

## COMMERCIAL LAW

# COMMENTARY: Coronavirus / Covid-19 on Force Majeure

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## Background

### Introduction

Coronavirus / Covid-19 has caused and continues to cause significant business disruption, from fulfilment of deliveries, disruption to supply of services, closure of shops and hospitality venues and cancellation of events. A question for many businesses is whether commercial parties can rely on **force majeure clauses** in their contracts to avoid the contractual duty and subsequent penalties for termination.

### Jurisdiction

The Coronavirus pandemic is a worldwide issue and not just affecting the UK. The position of foreign jurisdictions in their interpretation and implementation of force majeure events differs significantly. Here we will look at the implications from an English law perspective, though as a founding member of the **Alliance of Business Lawyers (ABL)** we are well placed to reach out to our colleagues across the globe to get the advice needed for other jurisdictions as needed.

For more information please speak to us or visit the ABL website at: <https://www.ablglobal.net/>

## What is force majeure

In English law a force majeure event is an unforeseeable circumstance that prevent someone from fulfilling a contract. Other jurisdictions have such events explicitly set out in their legislation, such as in the Netherlands, France, Italy or Germany, but in English law there is no formal, written definition of what constitutes a force majeure event. Because of this force majeure is not implied into English law contracts, and we must rely on what the contract actually says.

### What triggers a force majeure clause?

Since there is no statutory or common law definition of a force majeure event in English law, we must rely on the contract. If force majeure is not covered in the contract at all the situation is not entirely lost as the parties

may seek to end the contract on the grounds of **frustration**, but this can be difficult to argue and invariably one party (often the recipient or customer in a contractual arrangement) will seek to benefit from the situation. For more information on frustration in contracts please speak with us.

If the contract does have a force majeure clause with a list of non-exhaustive 'trigger events' you have more certainty and can generally rely on the drafting to protect you during an event such as the Covid-19 pandemic.

## **What happens when you trigger the force majeure clause?**

The contractual effects are generally set out in the contract. Often you will see consequences such as:

- suspension of contractual obligations;
- non-liability;
- extensions of time to fulfil obligations;
- renegotiation of terms;
- obligation to mitigate losses; and
- the right to terminate the contract.

However, if you wish to rely on these consequences you would have to show first that you were ready, willing and able to perform your part of the contract had it not been for the force majeure event.

## **What if you can foresee the force majeure event?**

This is important when entering into new contracts now that the Covid-19 pandemic has taken hold. Though it is difficult to predict the scale, length and effect of the pandemic the fact of an outbreak could hardly be said to be unforeseen.

English courts have taken the approach that if the contract is silent on whether the event needs to be unforeseen, a court will be reluctant to impose that qualification on relying on the clause. That said, given that the pandemic is prevalent today, it would be sensible to include it in the non-exhaustive list of events that would lead to a party relying on the force majeure clause.

## **Relying on the force majeure clause**

Even if a contract does contain a force majeure clause it is still not certain that you will be able to rely on it to protect against claims for non-performance as a result of the Covid-19 pandemic. In order to rely on the clause you will have to show that:

1. a force majeure event has occurred which is beyond your control; and
2. you have been prevented, hindered or delayed in your performance of the contract; and
3. you have taken all reasonable steps to avoid or mitigate the event or its consequences.

## Is Covid-19 a force majeure event?

This will depend on the clause in the contract. If "*disease*" or "*epidemic*" is not expressly set out in the clause you may still be able to rely on other terms such as "*act of God*" or "*an irresistible act of nature*". There may also be another 'catch-all' provision such as "*events outside of our control*".

## Prevention, hindrance or delay?

The question here is whether the Covid-19 outbreak has prevented, hindered or delayed performance of the contract. The key term here is **performance** of the contract – if it has just become more expensive to perform the contract that would not necessarily permit you to rely on the clause. It would have to be that you have been prevented from fulfilling your contractual obligations.

## Reasonable steps to avoid or mitigate consequences?

Parties have an obligation to mitigate the consequences of the force majeure event. Though parties may insist that they are unable to perform as a result of Covid-19, it is likely that many claims will fail through the lack of mitigation, or put simply, trying to find other ways to perform the contract.

## Next steps

Assuming that your contract has a force majeure clause and that the Covid-19 pandemic itself is deemed a force majeure event, the clause itself should say what happens next. The event itself may not necessarily mean the end of the contract, as the obligation to perform the contract may be suspended or delayed. However, a declaration of force majeure – **crucially complying with the correct notice provisions in the contract** – could lead to one party having the right to terminate. However, care has to be taken that this is done correctly to avoid to the other party claiming termination for breach.

## Further information

This commentary is an overview of force majeure and should not be taken as legal advice. The Coronavirus / Covid-19 pandemic is a complex and quick-moving situation so for any further information on force majeure or general commercial and contract enquiries please contact:

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