be considered as force majeure events when being part of the ordinary wage negotiations. If, however, the local strike is going on because the employer does not fulfil his legal obligations towards his employees, it is not considered to be beyond his control.

When considering a local strike as a possible force majeure event, it is important whether and to what extent a strike was possible at the time of entering into the contract. It is also considered important whether he could have avoided the strike by reasonable means.

The contractual force majeure must be based, as always, on the interpretation of the specific contract. Many standard contract clauses specifically mention strikes as force majeure events. Usually this is interpreted to encompass national as well as branch and local strikes. It is, nevertheless, necessary to control that the strike in question complies with all the conditions set forth in the specific contract.

5. EFFECTS OF FORCE MAJEURE

As already mentioned above, a valid force majeure will release a party from its obligations under the contract until the force majeure situation ceases. The party will therefore not be liable to pay compensation, as f ex liquidated damages, for the nonfulfilment of his contractual obligations. On the other side he will in general not be entitled to claim compensation from the other party for the losses caused by the force majeure event. In other words, the party must bear its own costs resulting from the force majeure event.

The party that encounters force majeure must notify the other party within reasonable time. It is often required that such notice also be given at the end of the force majeure situation. Some contracts may specify a more specific time-period for notifying the other party, and one should hence always examine the contract immediately if a force majeure event occurs. If he does not notify the other party about the occurrence of force majeure, he may become liable to compensate the other party for costs incurred thereby. He may also, in more serious circumstances, lose his right to invoke force majeure.

In many contracts, but not generally, it is set forth that each party shall cover its own costs and expenses incurred as a result of the force majeure. In certain standard contracts the buyer prevented by force majeure is obliged to compensate the supplier for expenses incurred in safeguarding and protecting the goods.

Many force majeure provisions entitle the parties to terminate the contract when a force majeure situation has lasted for a specified period of time. The usual range for such a period is from 3 months to 6 months.

Oslo, August 5, 2020

Christopher L. Sveen
Attorney/partner (H)