

## Insights

# FORCE MAJEURE FAQs: ENGLISH LAW ISSUES IN BUSINESS CONTRACTS

23 March 2020

## SUMMARY

As we all navigate these very uncertain times, there are several key considerations to have in mind when reviewing English law governed supply or other commercial contracts and assessing the parties' continued ability to perform their contractual obligations.

The BCLP team has been advising on the fall out from the COVID-19 outbreak for a number of weeks and is seeing the following themes emerge:

### **Q: Does your contract have a force majeure clause?**

First check if your contract has a force majeure (FM) clause. It is not implied into a contract under English law. If there is no FM clause, you would need to prove instead that your contract has been frustrated. The bar for showing frustration of a contract is much higher.

### **Q: Is COVID-19 a force majeure event for the purposes of your contract?**

Assuming there is an FM clause, the first stage is to assess whether a force majeure event within the drafting of your clause has occurred. It is the text of a FM clause and the particular factual matrix which is key. Interpretation will vary greatly depending on timing. For example, the outbreak was only declared a pandemic on 11 March 2020. Until this point, the WHO characterised it as a 'public health emergency of international concern.' This may be of relevance to FM clauses using terminology such as disease, illness, epidemic, pandemic or quarantine.

Likewise, the term 'government intervention' in an FM clause may mean the FM clause is in play, but this ultimately depends on the actions taken by a particular government where the company operates. Until 20 March 2020, for example, the UK government was only recommending and advising certain courses of conduct, which would likely fall short of being 'government intervention'. It is clear UK businesses were struggling to reach consensus about the nature of the UK government's 'recommendations' to close certain venues / businesses (e.g. theatres). If businesses elect to close voluntarily without waiting for a government to issue regulations

requiring them to do so, this may mean they are not excused liability under the provisions of their FM clause. This analysis will differ now that the UK government has announced that as from 20 March that all UK bars, pubs and restaurants are to close.

A shorter form FM clause including the term 'Act of God' (but not specifically including the term 'epidemic') may also cover the COVID-19 outbreak, but the clause itself would need to be construed in light of the contract as a whole.

The changes in governmental strategy (and WHO guidance) to tackle the outbreak also have implications for a company's portfolio of contracts, as whether an event is an FM event can change overnight. And the analysis may vary in each country of operation, as national governments adopt different responses to the outbreak, depending on the point they have reached in the spread of the virus and the strategies they adopt to contain it.

It is important to check if there are any excluded events which would mean a party couldn't rely on the FM event (e.g. financial hardship / lack of demand / economic downturn consequent on the FM event is causing the non-performance rather than the COVID-19 outbreak).

### **Q: When will the FM clause offer relief from performance?**

Again, we are seeing a range of thresholds at which a person seeking relief for non-performance is entitled to rely on the provisions of an FM clause. The threshold for triggering protection of an FM clause will vary by contract, with some contracts potentially excusing contractual performance when this has become 'inadvisable' rather than 'impossible' or others where the FM event 'hinders' performance.

### **Q: What if your contract has simply become less financially attractive to perform?**

Changes in economic or market circumstances affecting the profitability of a contract or the ease with which the obligations can be performed are **not** force majeure events. To be able to rely successfully on an FM clause, a business will need to show it is the FM event which is the primary cause of its non-performance. Refusal or deferral of payment (without more) may not be permitted under a FM clause, as the wording and circumstances will determine its effect.

### **Q: Issuing a FM notice and the duty to mitigate**

To rely on a FM clause, a business will need to check and follow the process steps set out in the contract (in terms of form and timing of notice to be given to counterparties). The parties will also need to consider if the contract should be terminated (or merely suspended) depending on what the contractual provisions envisage.

Any party alleging force majeure will also be under a duty to mitigate the effects of the event. The steps a party would need to take to mitigate will vary according to the nature of the particular contractual relationship. English case law suggests that language in FM clauses referring to

events ‘beyond the reasonable control of the relevant party’ can only be relied on by a party if that party had taken all reasonable steps to avoid its operation or mitigate its results. Given this duty to mitigate, it will be important to keep all records of all communications between the parties to document the steps taken in mitigation.

### **Q: Are there any other relevant considerations?**

As practice around containment / management of the outbreak varies by jurisdiction, so does practice around governmental intervention in private law contracts between parties. The Chinese government proactively started issuing force majeure notices to suppliers in certain regions in China, but we have not seen this practice adopted elsewhere to date. It is also not yet known how courts outside the PRC would interpret government FM notices in the context of an English law FM clause.

Even though Covid-19 might be a FM event under contract, it may not be covered by an insurance policy. It is important to check insurance policies to understand the scope of cover and any exclusions applicable in these circumstances.

### **Q: What should you be considering in light of the outbreak for new contracts?**

- When is the contract to be entered into?
- When is the contract to be performed?
- Where are the contractual obligations to be performed?
- What are the likely impacts of the COVID-19 outbreak on the parties and their ability to perform or benefit from the contract? For example, suppliers and customers will be approaching this issue from different perspectives.
- Is it possible to obtain insurance in case performance is delayed?
- Have the parties discussed who should bear the risk of delayed/non-performance of the contract? Has this been priced into the contract?
- Do the parties have contingencies to allow staff allocated to the project to continue work during the outbreak (e.g. from remote working)?
- What does the FM clause provide? Consider the relevant events giving rise to a FM event.

## **RELATED CAPABILITIES**

- Commercial Transactions

- Business & Commercial Disputes

## MEET THE TEAM



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