



Highlighting the issues

Coronavirus – commercial law update – Estonia



Is force majeure a recognised concept in Estonia and how is it defined?

Estonian law recognises the concept of force majeure. The obligor may excuse its non-performance of contract if the non-performance is caused by force majeure. Even though the concept is based on similar definitions given in PECL, CISG and DCFR, there is a significant difference to PECL and DCFR. In Estonian law force majeure does not extinguish or terminate the agreement, it can only be a (temporary) excuse for non-performance. If the effect of force majeure is temporary, non-performance is excused only for the period during which force majeure impeded performance of the obligation.

The definition of force majeure is given in Estonian Law of Obligations Act (LOA) § 103 (2):

"Force majeure are circumstances which are beyond the control of the obligor and which, at the time the contract was entered into or the noncontractual obligation arose, the obligor could not reasonably have been expected to take into account, avoid or overcome the impediment or the consequences thereof which the obligor could not reasonably have been expected to overcome."

Keep in touch





Is force majeure only available if it is specified in a contract in Estonia?

No, force majeure doctrine applies to all contracts, but they can specify the force majeure clause in the contract. The parties may also agree that a person shall be liable for non-performance regardless of whether the non-performance is excusable or not. The parties may also agree that a party is only liable if it is culpable for non-performance. Nonetheless, if force majeure has not been mentioned in the contract, it shall apply in the scope stated in LOA.

However, there is an exception regarding performance of an obligation to pay money. The Supreme Court of Estonia has stated that in general a party cannot rely on force majeure and excuse non-performance of an obligation to pay money. This standpoint is being questioned by many scholars. We can also provide examples from the practice where in our opinion the non-payment can be excused by force majeure.

What are the key requirements to claim force majeure in Estonia?

Firstly, it is presumed that non-performance is not excused. This means that if an obligor wants to rely on force majeure, it shall notify the obligee about force majeure and the obligor shall be able to prove circumstances of force majeure in court, if there should be a dispute.

The requirements that must be satisfied before a force majeure clause may be relied upon could depend on the wording and interpretation of the specific clause in the contract. Given the definition in LOA the elements of force majeure are following:

1) impediment - the first precondition of force majeure is that there is a circumstance that obstructs the performance of obligation

2) circumstance is beyond the control of the obligor

- only impediments that could not have been influenced or affected by the obligor can be considered force majeure. The cause of the impediment must be objective, which means that the impediment may not be caused by the obligor itself. The obligor can influence the risks related to its business, for example the actions of its business partners, suppliers and workers, and the risks related to the condition of its tools and materials. Natural disasters are usually considered to be beyond the control of the obligor. Also restrictions imposed by the state are considered to be force majeure, if they are general restrictions not aimed at the obligor specifically (for example fines cannot be considered to be force majeure)

3) circumstance could not be foreseeable - not every circumstance that could not have been influenced by obligor can be considered force majeure. Only circumstances the obligor could not reasonably have been expected to consider can constitute as force majeure. It is important that the circumstance was unexpected at the time of entering into contract. Therefore, if the parties know that at the time the contract should be performed, there are usually floods, the obligor cannot rely on force majeure as the circumstances related to flooding cannot be deemed to be unexpected

4) circumstance could not be voided or overcome - the impediment must be such that it cannot be reasonably expected that the obligor could void or overcome it. This aspect must be evaluated from the point of a similar reasonable person who is acting in good faith

If all elements listed above are present, the obligor can rely upon force majeure and should immediately notify the obligee about the impediment. In case of a dispute the obligor shall be able to prove all elements in court.



What is the effect of a force majeure certificate issued by a government body in Estonia?

The concept of force majeure applies only if force majeure is the reason why the specific non-performance occurred. There is no certificate that could release a person from performing its contracts.

What remedies are available if a party is able to rely upon force majeure in Estonia?

An obligor may excuse non-performance for the period during which force majeure impeded performance of the obligation. When force majeure occurs, an obligor cannot be ordered to perform the obligations, to compensate damages or to pay contractual penalty for breach of contract.

However, an obligee has the right to withhold performance, withdraw from the contract, cancel the contract or reduce the price regardless of whether the obligor can rely upon force majeure.

What are the risks of claiming force majeure incorrectly in Estonia?

An obligor risks that it might be considered liable for breaching the contract. In that case an obligor shall compensate all damages that have occurred and shall pay contractual penalty, if there is a contractual penalty prescribed in the contract.

Are there alternatives to force majeure such as frustration of contract or “change in circumstances”?

In Estonian Law there is the concept of alternation of balance of contractual obligations. It is similar to the German principle “Wegfall der Geschäftsgrundlage”. LOA § 97 (1) defines it as following.

“If the circumstances under which a contract is entered into change after the entry into the contract and this results in a material change in the balance of the obligations of the parties due to which the costs of one party for the performance of an obligation increase significantly or the value of that which is to be received from the other party under the contract decreases significantly, the injured party may demand amendment of the contract from the other party in order to restore the original balance of the obligations.”

Therefore, this concept is deemed to be different from the concept of force majeure. In case of force majeure the non-performance of contract can be (temporarily) excused. The concept of alternation of balance of contractual obligations is more aimed at long-term contracts where the balance of obligations has changed. If the requirements for alternation of balance of obligations are met, one party may ask the other party to amend the contract so that the balance is restored. If it is not possible or is not reasonable, a party may withdraw from the contract or, in the case of long-term contract, cancel the contract.



How can you find out if courts or tribunals have been closed or suspended?

The Council for the Administration of Courts has announced that declaration of an emergency situation will affect the proceedings, but the courts shall not be closed. When possible, the proceedings will be held in writing or by means of technical solutions. It is possible, that the hearings will be postponed and there might be delays if a party demands a hearing or the nature of the case. Furthermore, the Council for the Administration of Courts has released recommendations for organising the administration of justice during emergency situation.

We anticipate that updates and latest announcements in respect of the operational running of the courts will be communicated via digital channels, including the homepage of Estonian Courts and the homepage of Supreme Court.

As Estonia has implemented many technical solutions, there are no issues regarding filing documents to the court. For years, all procedural documents have been served on professional counsels electronically through the designated information system (E-toimik). The documents can be filed to court using the designated information system or via e-mail.

In practice, however, the courts have already postponed some hearings due to the current situation and this has been done by the court's own initiative.

Are arbitration proceedings being suspended in Estonia?

We are not aware of any suspended arbitration proceedings. The council of the main arbitration court in Estonia - The Court of Arbitration of the Estonian Chamber of Commerce and Industry – has notified the arbiters that due to the emergency situation there cannot be any hearings until to the end of the emergency situation. The council has recommended to carry out the arbitration proceedings without hearings by using the possibility of written proceeding if the parties accept it or by having hearings through internet by using relevant means if the parties accept it.

Contact a commercial lawyer in Estonia today

For more information about force majeure or any of the other topics mentioned in this briefing please contact:



Raiko Lipstok

Partner, Estonia

T: +372 622 9990

M: +372 513 2277

raiko.lipstok@eversheds-sutherland.ee

Keep in touch



[eversheds-sutherland.com](https://www.eversheds-sutherland.com)

© Eversheds Sutherland 2020. All rights reserved.
Eversheds Sutherland (International) LLP and Eversheds Sutherland (US) LLP are part of a global legal practice, operating through various separate and distinct legal entities, under Eversheds Sutherland. For a full description of the structure and a list of offices, please visit www.eversheds-sutherland.com
DTUK003192_03/20