

Coronavirus – Force Majeure or Frustration?

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The recent outbreak of novel coronavirus (also known as COVID-19) has had devastating effects since the first cases were reported in the city of Wuhan in China on 23 January 2020. As of 19 February there have been 75,285 reported cases of the virus, spanning 26 countries and resulting in 2,009 deaths.¹ On 30 January, the World Health Organization (the “WHO”) declared the outbreak was a Public Health Emergency of International Concern (“PHEIC”).²

The severity of the outbreak combined with the impact of responsive measures implemented by a number governments has also caused significant disruption to supply chains and other commercial relationships.³

Parties who are or may be unable to perform their obligations as a result of the epidemic may find a means of suspending or exiting a contract, or a shield from liability via *force majeure* clauses in their contracts, or through the doctrine of *Frustration*.

We examine below the broadly similar means by which these concepts are approached by the Courts in two common law jurisdictions (the UK and the US) and in a Civil Code jurisdiction (France).

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¹ World Health Organization, 2019-nCoV situation dashboard,

<http://who.maps.arcgis.com/apps/opsdashboard/index.html#/c88e37cfc43b4ed3baf977d77e4a0667>

² Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus, World Health Organization, 30 January 2020, [https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov))

³ See e.g. Nikou Asgari, Financial Times, *Jaguar Land Rover rushes parts out of China in suitcases*, 18 February 2020, <https://www.ft.com/content/c68b80d8-5266-11ea-90ad-25e377c0ee1f>

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What is a Force Majeure Clause?

Force majeure clauses seek to define circumstances beyond the parties' control which can render performance of a contract substantially more onerous or impossible, and which may suspend, defer or release the duty to perform without liability.

They can take a variety of forms but most list a number of specific events (as well as more general 'catchall' wording to make clear the preceding list is not exhaustive) which may constitute a "*Force Majeure Event*" and excuse or delay performance, or permit the cancellation of the contract. Matters such as war, riots, invasion, famine, civil commotion, extreme weather, floods, strikes, fire, and government action (i.e. serious intervening events that are outside the control of ordinary commercial counterparties) are typically included within the scope of Force Majeure Events.

Force Majeure Clauses Under English Law

Force majeure is a contractual term and has no prescribed definition in English law. As a result, such clauses are construed in accordance with ordinary principles of contractual interpretation with regard to their precise words. The English Courts have found clauses which reference generic "*force majeure conditions*" void on grounds of uncertainty.⁴ Additionally, the Courts have held that where clauses provide that a Force Majeure Event must:

- "*prevent*" a party from being able to perform its obligations or make it "*unable*" to do so, it must be impossible for that party to perform rather than just be more difficult or costly, and
- "*hinder*", "*impede*", "*impair*" or "*delay*" a party from being able to perform its obligations, performance must only be significantly more onerous (although even in these circumstances a force majeure clause is unlikely to be triggered

merely because a contract has become more expensive to perform).

A party who seeks to rely on a force majeure provision to excuse it from non-performance bears the burden of proving (on the balance of probabilities) that:

- a Force Majeure Event has occurred and that it had the effect specified in the contract (e.g. it prevented / hindered / impeded performance),
- its failure to perform was due to circumstances outside its control, and
- there was nothing it could reasonably have done to avoid the Force Majeure Event or mitigate its effects.⁵

Parties will not be able to claim force majeure in relation to events which have been caused by their own negligence or deliberate default. However, there is no requirement that a force majeure event must be unforeseeable. The English Courts have also recently held that force majeure clauses will only apply where the sole cause of a party's non-performance was a Force Majeure Event.⁶ Where the definition of Force Majeure Event consists of a list of specific events followed by broader 'catchall' wording (e.g. "*any other cause beyond the parties' reasonable control*"), the generic wording will have its natural wide meaning and is not qualified by the preceding list.

As to whether the coronavirus outbreak would trigger a force majeure clause under English law, the issue will be determined on a case-by-case basis, by reference to the wording in the contract. If the definition of Force Majeure Event encompasses "*epidemics*", "*diseases*" or similar language, it is likely to be triggered.

If it does not, parties seeking to classify the outbreak as a Force Majeure Event may have to rely on more generic language. They may find support for their position in the WHO's designation of the coronavirus

⁴ *British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd* [1953] 1 WLR. 280

⁵ *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640 (Comm)

⁶ *Maritime Inc v Limbungan Makmur SDN BHD* [2019] EWCA Civ 1102

outbreak as a PHEIC, which is defined as “an extraordinary event which is determined...:

- (i) to constitute a public health risk to other States through the international spread of disease; and
- (ii) to potentially require a coordinated international response”.⁷

The WHO has commented this definition “*implies a situation that: is serious, unusual or unexpected; carries implications for public health beyond the affected State’s national border; and may require immediate international action.*”⁸ It is also notable (although not determinative) that an international trade promotion agency in China (the China Council for The Promotion of International Trade) has started issuing force majeure certificates to Chinese businesses struggling with the effects of the outbreak.⁹

Frustration Under English Law

In the absence of a force majeure clause, the English Courts will not imply one, but the common law doctrine of Frustration may apply. A contract is frustrated (and automatically terminated) when an event occurs after the formation of the contract that makes:

- it physically or commercially impossible to perform a fundamental obligation in the contract, or
- a fundamental obligation radically different to that originally envisaged when the contract was entered.

The threshold for proving Frustration is typically higher than the standard required by force majeure clauses (which do not necessarily apply to

‘fundamental’ obligations in a contract, nor require that they are so significantly affected).

Additionally, a party cannot claim that a contract has been frustrated where, amongst other things, the parties have made provision for the consequences of the supervening event (e.g. through a force majeure clause), an alternative method of performance is possible, the contract is simply more expensive to perform or where the alleged frustrating event should have been foreseen by the parties.

A topical example of the difficulty in proving Frustration was recently seen in the 2019 case of *Canary Wharf (BP4) T1 Ltd v European Medicines Agency*¹⁰, in which the European Medicines Agency (the “EMA”) failed to convince the High Court that the relocation of its headquarters from London to Amsterdam (due to Brexit) frustrated its 25 year commercial lease in Canary Wharf. The Court found that, amongst other things, it was foreseeable in 2011 when the lease was agreed, that during its term the EMA might have to vacate the premises. Consequently, Brexit was adjudged not to have radically altered the EMA’s performance under the contract. The case is illustrative of the principle followed by the Courts that, “*since the effect of frustration is to kill the contract and discharge the parties from further liability under it, ... [it] must not be lightly invoked and must be kept within very narrow limits*”.

Force Majeure Clauses Under US Law

Using New York law as an example, force majeure clauses in contracts are generally treated similarly to those under English law. The non-performing party seeking to avoid its obligation under a contract has the burden of demonstrating the existence of a Force Majeure Event and must also demonstrate that it engaged in efforts to fulfill its contractual obligation

⁷ Article 1, International Health Regulations (2005) <https://apps.who.int/iris/bitstream/handle/10665/246107/9789241580496eng.pdf;jsessionid=C27F680B20E1EE483AAF0480A25D689A?sequence=1>

⁸IHR Procedures concerning public health emergencies of international concern (PHEIC), World Health Organization, <https://www.who.int/ihr/procedures/pheic/en/>

⁹ <https://www.reuters.com/article/us-china-health-trade/china-trade-agency-to-offer-firms-force-majeure-certificates-amid-coronavirus-outbreak-idUSKBN1ZU075>

¹⁰ [2019] EWHC 335 (Ch)

despite the alleged force majeure, but was unable to do so.¹¹

New York Courts tend to interpret force majeure clauses narrowly.¹² Where a force majeure clause contains enumerated examples, as opposed to a general provision, then the Court will typically find that only those events specifically listed are sufficient to excuse performance.¹³ To the extent the clause also includes a catchall provision, Courts will generally limit it to include occurrences “*of the same kind or nature*” as those enumerated.¹⁴

Additionally, Courts applying New York law typically require the non-performing party to demonstrate the unforeseeability of the alleged Force Majeure Event¹⁵ and that it is the cause of its inability to satisfy its contractual obligation. In certain circumstances, Courts applying New York law have found instances of indirect causation to satisfy this requirement.¹⁶

Frustration and Impossibility Under US Law

As in the UK, in the absence of an applicable force majeure clause a party might be able to rely on the doctrine of Frustration to excuse non-performance. Frustration of purpose occurs where an unforeseen event, not caused by either party, radically changes the circumstances surrounding the agreement so that performance of the contract is significantly different than the parties initially intended.¹⁷ Like force

majeure, this doctrine is very narrow and usually limited to “*where a virtually cataclysmic, wholly unforeseeable event*” makes the contract worthless to a party.¹⁸ Under New York law, as under English law, Frustration requires more than a contract becoming more expensive to fulfill.¹⁹

Additionally, New York law recognizes the doctrine of impossibility of performance as providing another basis by which a party lacking an applicable force majeure clause can seek to excuse non-performance. The impossibility doctrine applies where the “*destruction of the subject matter of the contract or the means of performance*” renders it objectively impossible for a party to execute its obligations under a contract.²⁰ The impossibility must have resulted from an unanticipated, unforeseen event that the parties could not have “*guarded against in the contract.*”²¹ As with both force majeure and Frustration, courts very narrowly apply the impossibility doctrine, reserving it for extreme circumstances.²²

Force Majeure Under French Law

Civil Code jurisdictions approach matters in a similar manner, but with some important differences. Thus, French law provides a statutory definition of force majeure. Article 1218 of the French Civil Code (the “FCC”) provides that:

(finding defendants’ delay in fulfilling its contractual shipping obligation excusable where delay was caused by post-hurricane congestion, as opposed to the hurricane itself).

¹⁷ See *Jack Kelly Partners LLC v. Zegelstein*, 33 N.Y.S.3d 7, 10 (N.Y. App. Div. 2016); see also Restatement [Second] of Contracts, § 265.

¹⁸ *A + E Television Networks, LLC v. Wish Factory Inc.*, No. 15-CV-1189 (DAB), 2016 WL 8136110, at *12 (S.D.N.Y. Mar. 11, 2016) (citing *United States v. Gen. Douglas MacArthur Senior Vill., Inc.*, 508 F.2d 377, 381 (2d Cir. 1974)).

¹⁹ *A + E Television*, 2016 WL 8136110, at *12.

²⁰ *Kel Kim Corp.*, 70 N.Y.2d at 902.

²¹ *Id.*

²² *Id.*

¹¹ *Id.* (quoting *Phillips Puerto Rico Core, Inc. v. Tradax Petroleum, Ltd.*, 782 F.2d 314, 319 (2d Cir.1985)).

¹² *Reade v. Stoneybrook Realty, LLC*, 882 N.Y.S.2d 8, 9 (2009).

¹³ *Id.* (quoting *Kel Kim Corp. v. Cent. Markets, Inc.*, 519 N.E.2d 295, 296 (N.Y. 1987)).

¹⁴ *Rochester Gas*, 2009 WL 368508, at *8 (quoting *Kel Kim*, 519 N.E. 2d at 295).

¹⁵ See e.g. *In re Cablevision Consumer Litig.*, 864 F. Supp. 2d 258, 264 (E.D.N.Y. 2012) (a breakdown in negotiations was not unforeseeable); but see *Starke v. United Parcel Serv., Inc.*, 513 F. App’x 87, 89 (2d Cir. 2013) (noting that a conclusion that force majeure clauses can only excuse breach for unforeseeable circumstances was not warranted).

¹⁶ See e.g. *Toyomenka Pac. Petroleum, Inc. v. Hess Oil Virgin Islands Corp.*, 771 F. Supp. 63, 67 (S.D.N.Y. 1991)

“There is force majeure in contractual matters when an event beyond the control of the debtor, which could not have been reasonably foreseen at time of signing of the contract and whose effects cannot be avoided by appropriate measures, prevents the performance of its obligation by the debtor”.

Three requirements derive from this definition for an event to qualify as force majeure. The event preventing the performance of the contract should be: (i) external (i.e. outside the contracting parties’ control), (ii) unforeseeable at time of signing of the contract, and (iii) irresistible (i.e. one whose adverse effects could not have been prevented by appropriate measures). Depending on the circumstances, this definition may include the coronavirus outbreak and apply even to contracts which do not contain any express contractual provision on force majeure.

Article 1218 further distinguishes between temporary and final force majeure:

“If the impediment is temporary, the performance of the obligation is suspended unless the resulting delay justifies termination of the contract. If the impediment is final, the contract is automatically terminated and the parties are released from their obligations (...).”

It follows from this provision that the coronavirus outbreak, although likely to last for a limited period of time, may constitute a temporary force majeure event, or a final force majeure event for contracts for which time is of the essence and which may consequently be terminated.

As a result of a suspension of performance of contracts caused by the coronavirus outbreak, the debtor would not be liable for breaches and delays resulting from this event. Indeed, Article 1231-1 of the FCC provides that:

“The debtor is condemned, if necessary, to the payment of damages either because of the non-fulfilment of the obligation, or because of the delay in the execution, if he does not justify that the execution was prevented by force majeure.”

In addition to this statutory definition of force majeure, French law provides, for contracts signed after 1 October 2016, a right to renegotiate the contract in case of a change in circumstances:

“If a change in circumstances that was unforeseeable at the time of signing of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. The first party must continue to perform his obligations during renegotiation. In the event of refusal or failure of the renegotiation, the parties may agree to the termination of the contract, on the date and under the conditions to be determined, or request the Court by mutual agreement to adjust the content of the contract. If no agreement is reached within a reasonable time, the Court may, at the request of a party, revise or terminate the contract, on the date and on the conditions it chooses”.²³

This provision is the closest equivalent under French law to the common law doctrine of Frustration.

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²³ Article 1195 of the FCC