



Q&A on COVID-19-related force majeure claims

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Introduction

We asked a group of our dispute resolution lawyers about the questions most frequently asked by their clients in relation to force majeure claims. As COVID-19 has and will continue to affect every industry, decision makers should have an understanding of how the concept operates and whether it can offer relief in these challenging times.

What is force majeure?

The purpose of a force majeure clause is to relieve a party from performing its contractual obligations when an unexpected, external event has occurred which prevents it from performing.

English law does not have a principle of force majeure. As a result, the circumstances in which force majeure will apply will depend on (i) the contract including a force majeure clause and (ii) the precise wording of that clause.

Generally the following will need to apply:

- A force majeure event has arisen.
- The party has been prevented (or delayed or hindered depending on the contract wording) from performing as a result of that event.
- The event was beyond the control of the party.
- There were no reasonable steps a party would take to avoid the event or mitigate its effects.

What steps do I have to take to rely on force majeure?

Check governing law

Check the governing law of the contract as the rules of force majeure vary between jurisdictions.

Check the definition of force majeure event

Generally a force majeure event is a supervening event which is outside of the control of the affected party. There are various approaches to defining what constitutes a force majeure event:

- Some contracts will use general wording such as *"a supervening event, which is outside of the control of the affected party"*.
- Others will set out an exhaustive list of specific events, which may include strikes, storms, floods, etc.
- A common hybrid is to include an illustrative list of events preceded or followed by general, sweeper wording such as *"and any other event beyond the affected party's control"*.
- Finally the contract may simply refer to a "force majeure event". As there is no general principle of force majeure in English law, what constitutes a force majeure event will be a matter of contractual interpretation.

In the COVID-19 context, terms such as "disease", "epidemic" and "pandemic" which are often listed as force majeure events are a natural starting point when it comes to seeking relief. Other less obvious, but equally common, terms such as "natural disaster" and "Act of God" may also cover COVID-19 impacts. However, it is often the steps which have been taken by governments and other authorities in response to COVID-19 which actually prevent or hinder contractual performance rather than the virus itself. In those circumstances, if the clause includes wording such as "government acts" or similar this may be a better ground to rely on.

Whilst it will always depend on the specific drafting, it is generally accepted that the ejusdem generis rule does not apply to the interpretation of force majeure clauses. This means that where there is an illustrative list of events, followed by more general, sweeper wording, the wider wording will not generally be interpreted as only catching events similar to those specifically listed.

An economic downturn, change in market price or increase in the cost of performance will not typically amount to a force majeure, even if that change is very substantial. This means that a party faced with performing a contract which has become economically unfavourable as a result of COVID-19 is unlikely to be entitled to force majeure relief.

Finally, check whether the contract wording excludes foreseeable events from the definition of force majeure. If it does and the force majeure event, e.g. COVID-19, was foreseeable when the contract was entered into, you may not be entitled to contractual relief.

Establish causation

Establishing causation is essential to obtaining force majeure relief. You must be able to show that the force majeure event has prevented (or hindered or delayed, depending on the contract wording) you from performing your contractual obligations. It is not enough that the force majeure event has arisen.

Carefully check the contract test – does it state that performance must be prevented or does it extend to events which delay or hinder performance. *"Prevented"* or *"rendered unable"* require proof that performance has become physically or legally impossible, not only difficult or unprofitable. *"Hindered"* and *"delayed"* set a lower hurdle.

The force majeure event must be the only or substantial cause of the inability to perform under the contract. If there is more than one reason for non-performance and that other reason is not a force majeure event, relief may not be available. For example, a party who claims force majeure as a result of the COVID-19 pandemic but who would not have performed the contract anyway because of the substantial drop in the oil price, is unlikely to be able to claim force majeure.

In COVID-19 scenarios, causation can be difficult to establish, as governmental measures change and new emergency legislation is implemented.

Check notice provisions

Failing to comply with notice provisions may mean force majeure relief is not available. Most clauses contain an express obligation to notify and some require continued provision of information for the duration of the force majeure event.

Key points to check in any notice provision are:

- Timing restrictions, e.g. must be served within two days of the force majeure event occurring
- Any supporting information to be provided to the counterparty
- The method of service of the notice
- Any ongoing notification obligations

What are the consequences of calling force majeure?

The consequences of claiming force majeure will depend on the contract. Most often, we see suspension or termination of the contract, but you may also encounter compensation or negotiation provisions. Many force majeure clauses are layered – meaning that the type of relief available changes with time or at the option of the parties.

Suspension

The most common consequence is suspension of rights and obligations for the duration of the force majeure event for either or both parties. In practice, this grants the affected party an extension of time for performance until the event impacting its ability to do so ceases.

The parties should check how soon after the force majeure event the affected party is required to resume performance. This recovery period can be critical. For example, where manufacturing plants have been closed down as a result of COVID-19 measures, it may take a considerable time to return to previous levels of production, even after official measures are relaxed. As a result, the affected party may not be able to immediately return to fulfilling its contracts and will continue to require relief beyond the official lockdown.

Termination

Depending on the contract, termination can either arise as an automatic consequence of claiming force majeure or it may give the parties discretion to terminate, normally after a specified period of time.

If you choose to exercise a right to terminate, you should comply with the termination requirements of the contract, including any notification provisions. Do not forget to check how payments or performance already made will be dealt with under the contract.

Compensation

In rarer cases, the contract will allow the affected party to claim financial compensation from the non-affected party for costs associated with the force majeure event.

In those circumstances, carefully check the costs that the affected party is entitled to, how these should be calculated and what (if any) mitigation obligations apply. If you are the claiming party, do not assume that these costs will be easy to recover in the current economic climate.

Negotiation

A final and arguably the most challenging alternative, particularly in circumstances changing as dynamically as the COVID-19 environment, is an obligation for the parties to negotiate amendments to the contract to address the impact of force majeure.

This is challenging for a number of reasons, the most salient one being whether an agreement to negotiate can be enforceable under English law. It will depend on the drafting and how precise the requirement to negotiate is. You should always check the parameters of the clause carefully in order to establish whether you are actually under an enforceable obligation to agree changes to the contract or simply one to try to negotiate.

Do I need to take steps to mitigate or avoid the force majeure event?

If there are steps that a claimant party could have taken to avoid or mitigate the effects of the force majeure event, for example by some alternative method of performance, it will generally be expected to have done so.

Contracts will often include express mitigation wording requiring a party to “*take reasonable steps*”, “*take all reasonable steps*” or “*use best endeavours*” to avoid the force majeure event or mitigate its effects. Whilst it will depend on the factual circumstances (including, for example, industry norms/practices) and wider drafting, generally “*all reasonable endeavours*” will require a party to do more than “*reasonable steps*” and in turn “*best endeavours*” will entail more than “*all reasonable steps*”.

You should also check whether the contract requires you to take any specific mitigation steps, for example, to take delivery at an alternative location or source alternative supplies.

Finally, it is important that you document all decisions and their rationale. Keeping relevant meeting minutes on file is a prudent and a highly recommended step. This is particularly important as the global response to COVID-19 and governmental guidance is changing frequently, which may mean that without a documented process, decisions taken one day may be seen as less reasonable in hindsight.

Can you call force majeure in anticipation of a force majeure event?

Calling force majeure in anticipation of a force majeure event occurring is a complex question of causation. It will always depend heavily on the particular circumstances of the case and the force majeure clause in question.

Generally, a party is more likely to be successful in its anticipatory force majeure claim if at the time a reasonable person would have taken the view that the event would lead to a sufficiently serious interference with the affected party's ability to perform for it to claim force majeure.

If there is another reason as well as the force majeure event that is preventing performance, can I still rely on the force majeure event?

As stated above, under English law a force majeure event must be the sole or substantial cause of the affected party's inability to perform under the contract.

In practice, if there are other factors preventing your performance, for example falling commodity prices or fall in demand, you are unlikely to be entitled to relief. Always ask yourself whether the basis of your claim is defensible. Document your decision making and provide comprehensive evidence to your counterparty with the force majeure notice. If you are simply looking to get out of what now looks like a bad deal, force majeure is unlikely to be available.

What happens if I wrongly call a force majeure event?

Triggering termination rights

Many contracts will have express termination rights. Failure to perform a material obligation under the contract without excuse may permit the innocent party to seek to terminate the contract. Likewise, at common law, failure to perform your contractual obligations which go to the root of the contract could allow the counterparty to terminate for repudiatory breach and sue for damages.

Late Performance

Even if the innocent party does not have a right to terminate the contract as a result of you incorrectly calling force majeure, there may be other consequences arising from your late performance such as damages for breach of contract or self-help remedies including liquidated damages, acceleration, forfeiture, etc.

What should I do if I receive a force majeure notice?

Check the notice requirements

Check compliance of the claimant party with contract notice requirements, e.g. was the notice served on time and to the correct addressee. If a notice is defective, and the notice requirements amount to conditions precedent, the claiming party may not be entitled to relief.

We have seen authorities in some jurisdictions issuing force majeure certificates to companies to use as "evidence" of force majeure. An English court or tribunal is unlikely to treat a certificate of this kind as definitive and would instead undertake the usual multi-stage inquiry to verify whether the force majeure contract test has been met.

Question causation

Question causation and consider whether there might be another reason why the counterparty is not performing under the contract. Recall that force majeure event must be the sole or substantial cause of its inability to perform.

Check mitigation requirements

Check if the party trying to claim force majeure has taken necessary mitigation steps and demand evidence of actions taken.

Consider the bigger picture

Understand the potential domino effect on your other contracts (i.e. having to claim force majeure yourself as a result of this claim) and consider the force majeure claim in the context of the commercial relationship with the counterparty. In some cases, companies will use a force majeure claim or a threat of termination to influence the commercial relationship or re-negotiate the contract.

What if there is no force majeure clause in my contract?

Even if there is no force majeure clause in the contract there may be other relief that you are entitled to as a result of the impact of COVID-19.

Change in law

Some contracts include change in law clauses which protect the parties if a change in law makes performance illegal, impossible or more onerous. With many governments and other authorities having enacted emergency legislation in response to COVID-19, relief may be available under a change in law provision.

Frustration

If there is no force majeure relief under the contract, the common law doctrine of frustration may apply. A contract may be frustrated where a supervening event makes performance impossible, illegal or something radically different to that agreed when the contract was entered into. The effect of frustration is that the contract comes to an end automatically (i.e. without any further steps taken by either party), which can be a very blunt outcome.

Price Reviews

Some contracts, for example, long-term sale and purchase agreements for commodities, may provide for price renegotiation at either fixed milestones during the life of the contract or where there has been a major change in the particular market, which makes the contract price "out of step" with the market.

Termination

Termination clauses may provide the parties with rights to terminate a contract under specific circumstances or at convenience.

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