

FORCE MAJEURE

Impartiality of the Engineer

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The term Force Majeure is known to most of us but what does it mean and should we be concerned about its inclusion in our contracts?

Herbert Smith's Peter Godwin and Dominic Roughton explain that a Force Majeure clause is included in a contract to enable one (or both) parties to be excused from performance of their contractual obligations, or to suspend or delay performance, upon the happening of a specified event or events beyond the party's control.

The events listed in a Force Majeure clause will be a matter for negotiation between the parties and it is one of those clauses that parties do not usually have difficulty with. However, as our businesses are affected more and more by international factors, it is important to get it right. Some commonly listed events include Acts of God, war, belligerent action, hostilities (whether or not war has been declared), terrorist acts, acts of any civil or military authority, governmental or regulatory decisions, refusal of licences, riot, civil commotion, strike, acts of vandalism, fire, flood, earthquake, extreme weather conditions, epidemic, radioactive, chemical or biological contamination and aircraft crashes. There are many other possibilities.

1. Was the recent conflict in Iraq a Force Majeure event?

Most Force Majeure clauses will list war as a Force Majeure event allowing a party to rely on the clause if they have been prevented or hindered from performing the contract due to the outbreak of war. Many Force Majeure clauses will also include wording such as war or belligerent action, invasion, hostilities (whether or not war has been declared).

While it seems clear that the recent US-led attacks in Iraq constitutes an invasion and belligerent action, there is ongoing debate in academic circles as to whether it was a war.

If a court held that it was not a war, then to rely on the conflict as a Force Majeure event, the particular Force Majeure clause must include wording such as belligerent action or invasion etc.

2. Is SARS or Bird Flu a Force Majeure Event?

The outbreak of atypical pneumonia, known as Severe Acute Respiratory Syndrome (SARS) or current outbreaks of bird flu has led to, and may lead to, many declarations of Force Majeure.

The simplest way for SARS or Bird Flu to come within a Force Majeure clause would be if the clause includes the wording epidemic. An epidemic is a temporary but widespread outbreak of a particular disease and the World Health Organisation's classification of SARS as an epidemic is good authority that SARS is such an outbreak.

If SARS or Bird Flu was not considered to be an epidemic at the time that the party sought to rely on the Force Majeure clause, or if epidemic is not listed as a Force Majeure event, then it is likely that a party

would have to try to rely on government decision or administrative action or other similar wording commonly included in Force Majeure clauses. An example of administrative action taken as a result of SARS is the closure of buildings or the cancellation of events in SARS-affected areas.

Assuming that the conflict in Iraq or the SARS epidemic was a Force Majeure event covered by a particular contractual Force Majeure clause, the party seeking to rely on the clause must then prove that they have been prevented or hindered (depending on the wording of the clause) from performing the contract as a result of that event. In other words, there must be a causal connection between the Force Majeure event and the nonperformance. There is an ongoing debate as to whether the foreseeability of the Force Majeure event at the date the contract was entered into is relevant. Some argue that if it was foreseeable by the party seeking to rely upon the Force Majeure event, that party cannot so rely. Others argue that the only question should be whether the event was beyond the control of the party seeking to rely upon it. The details of this debate are beyond the scope of this article.

The party who wishes to rely on the Force Majeure clause must prove the facts bringing the case within the specific terms of the clause. They must prove that one of the events referred to in the clause has occurred and that they have been prevented, hindered or delayed (depending on the specific wording used) from performing the contract by reason of that event. Naturally, a party cannot rely upon any event which it has caused itself. Further, where possible, it must take reasonable steps to avoid or mitigate the consequence of the event.

Many Force Majeure provisions will also require the party seeking to rely on the event of force majeure to give notice within a specified period. The consequence of such a notice being given late is often a matter of contention. There are a number of cases in which the notice of reliance on a Force Majeure clause was defective for being out of time. The question whether the contractual requirement as to the time of giving notice is a condition or a less important (intermediate) term depends on the following three factors.

the form of the Force Majeure clause itself;
the relation of the clause to the whole contract; and
general considerations of law.

Examples of both types of terms and the distinction between them were set out in the *Bremer Handelsgesellschaft m.b.H. v. Vanden Avenne-Izegem P.V.B.A.* (HL) [1978] 2 Lloyd's Rep. 109 case. A clause requiring the sellers to advise buyers without delay was held to be an intermediate term only, so that failure to give the required notice without delay did not prevent the sellers from relying on the clause. It would only have had this effect if the resulting delay had caused serious prejudice to the buyer. The term was not expressly drafted as a condition, unlike other terms in the contract, and the term without delay was inherently vague and did not enable the buyer to ascertain exactly when the seller was in default.

By contrast, a second stipulation contained in the same contract required notice of certain events delaying shipment to be given within seven days of the occurrence; and that further notice was to be given for an extension of time not later than two business days after the last day of the contract period of shipment. The clause went on to specify further time limits and to provide exactly when the contract was to be considered void. It was held that the stipulation as to the timing of the notice for an extension was a condition – it specified fixed days for the giving of various notices and was a complete regulatory code.

Notice provisions should therefore be complied with to avoid future arguments.

By its very nature, a clause drafted to deal with unforeseen events cannot always cover all such events and it may yet be necessary to rely on the common law of frustration.

3. Frustration

The common law doctrine of frustration generally operates to discharge a contract where a supervening event occurs (without the default of the parties concerned and for which the contract does not make sufficient provision) which results in performance of the contract being physically or legally impossible, or the obligations under the contract being radically different to those originally undertaken.

The doctrine normally operates within relatively narrow confines. It cannot usually be invoked merely to relieve a party from an imprudent commercial bargain, nor where the parties have foreseen the relevant event and provided for it in the contract. Mere inconvenience, or hardship, or financial loss in performing the contract, or delay which is within the commercial risk undertaken by the parties, will usually be insufficient to frustrate a particular contract. Similarly, contrary to popular belief, a Force Majeure clause will not provide relief because something has become more expensive unless the Force Majeure clause specifically says that it will.

In addition, the purported supervening event should not be explicable by reason of the conduct of the party seeking to rely on it.

5. Some difficulties in drafting a Force Majeure clause

The uncertainty relating to the present approach of the courts to the interpretation of Force Majeure clauses is worthy of note, as this uncertainty may complicate the task of drafting such a clause in a contract.

The first area of uncertainty relates to whether or not Force Majeure clauses are to be construed contra proferentum. This means any uncertainty in the clause will be interpreted against the person wishing to rely upon it. In English law this was the situation (see *Fairclough, Dodd & Jones Ltd v. JH Vantol Ltd* [1957] 1 WLR 136), but the trend of recent cases has been in favour of giving effect to the intention of the parties, without adopting any preconceived notions of what the contract should mean, even in relation to exclusion clauses. In any event, the draftsman of a Force Majeure clause should, as with any contractual clause, aim to draft with clarity and precision.

The second source of uncertainty relates to the potential applicability of statutory provisions that seek to protect a weaker party. For example in England, there is the Unfair Contract Terms Act 1977. Although they may not strictly be exclusion clauses, there is considerable weight in the proposition that Force Majeure clauses may be covered by the UCTA and more particularly section 3. Very broadly, it appears that the wider the scope of the events which fall within the Force Majeure clause, the more likely it is that the clause may be regulated by UCTA in England.

Given recent international events, a party is well advised to consider Force Majeure provisions in both domestic and international contracts.