



Part II of the ‘Staying Virtually Up-to-date’ Series
delivered by 3PB’s Commercial Team

FORCE MAJEURE
CLAUSES &
COVID-19: Q&A

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FORCE MAJEURE CLAUSES AND COVID-19: Q&A

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Company

THIS GUIDE

This guide is intended to act as an aide-memoire to Part II of the 'Staying Virtually Up-to-Date' Series delivered by 3PB's Commercial Team on 5th May 2020. Thank you for joining us!

Whilst every effort has been taken to ensure the accuracy of the contents of this guide, Parliament resumed last week and the position in relation to Covid-19 is rapidly changing. This document should not be used as a substitute for obtaining legal advice. If you have a particular query, please contact David Fielder (Email - david.fielder@3pb.co.uk), who will be happy to direct your enquiry to the relevant person.

WHAT IS A FORCE MAJEURE CLAUSE?

1. FM Clauses are a contractual remedy: based on the parties' agreement (No generalised doctrine of Force Majeure)
2. The clause does not have to be identified as a FM clause
3. The Requirements and effects (rights & obligations) of the clause are normally defined/stipulated in the clause/contract
4. Envisages supervening event or type of event which is factual (e.g. pandemic causing staff illness) or legal (e.g. orders or restrictions imposed in reaction to a pandemic)
 - i. Might be drafted in a way to encompass the general (e.g. acts or regulations imposed by civil authority) or the specific (lists)
 - ii. Construed restrictively by the Courts (and sometimes (exceptionally) impliedly (*Metropolitan Water Board v Dick Kerr & Co* [1918] AC 119; *Notcutt v Universal Equipment Co (London) Ltd* [1986] 1 WLR 641
5. Often boiler plate (and a lot of authority as to meaning)
6. But:
 - i. Not the same as a hardship clause (generally not found in UK)
 - ii. Not the doctrine of "frustration"

WHAT ARE THE CONSTITUENT ELEMENTS OF A FORCE MAJEURE EVENT?

Normally some elements of:

1. Being unanticipated
2. Being unforeseen
3. Beyond control/not within the control
4. But not involving negligence on the part of the non-performed
5. Causing inability to perform or part performance of a contractual obligation for the claiming party

WHAT DEFINES ANTICIPATION AND FORSEEABILITY?

1. Unforeseeable, uncontrollable, unanticipated and unavoidable

2. Clauses which exclude foreseeable and/or foreseen or unanticipated events will have to be construed with a degree of reasonableness or else force majeure clause would never have effect. Almost everything can be foreseen, with enough imagination.
3. "Beyond control" - some guidance in ***Great Elephant Corp v Trafigura Beheer BV (The Crudesky) [2013] EWCA Civ 905; 2 Entertain Video Ltd. & Ors v Sony DADC Europe Ltd (2020) EWHC 972 (TCC)*** - court interpreted clause "circumstances beyond [its] reasonable control...including but not limited to riot" – Court found riot was unprecedented and unforeseen. However, the Court found that party claiming inability to perform contract was caused by circumstances which were within its control, considering that it could have taken further precautions to avoid the consequences of riot.
4. "avoidable" - goes to facts and circumstances of the specific incidents, as well as the overall event.

WHAT KIND OF THINGS CONSTITUTE FORCE MAJEURE?

1. Best known: "Acts of God" (Traditionally floods and earthquakes or "one off" events which "involved no human agency": ***Transco plc v Stockport Metropolitan Borough Council [2003] UKHL 61***).
2. Generally meteorological or geological or chemical or biological "or other natural disasters" ...
3. "diseases, epidemics..." And "pandemics?" What is the status of WHO declaration that COVID-19 is a pandemic? If specified in the clause – from that point. If not, can it be so construed?)
4. Typically, a range of events are defined. (COVID-19? Labour; materials; denial of access)
5. Can be as a result of human intervention (terrorist attack, civil war, civil commotion or riots, war, threat of or preparation for war, armed conflict, imposition of sanctions, embargo, or breaking off of diplomatic relations etc)
6. fire, explosion or accident, any labour or trade dispute, strikes, industrial action etc
7. Where the inability to perform is caused itself by the inability of sub-contractors or suppliers to perform – careful examination of the wording of the clauses. If FM causes the subcontractors' or suppliers' non-performance then perhaps covered. If not, performance still required because have to look to the cause as between the parties to the contract. (see below)
8. Expert evidence might be required as to whether COVID-19 falls within the terms of a clause?

CAUSATION AND IMPACT

1. The event must have “caused” the non-performance of the contractual obligation (often non-performance hidden behind a purported Force Majeure event. English courts reluctant to hold FM where negligence or breach of duty/contract by the claiming party)
2. Or has “impacted” on it ...
3. That non-performance must be due to circumstances both beyond the control of the party and for which the party had not assumed responsibility. (See further: ***Seadrill Ghana Operations Ltd v Tullow Ghana Ltd [2018] EWHC 1640 (Comm)***)

PROOF

1. Party seeking to rely on the force majeure clause will bear the burden of proof to
 - a. demonstrate the scope of the clause; and
 - b. demonstrate that the facts in question fall within the scope
2. What is “not foreseeable” or “unforeseen” - After Wuhan in December 2019?
3. Which was “unanticipated”? What degree of anticipation?
4. What about two causes – one FM and one not? English law may still permit the remedy even with concurrency (c.f. insurance and concurrent causes)
5. What about a second wave of lockdown?

WHAT DOES THE PARTY HAVE TO DO TO MAKE THE CLAIM

1. Formalities as to making a claim will likely be specified in the contract.
2. These are crucial.
3. Notice invoking force majeure may need to be given in a particular way, or within a time limit, or the event or consequences may need to be certified by an independent 3rd party body or State or entity.
4. Normally the Notice in writing must specify
 - a. the event claimed,
 - b. the clause subsection under which it is claimed,
 - c. the date when the delay to performance of a particular obligation (with reference to clause in the contract) commenced,
 - d. the cause of the delay,
 - e. the estimated duration of the delay

5. If "framed as a condition precedent" then a dis-conform notice will be defined as failure to give proper notice (and therefore be ineffective) or treated as a deemed waiver of right to claim.
6. The formalities could, of course be waived by the other party (forbearance, election and estoppel). (Careful of "no oral waiver" clauses - *MWB Business Exchange Ltd v Rock Advertising Ltd* [2018] UKSC 24 but be mindful of their limitations.)
7. Clause sometimes requires the non-claiming counterparty to respond to the Notice (with similar formalities) and again a non-response might be defined or characterised as waiver of the right to object
8. Note that if you serve the Notice, usually you cannot "un-serve it" but could on one view ask the counter party to ignore it (see above)

WHAT ARE THE CONSEQUENCES FOR THE CONTRACT IF THERE IS VALID RELIANCE ON A FM CLAUSE

1. Consequences of Force Majeure - depends on the express terms of the clause.
2. Typically, parties agree to suspend performance, or excuse liability for non-performance, for a period, or provide non-monetary entitlement e.g. an EOT.
3. Can be further notice requirements applying after the event is over.
4. If suspension for sustained (and normally defined) period, typically the clause gives the parties a right to terminate at common law, or for convenience under the contract.

DOES THE CLAIMING PARTY HAVE TO MITIGATE?

1. Normally a "reasonable endeavours" requirement to take steps to avoid or mitigate the supervening event or the effects of the event.
2. Might have to evidence this (alternative suppliers, costings etc)
3. With series of contracts and e.g. limited supply – would have to show reasonable apportionment or reasons why one contract performed but not the other.
4. Evidence generally as the event pans out: delay analysis; Government briefings; local orders; contract schedules; sub-contractor correspondence; employment records; emergency plans implemented; legal advice... all pointing towards unforeseen; unanticipated and beyond control...

IS COVID-19 A FORCE MAJEURE EVENT?

1. Lawyer's answer – "it depends" - on the clause...!
2. COVID 19 made a notifiable infectious disease by UK Government on 22 February 2020 in Scotland, on 28 February 2020 in Northern Ireland and on 3 March 2020 in England and Wales. On 5 March 2020, a statutory instrument was made into law that

added COVID-19 to the list of notifiable diseases and SARS-COV-2 to the list of notifiable causative agents.

3. **The Health Protection (Coronavirus, Business Closure) (England) Regulations 2020** came into force on 21 March 2020. The Regulations contain a list of businesses which are required not to open for trade.
4. World Health Organisation: 11 March 2020 COVID-19 was officially designated a "pandemic" by the WHO
5. A performance date could fall within a period when UK government guidance operative.
6. But note non-compliance with government guidance or other good practice, could prevent that party from relying on force majeure. (*Okta Crude Oil Refinery AD v Mamidoil-Jetoil Greek Petroleum Co SA* [2003] EWCA Civ 1031).
7. Complicating factors - Speak to 3PB about:
 - a. Ambiguous or non-existent FM Clauses
 - b. Non-performance owing to secondary effects (Staff illness, delivery problems)
 - c. Consideration of the interplay between FM and exclusion/limitation of liability clauses
 - d. Drafting a new clause in light of current events and anticipated future events (second lockdown etc)
 - e. Whether frustration might provide an alternative remedy.

PART III AND IV OF THE 'STAYING VIRTUALLY UP-TO-DATE' SERIES

Please join us for the next two webinars in this series.

On 13th May 2020, David Berkley QC and Neil Fawcett will deliver a webinar on Business Interruption Insurance Claims.

On the 19th May 2020 Joseph Giret QC, Alex Whatley and Oliver Ingham deliver a webinar on Urgent business and tackling live litigation during COVID-19 with Rebecca Farrell moderating.

To discuss this further with either of the authors or to instruct them for advice on this or any other matter, please contact their clerk David Fielder (Email - david.fielder@3pb.co.uk).

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