Contracts: force majeure

by *Practical Law Commercial*

Practice notes | **Maintained** | United Kingdom

A note outlining the use of *force majeure* clauses.

Purpose

A *force majeure* clause typically excuses one or both parties from performance of the contract in some way following the occurrence of certain events. Its underlying principle is that on the occurrence of certain events which are outside a party's control, that party is excused from, or entitled to suspend performance of all or part of its obligations. That party will not be liable for its failure to perform the obligations, in accordance with the clause.

It is used in contracts because of the limited remedies available to parties under English common law when a contract becomes impossible to perform. For an example of a *force majeure* clause, see *Standard clause, Force majeure* and its integrated drafting notes.

In the absence of an express clause, the common law doctrine of *frustration* may apply. Frustration only applies in certain restricted circumstances where performance has become impossible. It offers limited relief and remedies to the parties. For information on the law of frustration, see *Practice note, Contracts: frustration*.

Defining force majeure events

The term *force majeure* is derived from French law, but has no recognised meaning in English law. The term should therefore only be used in agreements when it is properly defined.

Force majeure events are usually defined as acts, events or circumstances beyond the reasonable control of the party concerned.

List of events

Drafting a list of *force majeure* events can be cumbersome and lengthy. The draftsman will be concerned about the rule of contract interpretation known as *expressio unius est exclusio alterius*, under which the expression of one thing excludes other things (see *Practice note, Contracts: interpretation: The express excludes the implied (expressio unius rule)*).

In light of this, a draftsman will often include sweep-up language to ensure that any list of events is not treated as an exhaustive list. There is a concern that another rule of contract interpretation might apply. Under *ejusdem generis* (Latin for "of the same kind"), a general word is assumed to be qualified by preceding examples which are of a common category (see *Practice note, Contracts: interpretation: General words at the end of a list (the ejusdem generis rule)*).

However, *ejusdem generis* does not automatically apply to clauses in commercial documents. The court will ask what the parties intended, and will give general words their wider and natural meaning where appropriate (*Chandris v Isbrandtsen-Moller Co Inc [1951] 1 KB 240; Navrom v Callitsis Ship Management SA (The Radauti) [1987] 2 Lloyds Rep 276, 281 (affd. [1988] 2 Lloyd's Rep 416)* and *Henry Boot v Central Lancashire New Town DC 1980 15 B.L.R.*; see also *Dunavant Enterprises Incorporated v Olympia Spinning & Weaving Mills Ltd [2011] EWHC 2028*).

In *Tandrin Aviation Holdings Ltd and Aero Toy Store LLC and others [2010] EWHC 40*, a party argued that the economic collapse of financial markets triggered the *force majeure* clause and prevented it from completing its purchase of aircraft. It was held that the sweep-up phrase "any other cause beyond the Seller's reasonable control" had to be read in the context of the entire clause. The judge noted that while there was no requirement to construe it *ejusdem generis* with earlier specific examples of *force majeure*events, he thought it was telling that nothing in the earlier list of examples was even remotely connected with economic downturn.

Express reference to certain events

Often, parties argue about which events are within or beyond the reasonable control of a party, that is, whether certain events fall within the scope of a *force majeure* clause.

Express inclusion or exclusion of certain events may be necessary when drafting and negotiating the clause, particularly if there is any doubt about whether specific events of particular importance in the context of the proposed transaction are included or excluded.

From the point of view of the party that is most likely to invoke the *force majeure* clause (typically a supplier), examples of events which may warrant express inclusion are:

- **Industrial action.** In the absence of a specific provision, a customer may argue that the supplier could have avoided the industrial action by giving in to wage demands.
- **Subcontractor or third party supplier default.** In the absence of a specific provision, the customer may argue such persons would not have defaulted if they had been more diligently supervised or better paid by the supplier.

Conversely, the party less likely to invoke the *force majeure* clause (typically a customer) may wish to ensure that these events are expressly omitted. A customer may wish to agree only a very tightly defined clause, listing only certain acts, events, accidents or omissions as *force majeure*, and excluding all other possibilities.

Reference to "force majeure" only

Because of its French law origins, the term *force majeure* has no recognised meaning in English law. Use of this term alone in an agreement, with no definition, is unlikely to be effective. For example, a clause stating that the "usual 'force majeure' clauses shall apply" has been held void for uncertainty (*British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd [1953] 1 WLR. 280*).

Specific events

Breach of contract by other party

If one party is prevented from performance because of the other party's breach of contract, the innocent party cannot rely on a *force majeure* clause (*Ministry of Sound (Ireland) Ltd v World Online Ltd [2003] EWHC 2178*).

Compliance with government requests

A *force majeure* clause referring to compliance with government requests required such requests to be independent of the affected party and beyond its control (*Okta Crude Oil Refinery AD v Mamidoil-Jetoil Greek Petroleum Co SA [2003] EWCA Civ 1031*). In that case, a government authority's request to a party not to perform the contract did not fall within the *force majeure* clause in the contract because the affected party had instigated the procurement of the request from the authority. This is a similar point to the issue raised in the *Channel Island Ferries* judgment (see *Take reasonable steps to mitigate effect*) and indicates that the courts will assume that the parties' intention was to grant relief only where the event was genuinely outside of their control.

Events already existing at date of contract

There is no justification for limiting the ordinary meaning of words in a *force majeure* clause to events that were not in existence at the date of the contract (*Navrom v Callitsis Ship Management SA (The Radauti) [1988] 2 Lloyd's Rep 416; SVH Gas Supply & Trading SAS v Naftomar Shipping & Trading Co Ltd Inc [2005] EWHC 2528*).

Events which are foreseeable

There appears to be no common law rule that the event should be unforeseeable or not in existence at the time the contract was made.

Because of this, the party less likely to rely on a *force majeure* clause (such as a customer) will sometimes expressly state that the other party (the supplier) cannot rely on a *force majeure* clause in respect of events which a reasonable supplier should have foreseen and made provisions for it. For example, by making contingency plans.

In *Great Elephant Corp v Trafigura Beheer BV (The Crudesky) [2013] EWCA Civ 905*, the *force majeure* clause expressly referred to an "unforeseeable act or event which was beyond the reasonable control of either party". The Court of Appeal said that the word "unforeseeable" did not add anything to the concept of reasonable control; if an act was within a party's control, it was very likely that it was also foreseeable.

Economic changes

It is a well established principle under English law that a change in economic or market circumstances, affecting the profitability of a contract or the ease with which the parties' obligations can be performed, is not regarded as being a *force majeure* event (*Thames Valley Power Ltd v Total Gas & Power Ltd [2005] EWHC 2208 (Comm)*; *Tandrin Aviation Holdings Ltd and Aero Toy Store LLC and others [2010] EWHC 40 (Comm)*).

In *Tandrin*, the purchaser sought to rely on the economic collapse of the world financial markets (which meant it could not obtain financing), arguing that this triggered the *force majeure* clause in the contract so it could not complete its purchase of aircraft. The High Court rejected this argument, on the basis that none of the events preceding the phrase "any other cause beyond the seller's reasonable control" in the clause were connected to economic downturn; the phrase referred to causes beyond the seller's control (not the purchaser); and that there was no causal link between any inability by the seller to control the credit markets and the purchaser's inability to pay the purchase price.

However, the introduction of the euro was recognised as being a possible *force majeure* event. Continuity of contract was ensured by Article 3 of *Council Regulation (EC) No 1103/97* on certain provisions relating to the introduction of the euro (*OJ 1997 L162/1*). (This provision is now spent.) In some cases, contracting parties will have wanted to take the opposite position, and so, instead, should have included a *force majeure* clause containing express language on this point, such as "the adoption of the euro by [relevant country]" as one of the relevant *force majeure* circumstances.

As already stated, a contract being more expensive to perform is generally insufficient to qualify as a force majeure event: the courts are cautious of parties terminating a contract by way of force majeure when economic conditions mean that it is more expensive to perform and less commercially attractive. This is certainly the case for oil companies. For example in *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd [2018] EWHC 1640 (Comm)*, Tullow sought to terminate its contract with Seadrill for the hire of a drilling rig on the basis that the Government of Ghana had issued an order preventing the drilling of new wells in an area of water that was the subject of an offshore boundary dispute with its neighbour Cote d'Ivoire. Tullow said that this order was a "drilling moratorium" which was listed as a force majeure event in the contract. However, Seadrill claimed Tullow terminated for convenience because it wanted to get out of a contract that had become less commercially attractive. Oil prices collapsed in 2014 which led to a reduced demand for rigs and a substantial reduction in the market rate for the hire of such rigs.

The court was not asked to specifically consider the issue of the contract being less commercially viable due to this change in economic conditions and held that there were two things that prevented Tullow from fulfilling its obligation under the contract:

- The drilling moratorium (a force majeure event); and
- Tullow's failure to progress, and the Government of Ghana's failure to approve, a plan to drill wells in certain oil fields unaffected by the moratorium (not a force majeure event).

As Tullow's failure to fulfil its obligation to provide drilling instructions to Seadrill was caused by these two matters, one a force majeure, the other not, the court held that the force majeure event must be the sole cause of the default (see *Only effective cause of default*). However, related to the contemporaneous fall in the market rate for hire of an oil rig, Tullow's documents contained isolated references to a "Project Voldemort" which Seadrill alleged was Tullow's plan to exit the contract given the falling oil prices and rig hire rates. This was not looked upon by Teare J in a positive light; the courts are cautious of oil companies terminating a contract by way of force majeure when economic conditions mean that it is more expensive to perform and less commercially attractive. This did not aid Tullow's argument.

Similarly, see *Brexit* below, as potentially forming the basis of a specific force majeure event.

Pandemics and civil emergencies

It is worth considering the inclusion of pandemics, epidemics and other civil emergency situations to the list of *force majeure* events in a contract. For a discussion of the legal and practical issues arising from these events generally, see *Practice note, Pandemics and other civil emergencies*.

Relying on force majeure clauses

Burden of proof

The burden of proof is on the party seeking to rely on the *force majeure* clause, who must prove that the event falls within the clause and that non-performance was due to the event.

Interpretation of clause

Whether a *force majeure* clause is triggered by an event will depend on the proper interpretation of the clause. In *Coastal (Bermuda) Petroleum Ltd v VTT Vulcan Petroleum SA (No 2) (The Marine Star) [1996] 2 Lloyd's Rep 383*, the Court of Appeal held that the proper approach to a *force majeure* clause is to interpret it by reference to the words the parties had used, not their general intention.

If a *force majeure* clause provides that the relevant triggering event must "prevent" performance, the relevant party must demonstrate that performance is legally or physically impossible, not just difficult or unprofitable (*Tennants (Lancashire) Ltd v G.S. Wilson & Co. Ltd [1917] AC 495*).

By contrast, the words "hinder" and "delay" have a wider scope and will generally be satisfied if performance is substantially more onerous. A mere increase in the cost of performing the contract, however, would still be unlikely to be enough to trigger a clause with wording of this kind.

Only effective cause of default

The High Court has determined that a force majeure event must be the only effective cause of default by a party under a contract relying on a force majeure provision. In *Seadrill Ghana v Tullow Ghana,* Teare J found that the defendant's failure to provide drilling instructions to the claimant, a contractual obligation, was caused by two matters; one a force majeure, the other not. Citing the Court of Appeal's decision in Intertradex v Lesieur [1978] 2 Lloyd's Reports 509, which establishes the proposition that a force majeure event must be the sole cause of the failure to perform an obligation, the court concluded that there was no sole cause here.

Ultimately, the question was one of construction of the contract and the wording of the force majeure clause. The relevant clause had a causation requirement in these terms:

> "if and to the extent that fulfilment has been delayed or temporarily prevented by an occurrence, as hereunder defined as Force Majeure".

Although the court recognised that in the business of drilling for oil there were many risks which, if they materialised, might prevent a party from being able to fulfil its obligations, the risk that materialised here was not a force majeure within the meaning of the clause so the non-performing party could not rely on force majeure and had to bear the consequences. This decision serves as a reminder that it is not at all easy for a party to seek to avoid obligations it has freely undertaken.

In *Classic Maritime Inc v Limbungan Makmur SDN BHD [2019] EWCA Civ 1102*, the Court of Appeal, in overruling the trial judge's award of nominal damages, held that a charterer could not rely on the exceptions clause in the affreightment contract as it would not have been ready and willing to provide cargoes for shipment even if the exceptions event had not occurred. It demonstrates that a party will not be excused performance of its obligations under the contract because of an exceptional event, where it is not able and willing to perform its obligations in the absence of any supervening event preventing performance. The exceptions clause was akin to a force majeure clause.

In this appeal case Limbungan, a charterer, was contractually obliged to supply Classic, a shipowner, with iron ore cargo but when the supplying mine shut down due to a dam bursting, it claimed force majeure under its contract of affreightment. Classic claimed significant damages for lost freight charges. The High Court initially found that, since the charterer would not have shipped the cargo even if the dam had not burst, the causation requirement of the force majeure clause was not met. It could therefore not rely on force majeure to excuse its failure to supply cargo and was liable in breach. This part of the decision was upheld by the Court of Appeal, which held that the charterer could not rely on the exceptions clause in the affreightment contract as it would not have been ready and willing to provide cargoes for shipment even if the exceptions event (the dam bursting) had not occurred. The Court of Appeal based this analysis very much on the interpretation of the specific clause in question.

The Court of Appeal however, overturned the trial judge's assessment of damages as he had found that the charterer was not liable for substantial damages, only nominal damages, because the dam burst would in fact have prevented the charterer from shipping any iron ore pellets. The Court of Appeal disagreed and overruled the award of nominal damages as being a distortion of the long-established compensatory principle. This distortion led to the paradoxical result that, even though the exceptions clause did not provide the charterer with a defence to liability, the clause meant that the charterer was not obliged to pay substantial damages for failing to perform its contract.

Take reasonable steps to mitigate effect

A force majeure clause usually requires the defaulting party to show that it used its reasonable endeavours to prevent, or at least mitigate, the effects of the force majeure.

In *Channel Island Ferries Ltd v Sealink UK Ltd [1988] 1 Lloyd's Rep 323*, the question for decision upon appeal was whether a force majeure clause in a "one off" joint venture agreement for the provision of a ferry service could be relied upon. Hirst, J. at first instance held on the fact that it could not and Sealink appealed. The Court of Appeal dismissed the appeal and said that Hirst, J. was right on the facts and on the construction of the clause. The Court of Appeal said that any clause which included language referring to events "beyond the control of the relevant party" could only be relied on if that party had taken all reasonable steps to avoid its operation or mitigate its results. This appears to be a rule of interpretation.

In *Seadrill Ghana v Tullow Ghana,* the High Court also considered, obiter, whether the defendant had used its reasonable endeavours to avoid or circumvent the effect of the force majeure, as required by the force majeure clause. The court concluded that the defendant had failed in this regard; it ought to have provided the obligatory drilling instructions and did not. This was a further reason why the defendant was unable to rely upon force majeure.

Acts of agents

In *Great Elephant Corp* the Court of Appeal held that reference in a free on board (FOB) contract to acts or events beyond the reasonable control of "either party" meant "beyond the reasonable control of that party or any party to whom the contractual performance of that party's obligation has been delegated". It is a FOB seller's obligation to place cargo free on board a vessel, and the sellers had delegated performance of their obligations. Moreover, the contract also included a clause requiring each party to procure that its agents complied with all rules, regulations and directions necessary for performance by each party of its obligations. Because in this case, the agent had broken terminal regulations, the sellers had breached this clause, and to allow them to rely on the *force majeure* clause would have allowed the sellers to take advantage of their own breach of contract.

Effect of a force majeure clause

The effect of a *force majeure* clause will depend on how it is drafted. Generally, its effect includes some or all of the following:

- **Suspension**. For the most part, *force majeure* clauses are suspensory, that is, the affected obligations do not go away. The obligations are suspended while the *force majeure* event continues, unless the parties agree otherwise. When the event comes to an end, the contract is re-activated. In some cases, the non-performing party will have to serve notice of *force majeure* on the other party in order to benefit from the clause, as was the case in *GPP Big Field LLP v Solar EPC Solutions SL (Formerly Prosolia Siglio XXI) [2018] EWHC 2866 (Comm)*, where the High Court found that the contractor was not delayed by a force majeure event and, in any event, did not give valid notice of force majeure (see *Legal update, LDs not a penalty, no valid notice of force majeure and parent company liable under an indemnity (High Court)* specifically at *No event of force majeure and no valid notice*). In other instances, the protections of the *force majeure* clause will automatically be available to the non-performing party when that event occurs.
- **Non-liability**. Once the *force majeure* clause is triggered, the non-performing party's liability for non-performance or delay in performance is removed, usually for as long as the *force majeure* event continues.
- **Obligation to mitigate**. In addition, the parties may also agree that the benefit of a *force majeure* clause should only be available where the affected party had taken all possible steps to avoid the event or the impact of its consequences. In many cases, this will be difficult for the affected party to prove. A duty to mitigate may be implied in any event (see *Channel Island Ferries Ltd*).
- **Right to terminate**. Although many *force majeure* clauses go no further than to suspend the parties' obligations so long as the *force majeure* event continues, this may be unsatisfactory if it becomes commercially unfeasible for the parties to resume performance of the agreement once the *force majeure* event ceases. To cater for this, some *force majeure* clauses allow either or both parties to serve notice terminating the agreement after a specified period so that they can make alternative arrangements. Termination can be without liability, except in respect of prior breaches. Although this preserves a neutral position, it may also be necessary to consider whether this would benefit one party. For example, if the agreement provided for advance pre-payment for goods or services which were then not provided due to the *force majeure* event, the paying party should be entitled to restitution.

Statutory control of force majeure clauses

Standard terms and conditions

In standard form terms of business, a *force majeure* clause will be governed by section 3(2) of *Unfair Contract Terms Act 1977* (UCTA).

Under this, a party cannot rely on any term to exclude or restrict liability for its own breach of contract, or claim to be entitled to render a contractual performance substantially different from that which was reasonably expected or (in respect of the whole or any part of its contractual obligation) to render no performance at all, unless such a term satisfies the reasonableness test under UCTA (*section 3(2), UCTA*).

The clause would therefore need to be reasonable to remain valid. When one party seeks to classify events, which are in fact within its control, as *force majeure* events, this could potentially be unreasonable.

Consumer contracts

In a consumer contract made on or after 1 October 2015, the *Consumer Rights Act 2015* (CRA) will apply. A supplier's *force majeure* clause will need to satisfy the CRA's concepts of fairness and transparency. In a consumer contract the CMA considers it permissible to exclude liability for delay or non-performance only where this is genuinely due to an event outside a trader's control (see *CMA Unfair contract terms guidance: CMA37, paragraph 5.9, CMA37*). As the term *force majeure* may not be understood by consumers, it is advisable to use wording such as "events outside our control". For more information, see *Practice note, consumer contracts: Main terms in consumer contracts: Excusing delay*, and for an example clause, see *Standard document, On-premises (in-store) consumer goods, services and digital content terms and conditions: post 1 October 2015, clause 7.3*.

For contracts made before 1 October 2015 the CMA guidance was essentially the same but the underlying legislation was the *Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083)* and UCTA. For more information, see *Practice note, Consumer contracts: pre-1 October 2015, Excluding and limiting liability in consumer contracts*.

Brexit

On 23 June 2016, the UK voted to leave the EU and on 29 March 2017, the UK government gave formal notice of the UK's intention to leave under Article 50(2) of the Treaty on the European Union. For more information, see *Legal update, Government triggers Article 50 and starts countdown to Brexit*. The UK's departure was scheduled to take place on 29 March 2019 (see *Practice note, Brexit: Article 50 and the withdrawal process: Article 50 timeframe for negotiations and exit*) but this has now been delayed; if the UK does leave the EU, it will be on *exit day* (for more information, see *Practice note, Brexit: extension and exit day*). The direct legal and practical implications of Brexit for the parties to any commercial arrangement are unclear. However, we do know that the withdrawal of the UK from the EU is a complex process and may have a profoundly disruptive effect on a commercial contract. For more information on Brexit in the context of commercial agreements, see *Practice note, Brexit: implications for commercial law* and *Article, Brexit and commercial contracts: assessing the impact*.

The occurrence of Brexit and/or a Brexit-related event, could potentially form the basis of a *force majeure* event. This is down to the potential for Brexit to affect the commercial bargain underlying the contract. For instance,

cross-border trading relationships that are sensitive to currency exchange rate fluctuations, or to changes in taxes and tariffs. Whether a Brexit-related trigger event could warrant express inclusion in a *force majeure* clause would essentially depend on the nature of the contract. Where relevant, the parties should consider how the contract might be affected by the UK's departure from the EU, not a simple task when the form of the UK's future relationship with the EU remains unknown, and consider whether a Brexit-related trigger event would be appropriate. Essentially the parties would need to define the Brexit-related trigger event (in itself, a complex task), and specify what consequences would flow from that. Whether such a clause would be triggered depends on the exact drafting of the provision and the application of the rules of contract interpretation. References to a government-imposed change might be helpful in this context but the inclusion of a specifically defined Brexit-related trigger event would be preferable.

In the absence of wording specifically contemplating Brexit, or a reasonably analogous event, the market consensus seems to be that a typical *force majeure* clause is unlikely to be triggered by Brexit. For further discussion, see *Practice note, Drafting for Brexit: Brexit clauses* at *Are there standard provisions that are already included in contracts that I can rely on instead?* and *Standard clause, Force majeure* and its integrated drafting note on *Brexit*.

In the absence of an express clause contemplating Brexit, the common law doctrine of *frustration* could potentially apply. However, frustration only applies in certain restricted circumstances where performance has become impossible and offers limited relief and remedies to the parties. For more information on the law of frustration, see *Practice note, Contracts: frustration*.

For a discussion of the key issues to consider on drafting for Brexit (including discussion of *force majeure* provisions), and examples of long and short form Brexit clauses, see *Practice note, Drafting for Brexit: Brexit clauses*.

We are monitoring the progress of Brexit and will update our materials to reflect new developments as and when appropriate. For the latest updates on Brexit, see the *Brexit key developments: tracker* and visit Practical Law's *Brexit page*. For the main developments in the Brexit negotiations, see the *Brexit negotiations: tracker*.

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