

After Lockdown: Bates Wells Guide

To Force Majeure

With the coronavirus still causing problems for many organisations, the uncertainty is set to continue for some time as the world adjusts to our new normal. As we all begin to come out of lockdown, you may be wondering where you stand in terms of your key contracts, what your contractual obligations are and whether force majeure applies to your situation. In this guide we walk you through the key considerations relating to force majeure clauses.

What is a force majeure clause?

Many commercial contracts will include a “force majeure” clause. Usually, this will excuse one or both parties from performance of the contract in some way (e.g. by delaying performance or terminating the agreement) when certain events outside the parties’ control occur, without incurring liability for a breach of contract.

The term “force majeure” has no fixed definition in English law, so it must be properly defined in the contract for the clause to be effective. Whether and how force majeure applies will therefore depend on what the clause in your contract says.

Is the COVID-19 pandemic a force majeure event?

Force majeure events are commonly defined as acts, events or circumstances beyond the “reasonable control” of the party concerned. Typically, contracts list specific events (which may include pandemic disease and government actions) that will trigger the force majeure clause, often supplemented by a “sweep up” provision to catch other events (e.g. “any other cause beyond the Seller’s reasonable control”).

The clause should also make clear when a force majeure event can be relied on. For example, some clauses will apply only where performance is entirely prevented; others will allow greater flexibility, applying (for example) where performance is delayed or hindered. It is essential to consider precisely how and why the pandemic is affecting your ability to perform contractual obligations: often, for example, the effect on the parties will come from specific legislative measures taken in response to the pandemic, not from the pandemic itself.

What should I do if I want to rely on a force majeure clause?

- **Seek early legal advice** – whether a force majeure clause will apply will depend on how it is drafted and the specific circumstances of the parties.

- **Understand the consequences** – if the clause applies, what is its effect? Does it terminate obligations, or allow the parties to delay performance? If so in what circumstances and for how long?
- **Consider alternatives** – is there any way that you can perform your obligations under the contract, even if it would be more expensive or more difficult? The fact that performance becomes more onerous will usually not trigger a force majeure clause, unless the clause clearly envisages otherwise.
- **Notice** – the contract should state when, how and to whom you are required to give notice to the other party that you want to rely on the force majeure provisions. It is generally advisable to give notice as soon as possible, complying with any contractual deadline and providing a coherent explanation as to how your performance has been affected. Confirm in writing that you are giving notice, even if the contract does not specifically require you to give written notice.
- **Proof** – a party seeking to rely on a force majeure clause must be able to show that:
 - o A force majeure event has arisen;
 - o It has caused their ability to perform their obligations to be affected in the way the clause envisages (whether that is prevention, hindrance, delay or some other effect);
 - o This is due to circumstances beyond their control; and
 - o There were no reasonable steps they could have taken which would have avoided or mitigated the event or its consequences.
- **Keep records** – in particular, you should document the reasons why your ability to perform your obligations under the contract is being affected, any steps you took to find alternative ways to perform what was agreed and how you tried to mitigate the impact of the force majeure event.

What if there is no force majeure clause?

If there is no force majeure clause or your circumstances fall outside the scope of the clause, you may be able to show that the contract has been frustrated. This means that the contract has become legally and/or physically impossible to perform, **or changes the parties' obligations into something entirely different from what they had envisaged**, through no fault of the parties. Frustration can be difficult to establish and has the effect of immediately terminating the contract, which may not be desirable for one or both of the parties.

After lockdown

As we emerge from lockdown, restrictions on our ability to work, travel and assemble will gradually be lifted; delays and interruption in supply chains may be removed. If you are party to a contract under which performance has been suspended, it is important to assess on an ongoing basis whether the reasons for suspension still apply: a party will not be able to continue to rely on a force majeure clause once it becomes possible to resume performance.

If you are entering into a contract, ensure you check whether it contains a force majeure clause. If it does, consider whether it is likely to assist you – for example in the event that lockdown measures are reintroduced if infection rates increase – or could it be improved? If there is no force majeure clause, should one be added?

Take particular care where you are contracting on another party's standard terms, which may have been drafted long before the coronavirus outbreak and no longer reflect the realities of commercial life in a time of pandemic.

For more advice, please get in touch
with our [Dispute Resolution](#) team.



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