

One of the frequent questions coming to Gard Defence Lawyers is whether the COVID-19 pandemic falls within the various charterparty force majeure clauses. We are grateful to Brian Perrott, partner with HFW, and his colleagues for sharing their views.

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Force majeure, taken from the French for 'superior force', is a common clause in contracts that can limit a party's liability when an extraordinary event or circumstance outside the party's control prevents or hinders that party from fulfilling its obligations under the contract. Generally, the clause allows, on the occurrence of certain events, for one (or both) of the parties to cancel the contract and/or be excused from performance of some or all of its obligations for a period of time. Factual scenarios and charter terms vary and need to be considered individually so the following views should not be considered as legal advice.

General points

1. There is no general concept of *Force Majeure* (FM) in English law. An express contractual clause is required, and the effect depends on the specific wording. The clauses are generally construed strictly, although given the uniqueness of the current situation, courts/tribunals may be more open to allow reliance on FM clauses.
2. Generally, parties in order to rely on a FM clause need to show, in addition to an event potentially falling within the wording of the clause:
 3. An event outside a party's control; which has
- ii. Prevented, delayed or hindered performance (depending on clause wording); and that
- iii. Party seeking to rely on clause has taken all reasonable steps to mitigate.

Is COVID-19 an FM event?

1. This depends on the specific circumstances and the wording of the FM clause. However, COVID-19 may constitute an FM event under many common clauses.
2. It should be considered whether there is a specific reference to disease, epidemic, quarantine etc. It could also arguably fall within other provisions e.g.:
 - i. Act of God: this has been described in caselaw as a "*direct and violent and sudden and irresistible act of Nature*". It is unclear whether COVID-19 would fall within this category, but it is arguable.
 - ii. Act of government
 - iii. Other circumstances beyond reasonable control.

The precise wording and circumstances must be assessed. Further, for contracts entered **after** the outbreak in China, it may be more difficult to argue that, as a matter of construction, COVID-19 should fall within more general wording (as it could have been specifically listed).

3. Does the clause require events to be unforeseeable?
 - i. It seems likely that COVID-19 was an unforeseeable event. However, for contracts entered into after the outbreak, a requirement in an FM clause for events to be unforeseeable may prevent reliance on the clause.

Insufficiency of goods

A party may still be able to rely on FM if it can perform some contracts but not all. But, they must generally allocate goods reasonably, e.g. pro rata.

Causation

FM must be the effective cause – if there are other causes which are not FM events and which would have affected performance, then a party may not be able to rely on FM.

Mitigation

A party must generally show that it could not have avoided the impact by taking reasonable steps. Financial cost may be a factor as to what steps are reasonable.

In light of the extreme circumstances, the courts may adopt a generous approach to mitigation. For contracts entered into after the outbreak, parties may be held to a higher standard of mitigation.

Notice provisions

Should be complied with. Compliance may be a requirement to rely on the clause.

Frustration

May apply even if there is no FM clause. However, this is difficult to satisfy. Careful consideration of the contractual obligations would be required to assess whether it applies.

Practical points

1. Comply with notice provisions.
2. Retain document trail
3. Take steps to mitigate – and keep document record.
4. Review the entire contract – provisions in addition to the FM clause may be relevant for example, exclusion/limitation clauses.
5. For new contracts, FM provisions should be carefully considered as to how they may apply to performance. Note that some contracts only allow one party to rely on FM. Parties should also consider expressly providing for the potential impact of COVID-19.

Please note that the above is intended as guidance only and relates to English law. It should not be considered as legal advice.