

With the current world coronavirus disease 2019 (COVID-19) situation, where parties are finding it increasingly difficult, if not impossible, to perform their contractual obligations pre-dating these extraordinary and turbulent times, Rob Broom (associate) and Paul Brennan (consultant) from our Energy & Natural Resources Practice take a closer look at *force majeure* and other relief mechanisms potentially available under English law.

1. Introduction to Force Majeure

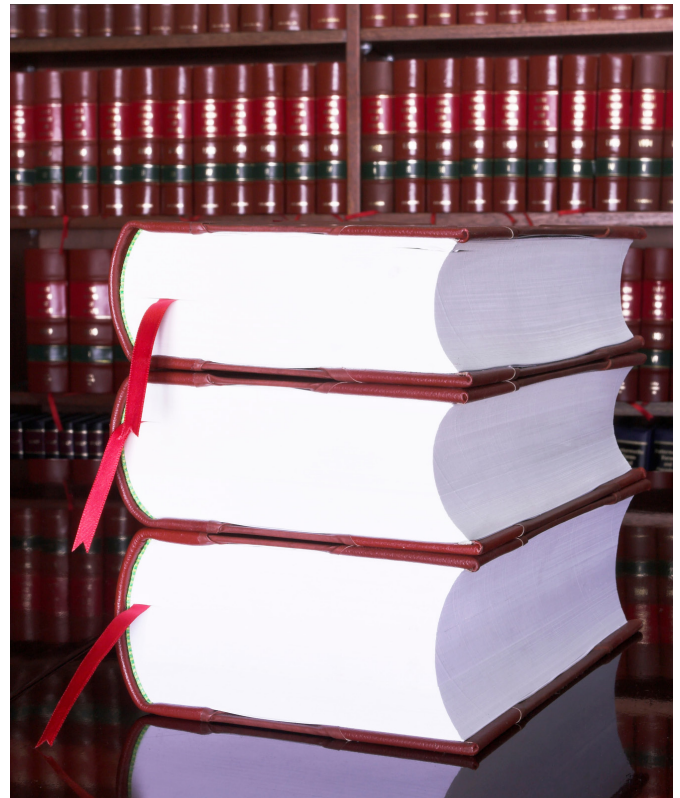
In English law, *force majeure* (French for “superior force”) is a creature of contract and not of the general common law; it is a contractual term that arises solely on the basis of an express provision included in a contract (typically as a boilerplate provision) and cannot be implied. The parties to a contract, therefore, have the freedom to agree what will amount to *force majeure* (often referred to as “FM” for short) for the purpose of their contract and what the consequences will be if such an event happens.

Force majeure clauses operate as a mechanism to allocate the risk associated with events or circumstances (usually defined as *force majeure* events) that are beyond the parties’ control. Typically, a party prevented (or hindered, impeded or delayed, as the case may be) from fulfilling its obligations by such events or circumstances is temporarily relieved from complying with them and avoids liabilities that would otherwise be associated with non-compliance. In fact, a *force majeure* clause can excuse, suspend or extend the time for, performance of the contract, upon the occurrence of an event or circumstance beyond a party’s control

In general, *force majeure* events include a list of extraordinary events, such as the outbreak of war, terrorism and “acts of God”, such as earthquakes, fires or floods – and, sometimes, epidemics and/or pandemics. Usually the list is non-exclusive, setting out specific examples of events or circumstances that are beyond a party’s reasonable control.

The general principles as to what is outside a party’s control varies from contract to contract, as does the list of examples, which means there are no generic answers to questions about whether *force majeure* relief applies. Each party must look at the wording of the contract to establish whether the *force majeure* (within the meaning of the contract) is ongoing and how best to proceed in the relevant circumstances.

It is important to note that not all contracts contain a *force majeure* clause, and some contracts, for instance, payment guarantees, may even exclude it by including wording that they apply regardless of any assertion of *force majeure*, frustration or equivalent legal doctrine. It follows that a *force majeure* clause will be interpreted by reference to the usual principles of contractual interpretation under the applicable law of the contract.



2. Frustration

Frustration is the closest equivalent to a non-contractual concept of *force majeure* in the law of England and Wales. In the words of Lord Radcliffe “frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.”¹ The requirement for a fundamental transformation in the nature of the contractual relationship, caused by a change of circumstances, means that contract frustration is much rarer and more difficult to establish than contractual Force Majeure. In other words, the application of the doctrine rests upon the construction of the obligation in the agreement in light of the circumstances that have now come to pass. Lord Radcliffe went on to say that frustration requires “such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.”² What is more, in contrast to *force majeure*, the doctrine of frustration does not provide temporary relief. Inherently, it entails the ending of the contract, with all current and prospective rights and obligations cancelled, with neither side being entitled to compensation.

¹ Davis Contractors Ltd v Fareham UDC [1956] AC 696

² Ibid

The consequences of contract frustration are stark, though there is some statutory protection under the Law Reform (Frustrated Contracts) Act 1943, which provides for the return of prepayments made for benefits due to have been delivered after the contract was frustrated and, contrariwise, for payments to be made for benefits received beforehand, which were not due to be paid at that time. Clauses making provision for the survival of rights that had accrued prior to termination may also provide some protection. Some contracts, namely time charterparties and charterparties by way of demise, contracts for carriage of goods by sea, insurance contracts and contracts for the sale of perishable goods are not covered by the act. In these, and indeed any other case, a possible alternative, where, for instance, there has been a total failure to perform the contract, is to seek to repayment on the grounds of unjust enrichment.

3. Illegality

COVID-19 legislation may result in it becoming illegal to perform certain contracts, for instance, where they involve activities and business covered by The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, which prohibits opening restaurants and public houses, or operating various types of entertainment and health and beauty businesses. In such instances, the contract may be discharged on the grounds of supervening illegality of English law. Contracts governed by English law, which are to be performed overseas, may also be treated as discharged if a change in the law of the host nation renders them illegal.

Given the nature of the restrictions imposed so far, the doctrine of supervening illegality is unlikely to have much relevance to contracts in the UK energy sector, though it is not inconceivable that it could affect contracts, for meter reading, for instance, which involve visiting premises that house the elderly.

In cases such as meter reading contracts, a change of law may make the performance of some, but not all, of the obligations under the contract illegal. Companies in dire financial difficulty may seek to use the threat of walking away from contracts to gain respite from payments obligations, but generally speaking, save where the change of law strikes at the heart of the contract, parties would be best advised to negotiate a proportionate response to the change. Of course, many high value longer-term contracts will include express provision for dealing with a change of law.

4. Possible Consequences of Force Majeure Clauses

Claiming that a contract has been discharged on the grounds of frustration or illegality, if successful, entails not only the loss of the burden of the contract, but its future benefit as well, without compensation. More usually, the parties to a contract will want a *force majeure* to provide temporary relief from contractual obligations, rather than permanent discharge of the contract, especially when the change in circumstance or law only frustrates or prevents the discharge of some of their contractual obligations. Inclusion of a *force majeure* clause brings greater flexibility than reliance on the doctrines of frustrations and illegality and allows for a proportionate allocation of risk in response to a much wider variety of circumstances.

Depending on their drafting, *force majeure* clauses may have a variety of consequences, including:

- Excusing the affected party from performing the contract in whole or in part
- Excusing that party from delay in performance, entitling them to suspend or claim an extension of time for performance
- Giving that party a right to terminate

Based on such a typical *force majeure* clause, the affected party would usually have to show that:

- A *force majeure* event has occurred, which is beyond its reasonable control
- The *force majeure* event could not have been avoided or mitigated by the affected party taking reasonable steps (see part 5 (Duty to Mitigate))
- The *force majeure* event causes or results in the affected party being unable to perform, or being delayed in performing, obligations under the contract

Declaring *force majeure* is only the beginning of a process. The party issuing a *force majeure* notice citing COVID-19 as the cause will bear the burden of proof to show that the current circumstances fall within the ambit of their contractual *force majeure* provisions, and must establish a causal connection between the *force majeure* event and its failure to perform its contractual obligations.

5. Duty to Mitigate

A party seeking to rely upon a *force majeure* provision will usually have to show that it has taken reasonable steps to avoid or mitigate the event and its consequence, and that there are no alternate means for performing under the contract. What constitutes a reasonable mitigation measure is fact-specific and depends upon the nature and subject matter of the contract in question.

6. Is the COVID-19 Pandemic an Event of Force Majeure? The Devil Is Always in the Detail

Whether the COVID-19 pandemic constitutes a *force majeure* event depends on the exact drafting and scope of the *force majeure* clause. As the COVID-19 outbreak was declared a pandemic by the World Health Organization on 11 March 2020, if the *force majeure* clause expressly specifies "epidemics, diseases, and/or public health emergencies" as events of *force majeure*, it is likely that the COVID-19 pandemic would qualify as an event of *force majeure*. In addition, if the *force majeure* provision lists "acts of government" as a *force majeure* event, a party will find it easier to establish that travel restrictions, lockdowns and government imposed business closures qualify.

Even if epidemics, diseases and public health emergencies are not expressly specified as events of *force majeure* in the contract, the COVID-19 pandemic may, nevertheless, fall within the general *force majeure* wording as event beyond the parties' reasonable control. In light of the current epidemic, in any new contract it would be prudent to add epidemics to the listed examples of *force majeure* events, especially where the contract specifies that *force majeure* events or circumstances must be unforeseeable,

It is unlikely that a party will be able to claim *force majeure* relief simply because a *force majeure* event has occurred or because performing its contractual obligations has all of a sudden become more expensive, onerous, or time-consuming as a result of the COVID-19 pandemic. Both the contractual wording and the impact of the relevant circumstances on the parties, including the effect of the most recent government policies or directions, will need to be scrutinised carefully to determine whether the clause is engaged.

7. Key Questions to Determine Whether a Force Majeure Clause Responds, and Related Considerations

Question 1 – Establishing causation – has COVID-19 (and/or any government, legal or regulatory steps taken to combat the pandemic) prevented, hindered or delayed the performance of the contract?

Where the clause states that a party is relieved from performance or liability if it is "prevented" from performing its obligations or is "unable" to do so, it is necessary to show physical or legal impossibility, and not merely that performance has become more difficult or unprofitable. English law does not permit general economic impracticability to qualify as a valid *force majeure* or frustrating event. The economic toll of the pandemic will, therefore, likely not suffice. If a party asserts that they were "prevented" from performing the contract, the courts will examine this strictly. It will generally not be enough to show that performance was more difficult or less profitable than bargained for: nothing short of physical or legal impossibility will suffice. Being "hindered" is a lower hurdle (see *Tennants (Lancashire) Ltd v CSWilson & Co* [1917] AC 495)³, though still requires something more than foreseeable fluctuations in the market.

Question 2 – Does the particular *force majeure* clause respond in relation to the consequences of government intervention and, in particular, the difficulties associated with the skills shortage that results from stay at home orders? What events are listed as *force majeure*?

If the parties have made express provision in the clause covering the event that has occurred, then this will be binding on the parties. The word "epidemic" is often included as a *force majeure* event and a "pandemic," being a global epidemic, would likely be captured within the meaning and inclusion of "epidemic," as a *force majeure* event.

Question 3 – What is the level of disruption that the *force majeure* event must have on the affected party to trigger the relevant consequences under the contract?

As mentioned above, some contracts state that the *force majeure* event must "prevent" the affected party from performing its duties, others that the event must merely "hinder" performance.

If the contract requires performance to be prevented, a party must show that performance must be legally or physically impossible. On the other hand, a clause that requires a party to show that the event or circumstance "hindered" or "impeded" its performance is a lower bar. In both cases, it is not enough to show that performance has been made more difficult or that performance is now economically unviable.

Question 4 – Are there any procedural requirements?

Parties should check if there are procedural requirements, e.g. a prompt notice requirement, in the *force majeure* clause. If a contract specifies a procedure that is to be followed in given circumstances then the English courts will expect the parties to follow that process – the ability to rely on *force majeure* can be lost if the procedural requirements in the contract are not followed in good time. Typically, the contract will require the party affected by *force majeure* to keep the other parties informed as to developments and the steps it is taking to overcome the problem.

³ In *Tennants (Lancashire) Ltd v CSWilson & Co* [1917] A.C. 495, Lord Atkinson said: "'Preventing' delivery means, in my view, rendering delivery impossible; and 'hindering' delivery means something less than this, namely, rendering delivery more or less difficult, but not impossible."

8. What if a Force Majeure Clause Is Wrongly Exercised?

The problem with inappropriately exercising a *force majeure* clause is that the party claiming *force majeure* relief can:

- Potentially expose themselves to a claim for breach of contract, if they wrongly cease performance of their contractual obligations
- Possibly put themselves in repudiatory breach of the contract if they have no proper basis for not performing, entitling the other party to terminate and claim damages

9. Concluding Thoughts

To properly secure *force majeure* relief under a contract, one must jump through all of the express contractual hoops: the actual occurrence of the event; that it has been prevented or hindered (as the case may be) from performing its obligations under the contract because of the event; that its non-performance was due to circumstances beyond its (reasonable) control; and that there were no reasonable steps that it could have taken to avoid or mitigate the event or its consequence.

Before seeking to declare *force majeure* under any contract or, for that matter, claiming the contract is discharged on the grounds of frustration or its performance becoming illegal, the strengths and weaknesses and pros and cons of pursuing such a course of action (should it be available) need to be very carefully considered. They are often very difficult and uncertain provisions to invoke.

However, a contract that is silent or unhelpful on *force majeure* may well contain other helpful general provisions, such as a right to terminate for convenience on notice, or provisions specifically addressing changes in law.

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