

# BRIEFING NOTE

## FORCE MAJEURE AND COVID19

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17<sup>th</sup> April 2020

### Good Practice

- A party affected by the COVID-19 outbreak should take steps to record and document the steps it is taking to prevent or mitigate the impact of the COVID-19 outbreak on its contractual obligations. Don't wait until you have to respond to or by a force majeure notice.
- If claiming force majeure, consider carefully how the force majeure event is drafted and the consequences that arise under force majeure.
- Only make a force majeure claim with care and after legal advice as a wrongful claim could have serious consequences, including amounting to a breach of contract or a repudiation of the contract allowing the other party to claim damages or to terminate the contract.

### Force Majeure Provisions

The rapid spread of the novel coronavirus ("COVID-19"), first reported in Wuhan, China in December 2019, meant that it was obvious by early January that a world pandemic was occurring, although the World Health Organization only declared pandemic officially on March 11, 2020. As a result, force majeure provisions have been activated in many commercial contracts together with common law doctrine of frustration. (This analysis is written under English law, although we are happy to advise on other jurisdictions, particularly China and Italy).

A force majeure event refers to the occurrence of an event which is outside the reasonable control of a party and which prevents that party from performing its obligations under a contract. A party affected by such an event of force majeure will typically be relieved from performing the obligation affected for the duration and in some cases, extended periods of force majeure may give rise to contract termination rights.

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1 English common law has no general concept of force majeure so it is a purely  
2 contractual matter. A party's ability to claim relief for a force majeure event therefore  
3 depends upon the terms of the force majeure clause in the contract (although the entire  
4 contract should be checked to ensure that there are no other clauses such as "Supplier  
5 Shortage" clauses that can be relied upon. This means that a force majeure provision  
6 must be an express term and will not ordinarily be implied into contracts governed by  
7 English law. There is, however, some relief from the limited common law doctrine of  
8 contractual frustration which is also considered below.

9 As with all matters dependent upon the terms of the contract, each force majeure  
10 provision must necessarily be considered on its precise terms and in its specific context  
11 and the commentary below considers some of the more common features found in force  
12 majeure provisions.

13 **What Constitutes Force Majeure**

14 Force majeure usually requires three distinct criteria to be satisfied:  
15 1. the event must be beyond the reasonable control of the affected party;  
16 2. the affected party's ability to perform its obligations under the contract must have been  
17 prevented, impeded or hindered by the event; and  
18 3. the affected party must have taken all reasonable steps to seek to avoid or mitigate  
19 the event or its consequences.

20 Force majeure events are commonly split into two categories, (i) political force majeure  
21 dealing with risks related to changes in the political or legal environments and (ii)  
22 disaster, natural forces and non-political force majeure which deal with physical or  
23 environmental risks that might impact a business or a project. Each typically carries a  
24 different remedy – in the case of political force majeure, an extension of time and an  
25 ability to recover increased costs and in the case of other force majeure an extension of  
26 the time for completion and relief from termination consequences.

27 **Is it covered?**

28  
29 Many contractual provisions set out a specific list of force majeure events. One typical  
30 clause is .....caused pandemic, communicable diseases, and significant epidemics  
31 affecting the business of the party. In some cases, the placing of the comma can be  
32 critical, and in many cases, even though a pandemic arises, various other criteria may  
33 need to be satisfied for a force majeure clause to be activated.

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1 Most force majeure provisions contain “catch-all” language in respect of events which  
2 are “outside the reasonable control of the party affected”, but where there is silence  
3 about pandemic, or where there are clauses including action by a government  
4 department, then it will be necessary to consider whether COVID-19, or its impact on a  
5 business or a project, is captured by the clause. In particular, even where the  
6 government has issued a lockdown process, there is no certainty that the force majeure  
7 clause will bite effectively. It is important to establish whether the consequences of the  
8 relevant force majeure event are covered by the clause and whether it impacted upon  
9 the ability of the affected party to the extent set out in the clause or whether the party  
10 claiming force majeure simply volunteered to breach the contractual obligations because  
11 there were clear work-arounds and that the ability of the party to perform their  
12 contractual obligations was affected by COVID-19, but not to the extent claimed.

13 **Performance**

14 Therefore, this brings us into the second criterion the degree of impairment of the  
15 affected party’s ability to perform its contractual obligations and in effect, the force  
16 majeure excuse for relief from what would otherwise be a breach of contract, a failure to  
17 perform an obligation.

18 The burden of establishing the causal link between the event and its inability to perform  
19 lies with the party relying upon the force majeure clause and this means that they must  
20 that the party is “prevented” by the force majeure event from performing its obligations.  
21 This burden is significantly more difficult to establish where non-performance is claimed  
22 rather than a claim on being “impeded” or “hindered” in the performance of its  
23 obligations.

24 A highly likely scenario with COVID-19 would be the inability to perform a contract due to  
25 having to self-isolate an office or a team due to the fear of an outbreak of COVID-19 at  
26 the workplace. This is particularly difficult. Where there is an actual outbreak and the  
27 workforce is compulsorily quarantined or self-isolated, then the party relying on the  
28 clause will have to show (i) the compulsorily quarantine or self-isolation and (ii) the  
29 inability to fulfil the contractual obligation as a result. For some cases, the mere fact that  
30 staff are working from home is not going to provide the necessary element of inability, in  
31 other cases the mere fact that staff are quarantined or home isolating will create an  
32 obvious element of inability.

33 The difficulty is where the staff are furloughed or where they are self-isolating without an  
34 actual infection in the workplace, and where it is possible to adjust workplace conditions  
35 to maintain appropriate work distancing so that work can continue (if necessary with

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1 PPE) because whilst arguably this would hinder, delay or impair timely performance, it  
2 may not necessarily meet the criteria of preventing the contract being fulfilled, but merely  
3 delaying matters.

4 Under many force majeure clauses therefore, it will be necessary to look at the impact  
5 and causal link in quite a lot of detail before claiming a force majeure event, because it  
6 will be necessary to decide the scope of the force majeure excuse to be asserted. It will  
7 also be necessary to examine the extent to which the party affected has taken all  
8 reasonable measures to minimise or eliminate the impact of COVID-19.

9 For example, a disruption that merely impacts the profitability of a contract, or a closure  
10 of a retail outlet so that the purchaser can still receive the goods but has no outlet for  
11 their sale (or limited outlet via internet sales) may not be sufficient for a force majeure  
12 claim unless there is express contractual provision covering such a circumstance.  
13 Similarly, the impact of an economic downturn or other general adverse business  
14 conditions is not likely to be sufficient, even if it could clearly be shown that a key trigger for  
15 the downturn was COVID-19.

16 On top of that matrix is also placed the question of emergency powers and emergency  
17 actions, such as a direct request from a Government Minister, given the state of  
18 emergency, to redirect production into essential medical supplies such as ventilators or  
19 PPE, causing a material delay in the production cycle but which delay is claimed to be  
20 justified in the unique circumstances of the COVID-19 outbreak. It is arguable that the  
21 non-producing party has volunteered in most cases to breach the contract to produce the  
22 ventilators or PPE etc, and that there is no application in such circumstances for force  
23 majeure and that this is no different to a manufacturer breaching a contractual provision  
24 in arguments, we are in uncharted territory as, unlike WW2, we don't have the war  
25 powers acts allowing governments to force the breach of contracts and the manufacture  
26 of armaments.

27 **Mitigation**

28 A party seeking to rely upon a force majeure provision will usually have to show that it  
29 has taken reasonable steps to avoid, or to mitigate, the event and its consequences, and  
30 that there are no alternate means for performing under the contract. This will be a  
31 question to be determined in each individual contract to decide what constitutes a  
32 reasonable mitigation measure, because these will be decided on a fact-specific basis  
33 and will depend upon the nature and subject matter of the contract in question.

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1 For example, a supplier could consider using alternative manufacturing lines in a  
2 different location, or a project owner could seek alternative suppliers. In many cases, the  
3 use of an alternative supplier of raw goods is not desirable due to the damage to the  
4 supply chain via COVID-19, and consequential delays to supply chains and logistics;  
5 however, the reasonableness of a mitigation measure will be considered in light of any  
6 additional factors and this will include such matters as the additional burdens and costs  
7 that the party suffers, the impact of delay, the availability of alternative manufacturing  
8 process and the overall impact on the schedule of the contract. The COVID-19 pandemic  
9 effect on the global supply and manufacturing chain means that there are fewer  
10 mitigation measures available at present.

11 There is also the question of how the force majeure impacts are felt when the need for  
12 employers to follow all relevant official guidelines, social distancing, vulnerable family  
13 members of employees etc is considered and to determine whether the reasonable  
14 measures to contain or limit the spread of the virus in the work place are either feasible  
15 or justifiable in terms of risk so that the contractual performance can continue.

16  
17 in addition, the question of mitigation will also have to consider the extent to which the  
18 parties have carried out pandemic contingency planning and it may be argued that a  
19 party could have mitigated if it had carried out proper pandemic contingency planning  
20 and that the delay arises not due to the COVID-19 event, but due to the lack of  
21 pandemic contingency planning and that a competent pandemic contingency plan would  
22 have incurred only minor delay and that it is the negligence in failing to have a  
23 competent pandemic contingency plan in place, following warnings from SARS, MERS,  
24 H1N1 etc, that has materially contributed to the loss. In such event, the party opposing  
25 force majeure will be able with hindsight to argue that with a competent pandemic  
26 contingency plan, there would have been little or no delay and therefore that the party is  
27 not entitled to claim force majeure and this will place the burden of proof back onto the  
28 party relying on the force majeure event to show that the no reasonable pandemic  
29 contingency plan would have worked.

30 **The Duty to Give Notice**

31 An affected party who is seeking to rely upon the force majeure provision for relief under  
32 the contract will be required to issue a notice of force majeure to the other party,  
33 supported by reasons in detail and the mitigation steps considered and backed upon  
34 request (or sometimes without request) by the necessary evidence to back up the claim  
35 of force majeure. The clause usually also requires the notice to state the anticipated  
36 consequences and expected duration of the force majeure event.

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1 Some contracts, especially construction contracts, include a “time-bar” clause that  
2 requires notice to be provided within a specified period from when the affected party first  
3 became aware of the force majeure event,, after which time, the affected party is barred  
4 from claiming force majeure.

5 COVID-19 is a unique set of circumstances because it is unlike typical natural disasters,  
6 political or coup events, which are typically limited in time and the effects are confined to  
7 a limited geographical area, and is also different from SARS/MERS which were again  
8 limited in their spread. The COVID-19 pandemic has been dynamic, spreading very  
9 dynamically and without symptoms and with a death rate that has challenged most  
10 countries’ health systems and defeating countries attempts to close borders to prevent  
11 spread

12 Many companies have therefore adopted the approach of issuing “protective” or “rolling”  
13 force majeure notices that take into account the developing impact that the COVID-19  
14 outbreak has upon the performance of their obligations under the contract and have  
15 issued indefinite delay notices stating that until health authorities have cited when the  
16 COVID-19 restrictions will be lifted, detailed time estimates of resumption of manufacture  
17 or production under the notice cannot be given.

18 **Force Majeure Claim Consequences**

19 As highlighted above, the consequences for a party considering Force Majeure will  
20 depend upon a contract specific analysis taking into the nature of the affected party’s  
21 obligations, the consequences of the COVID-19 events, the available mitigation and the  
22 remedies that are sought and in many cases this will result not in termination but in an  
23 extension of time to perform the obligations or a temporary suspension of contractual  
24 performance for the duration of the force majeure event.

25 In some cases, the force majeure event will provide that if the force majeure event  
26 continues for more than a certain period, then either party can serve notice of  
27 termination. In some cases, each party bears their losses at the date of the force  
28 majeure notice of termination and in other cases, the clauses are drafted so that in the  
29 event of a force majeure notice of termination, the parties are to be treated as if they  
30 never entered into the contract, although in many cases, the provisions about how and  
31 when money is returned has been inadequately considered.

32 **Doctrine of Frustration**

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1 In the absence of an express force majeure provision within an English law contract,  
2 parties may also look at the doctrine of frustration; however it should be noted that the  
3 doctrine of frustration is not available if the contract contains an express force majeure  
4 provision because such a clause has been deemed to be an agreed allocation of risk  
5 between the parties. The doctrine of frustration however is draconian as it results in the  
6 contract automatically coming to an end with the effect that the parties to the contract will  
7 no longer be bound to perform the obligations arising at a future date and it is for this  
8 reason that the threshold for proving frustration is significantly greater than found in  
9 caselaw in relation force majeure provisions. The burden on the party claiming frustration  
10 is to show that the obligations from COVID-19 are so material that they have  
11 fundamentally changed the nature of the contract.

12 The doctrine of frustration will apply if (i) the underlying event is not the fault of any party  
13 to the contract, (ii) the event or circumstance occurs after the formation of the contract  
14 and was not foreseen by the parties; and (iii) it becomes physically or commercially  
15 impossible to fulfil the contract, or transforms the obligation to perform into a radically  
16 different obligation from that undertaken initially.

17 **Change in Law impact of COVID19 Regulations**

18 Some contracts may also contain a “change in law” provision, which addresses  
19 circumstances where there has been a change in law that makes it impossible for the  
20 party to perform its contractual obligations. In some cases, the laws passed in order to  
21 contain the spread of COVID19 such a travel restrictions, compulsory quarantine and  
22 self-isolation measures, may be adequate to amount to a change in law frustrating key  
23 parts of the contract. In other cases, the clause will be triggered by the type of wording  
24 that is covered by the COVID Acts and Regulations; however in most cases, the  
25 obligations under the contract will not be adequately impacted upon as to activate that  
26 clause. In other cases, there is not a change in law, but only a change in regulation or,  
27 as with the Health Protection (Coronavirus Restrictions) England) Regulations 2000, the  
28 degree of discretion within the regulations and the express provision that travel is  
29 permitted for “the purpose of fulfilling a legal obligation” will mean that the Change in law  
30 clause is inadequate. In some of these clauses, most of which have been poorly  
31 considered boilerplate, there are provision for parties to recover increased costs or for a  
32 right to terminate the contact and, again, it will be for each contract to be considered in  
33 the light of its own circumstances.

34

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1 **Practical Suggestions**

- 2 • Review your contract to determine whether the contract includes a force majeure
- 3 provision or other provisions that can be activated;
- 4 • Review any time limit for a claim of force majeure or additional costs or similar notice
- 5 to be issued.
- 6 • Consider the consequences of a successful claim for force majeure will be.
- 7 • Carefully review the definition of force majeure in that contract to determine whether
- 8 there is any express event incorporating events such as COVID-19
- 9 • If not, review general language of the clause to see if it is sufficient to include COVID-
- 10 19 and its consequences.
- 11 • Consider relevant contractual aspects and be sure that the inability to perform is due
- 12 to the consequences (direct or indirect) of COVID-19.
- 13 • Consider whether your counterparty will use COVID19 to delay or terminate under
- 14 Force Majeure and if payments are due ahead of delivery, consider how to protect
- 15 yourself;
- 16 • Consider and review what steps you are taking as a business to avoid or at least
- 17 reduce so far as possible the effects of COVID-19
- 18 • Consider and review what steps you are taking as a business to maintain your ability
- 19 to continue to perform contracts and to mitigate any problems. (You will need to show
- 20 you have taken all reasonable measures to mitigate).
- 21 • Consider and review what steps you are taking as a result of changes in law and in
- 22 respect of official guidance and how this impacts on the contract and whether it falls
- 23 within force majeure events if you are suffering hinderance, additional costs or delay.
- 24 • Consider remote working a “clean team” for the contract.
- 25 • If claiming Relief consider that supporting documents will be needed.
- 26 • Determine whether you have business interruption or force majeure insurance or
- 27 international trade guarantees that might may cover any of the expected losses.
- 28 • Seek legal advice

29 **If You have Received Notice of Force Majeure**

- 30 • Carefully examine the notice to determine if it is within any time limit.
- 31 • Carefully examine the notice to see if it is within the scope of the force majeure
- 32 provision;
- 33 • Carefully examine the notice to see if the process for giving notice has been complied
- 34 with; and
- 35 • Carefully examine the notice to see if supporting documentation or information has
- 36 been provided. If no supporting document has been provided, check that supporting
- 37 documentation should be provided with the notice, and if so, immediately reject the
- 38 claim.(A future claim may be out of time).

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- 1 • Look at your back-to-back or inter-related contracts as you may need to take a  
2 strategic approach, both in relation to those contracts and possibly to decide whether  
3 the notice received by you triggers a force majeure event on the other contracts.  
4 • Consider in any event issuing protective notices of force majeure under the linked  
5 contracts .  
6 • Seek legal advice and where different laws govern back-to-back contracts, get legal  
7 advice in each jurisdiction.

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