

30 March 2020

COVID-19 – The Force Majeure event affecting businesses within the retail motor industry

Please find a legal view by our **RMI Attorneys, Barnard Incorporated**.

The Virus is significantly affecting businesses in the retail motor industry – no less than in other business sectors.

It is essential to react appropriately to performance constraints and restrictions.

1. Performance, delivery and COVID-19

As a result of COVID-19, there have been announcements from various Governments to, amongst other things, suspend and control travel and exchange of goods between countries.

Consequently, a significant number of businesses have been adversely affected globally and in South Africa, businesses are now realising the impact of poor delivery or underperformance in terms of commercial agreements beyond their control – by the other contracting parties and in many instances, themselves.

2. Force Majeure Clause

Most agreements in commercial relationships provide, as a legal mechanism, for events such as these and which ordinarily are arranged in provisions called the “Force Majeure clause”.

Force Majeure provides for an event that is beyond the reasonable control of one or more parties and it may be particularly drafted in different details, depending on the applicable agreement.

A contracting party is required to ensure that the correct procedures are followed during events that are beyond its control. Specifically, certain communications and notices may be prescribed in such Force Majeure clause in order for a party to rely on those events to escape liability due to its non-performance.

The outbreak of COVID-19 may not ordinarily qualify as an automatic force majeure event. Careful consideration should be given to evaluate whether it does prohibit or restrict performance. Notionally, the COVID-19 will be the cause of such event.

Each agreement and its provisions relating to Force Majeure must be carefully evaluated against the prevailing circumstances before simply relying on the provisions of this clause. Particularly, in the franchise regime, a franchisee should cautiously consider whether to rely on the provisions of the force majeure clause, having regard to the manner in which it is drafted – it may give rise to the unintended termination of the franchise agreement.

3. Can you enforce delivery or performance?

Once a claim is made that delivery or performance is not possible or will be disrupted due to an alleged force majeure event, the merits must be assessed. Non-performing parties – which would otherwise simply have been in breach should the alleged force majeure event not have been present – cannot simply escape their liabilities.

On the other hand, performance cannot be contractually enforced by another contracting party in circumstances where the alleged force majeure event factually prevents or restricts same. In those circumstances, however, a party not able to perform, cannot sit idly by and take no measures to mitigate the force majeure event or circumstances.

4. Which steps do you need to take?

- a. Evaluate the circumstances against the contractual rights and obligations.
- b. Ensure that the prescribing contractual procedure is followed.
- c. If in doubt, obtain legal advice.

5. Do you require assistance?

Members are reminded that, from the moment that a party invokes the provisions of a force majeure clause, the clock is ticking and the measures that are consequently required are to be followed diligently and without delay. In this regard, you are advised to contact your attorney, or, if you require legal assistance, you may contact the RMI's attorneys, Barnard Incorporated (Centurion):

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