

FORCE MAJEURE TOOLKIT



COVID-19








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FIVE STAGES OF ANALYSIS

Force Majeure questions are highly fact sensitive and dependent on the specific wording of the relevant clause. There are no general answers.

The purpose of this 'toolkit' is to provide guidance on the questions that may arise in relation to contracts governed by English law, and the points to look out for and consider.

A fuller version of this Toolkit is available on request. Please [contact us](#) if you would like to receive a copy, or if you have any specific queries in relation to the subjects covered (including queries in relation to contracts governed by laws other than English law).

<p>OBLIGATION</p>  <p>It is necessary first to identify what obligation it is that has been or will be breached by a party seeking to rely on a Force Majeure clause.</p>	<p>EVENT</p>  <p>In order to assess whether the event or circumstance in question falls within the definition of Force Majeure in the relevant clause, the event or circumstance itself must be identified with precision.</p>	<p>CAUSATION</p>  <p>The question of causation is key to any Force Majeure clause. There must be a causal connection between the non-performance of the relevant obligation (see first stage) and the event or circumstance relied on as amounting to Force Majeure (see second stage).</p>	<p>PROCEDURE</p>  <p>Most Force Majeure clauses impose certain formal requirements to be complied with in order to benefit from the relief available. A notice requirement is very common. Some clauses also seek to impose mitigation obligations.</p>	<p>EFFECT</p>  <p>What does the contract say is the effect of the Force Majeure clause? Typically the effect is suspensory. Some prolonged Force Majeure events can give rise to contractual termination rights.</p>
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The information contained in this Toolkit does not constitute legal advice. The situation surrounding COVID-19 is rapidly changing by the day so there is no guarantee that any observations made specifically in this Toolkit in relation to COVID-19 will continue accurately to reflect the position as it evolves. Any such observations reflect the position as at 1800 on 25 March 2020. Please do get in touch with us if you have specific queries arising out of any of the issues mentioned in this note.
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IDENTIFY THE OBLIGATION

THE BURDEN OF PROOF TO ESTABLISH FORCE MAJEURE RESTS ALWAYS ON THE PARTY WHO SEEKS TO BE EXCUSED FROM PERFORMING ITS CONTRACTUAL OBLIGATIONS

- What is the obligation that cannot be complied with?
- Think also about the order in which parties' obligations are likely to be impacted by the event in question:
 - Which obligation will be impacted first?
 - Are there any implied obligations that will arise before express ones (e.g. implied obligations to provide service providers with access to premises)?
- Particularly difficult questions arises in relation to:
 - Contracts where one obligation in a contract containing a scheme of related obligations is affected by a Force Majeure event; and
 - issues involving payment obligations.



THE EVENT

THERE IS NO GENERAL DEFINITION IN ENGLISH LAW OF FORCE MAJEURE. IT IS A CREATION PURELY OF CONTRACT

- There are different ways of defining Force Majeure contractually:
 - Closed list (not common)
 - Open list ('any circumstances beyond the parties' control, including...')
 - Does the ejusdem generis rule (construction of general words following specific examples) apply?
- Some common concepts to which the COVID-19 situation may apply:
 - Act of God
 - Epidemic
 - Act of Government



CAUSATION

THIS IS ALSO HEAVILY INFLUENCED BY THE WORDING OF THE FORCE MAJEURE CLAUSE, AS THERE CAN BE DIFFERENT CONTRACTUAL STANDARDS.

- 'Prevented'
- 'Delayed'
- 'Hindered'
- Where the clause is silent, the standard is likely to be 'prevented'.

THERE ARE ALSO SOME TRICKY LEGAL QUESTIONS:

- Must the Force Majeure event be the only cause of prevention/delay/hindrance?
- What if the Force Majeure event was simply part of a wider commercial decision?
- What if the obligation is just more onerous as a result of the Force Majeure event?



PROCEDURE

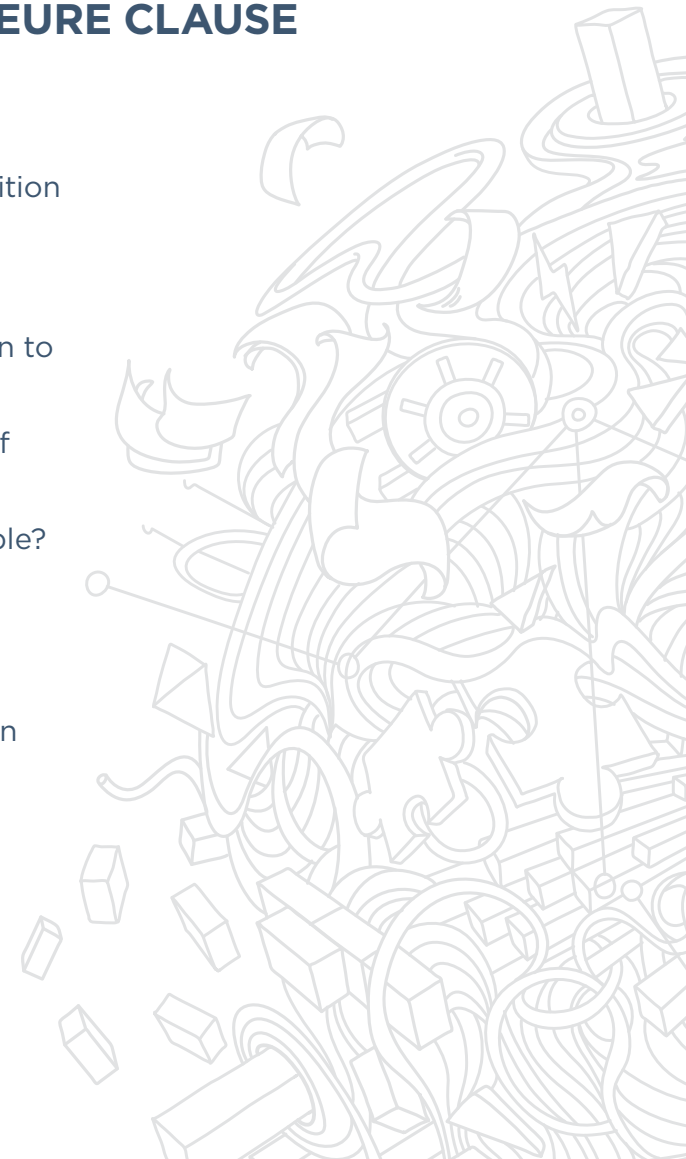
CHECK IF ANY FORMAL REQUIREMENTS NEED TO BE COMPLIED WITH TO BENEFIT FROM RELIEF UNDER THE FORCE MAJEURE CLAUSE

NOTICE

- It is a matter of interpretation as to whether provision of notice is a condition precedent to relief – check the clause carefully.
- What does the clause require and when?
 - Is notice of the event/circumstances sufficient, or is there an obligation to notify a risk/expectation?
 - What details must be given of the event relied on? Must an estimate of duration of interruption be given?
 - Must notice be served immediately or as soon as reasonably practicable?

MITIGATION

- Often express BUT may be implied. It is therefore sensible to take steps in mitigation in any event.
- What is the nature of the mitigation obligation?



EFFECT

FORCE MAJEURE CLAUSES HAVE THE EFFECT OF EXCUSING CONTRACTUAL NON-PERFORMANCE FOR THE DURATION OF THE EVENT OR CIRCUMSTANCE IN QUESTION

- Obligation is suspended.
- Individual contracts vary as to when a Force Majeure clause is engaged. Sometimes a Force Majeure clause is engaged automatically on the occurrence of a Force Majeure event. Some clauses may require that the parties must take certain steps (e.g. the giving of notice, as discussed at [stage 4](#)) in order to engage the Force Majeure clause.
- Force Majeure does NOT automatically terminate contract, though some clauses contain termination rights in the event of a prolonged Force Majeure event.
- Note also the common law principle of frustration. It is generally (but NOT universally) the case that, as a matter of contract interpretation, a Force Majeure clause will exclude the application of the doctrine of frustration.
- Again, there is also the question of the effect on subsequent or related obligations of performance of an obligation being excused on the grounds of Force Majeure, which was addressed in [stage 1](#).



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**PROBLEMS. POSSIBILITIES.
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THE DIFFERENCE IS IMAGINATION.
THE DIFFERENCE IS **AG.****

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