

# Force Majeure: Friend or Foe Amidst COVID-19

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This Katten advisory considers how UK businesses could seek to rely on the principles of force majeure or frustration to suspend or end performance of contractual obligations (without liability) should that be required in light of COVID-19.

## What are force majeure clauses?

Force majeure clauses in commercial contracts usually excuse a party's failure to perform its contractual obligations due to the occurrence of events that are outside that party's control. As there is no set definition of a force majeure event in English Law, what amounts to a force majeure event will depend on what the parties have defined in the contract. Typically, force majeure events have been recognised by the courts to include acts of God (such as adverse weather conditions) riots, war, invasion, strikes and terrorism. The relief offered under force majeure provisions, is usually the right to either suspend performance of a contract or terminate it without liability.

## Does the force majeure clause in your contract capture COVID-19?

This will depend on the definition of "force majeure event" and whether the contract specifies 'pandemics' 'epidemics' or 'global health emergencies' as events capable of triggering force majeure relief. If your contract's definition of 'force majeure event' does not expressly refer to pandemics, epidemics or similar events, other wording in the definition such as 1) events beyond the parties' reasonable control; 2) acts of God; or 3) government or regulatory action may be enough to at least run an argument that COVID-19 permits reliance on the force majeure provisions. It could be argued that mandatory office closures, full or partial lockdowns of cities, quarantine and travel bans can be considered government or regulatory intervention beyond the parties' control. Again, this will depend on the drafting, circumstances and intentions of the parties at the time of entering into the contract.

If the force majeure definition expressly excludes events that could be considered reasonably foreseeable, the other party to the contract (should they wish to prevent you from seeking relief), could argue that outbreaks such as COVID-19 fall outside of force majeure protection due to previous outbreaks of similar viruses such as SARS. It might be difficult to prove that another variant of a similar virus was unforeseeable, however certain facts such as the unprecedented lockdowns associated with COVID-19 may sufficiently differentiate it from other viral outbreaks.

## Declaring a force majeure?

If you are thinking about declaring a force majeure event, the onus will be on you as the party seeking to invoke the provisions to prove that:

- You have been prevented, hindered or delayed (depending on the wording of the clause) in performing your obligations due to the occurrence of an event which falls within scope of what the contract defines as a force majeure event.
  - All reasonable steps (if any) that you could have taken to avoid or mitigate the event or its consequences have been taken.
  - Non-performance was due to circumstances beyond your control.
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The contract also may set out a process that must be followed when serving a notice of force majeure.

Care should be taken here. This is because, if the required conditions to invoke force majeure relief are not followed, the other party could counterclaim that the suspension or delay in performance amounts to a breach of contract as the prerequisites to benefit from the force majeure provisions were not met.

### **Received a force majeure notice: What next?**

The first thing to do is to review the relevant provisions. Consider whether the party serving the notice:

- Has supplied sufficient evidence to prove the occurrence of a force majeure event. For example, if the force majeure clause states that the relevant trigger event must 'prevent' performance, they will need to demonstrate that performance is either a physical or legal impossibility, and not just more costly, difficult or unprofitable.
- Can show that they have taken reasonable steps to mitigate or avoid the effects of the force majeure event (i.e., an expenditure of funds, rescheduling of resources, activating business continuity plans or business interruption insurance policies to minimize the impact of COVID-19 on their contracted obligations).
- Has complied with all formalities (such as timescales) in serving the notice.

Your response to any force majeure notice must be considered carefully. Try to avoid any conduct that could be deemed a waiver of your rights to later challenge the validity or enforceability of the force majeure provisions in the contract.

If you are served with a notice of force majeure under a contract which was not negotiated at the time of signature (i.e., standard terms of business), and you feel the terms of the force majeure clause are unreasonable; it may be possible to challenge the validity of the provisions under the Unfair Contract Terms Act 1977 (UCTA). UCTA regulates the use of exclusion of liability clauses in commercial contracts. As the objective of a force majeure clause is to exclude liability, it could be subject to UCTA. If challenged under UCTA, for the clause to remain valid, it must be found by the courts to be "reasonable". Clauses that are onerous or unfair will not be upheld.

### **What if there is no force majeure clause?**

If there is no force majeure clause, or the impact of the COVID-19 pandemic is outside its scope, the parties may need to consider whether the contract is terminable by operation of law such as "frustration". The law around frustration applies where occurring events result in a situation that is fundamentally different to what was in the contemplation of the parties when the contract was made. However, the doctrine of frustration is rarely available in practice and is unlikely to apply where performance is merely delayed. This is because courts and tribunals typically require the parties to demonstrate something akin to "impossibility" of performance in order to find that frustration has occurred.

Accordingly, given the difficulty of relying on the legal principles of 'frustration' should force majeure provisions not be available, you could consider other terms in the contract that may offer some recourse should you need to delay performance of a contract or terminate it. Such clauses may be change control or variation provisions (which govern how the parties can amend a contract), as well as termination and suspension provisions.

Practical considerations and steps to mitigate risks

- Consider which existing contracts may be impacted by closures or delays, or where a counterparty may seek to terminate or suspend the contract.
- Review the force majeure clauses contained in these contracts, with specific regard to whether the COVID-19 pandemic falls in scope as a force majeure event.
- Seek information and invite communications from suppliers or customers regarding the impact of the pandemic to prepare as best you can for potential disruptions.
- Where breaches under a contract have already occurred, steps should be taken to reduce the impact of the breach, and an accurate record of efforts and related communications retained.
- Consider how the long-term impact of the COVID-19 pandemic can be mitigated by building in appropriate contractual provisions to any new contracts.

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## CONTACTS

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