

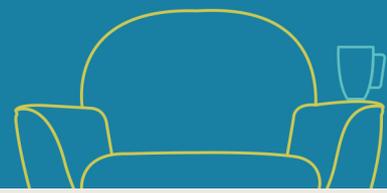


Covid-19, Contracts & Force Majeure

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Last week was an odd week. It was also a week which saw more questions on force majeure (English translation “superior force”) than I’ve had to answer in my entire career so far.

This is one of those rare occasions where clients actually understand why we lawyers go on about ‘boilerplate’ clauses being important.

What is Force Majeure?

It is a legal concept that allows a party to not deliver or deliver late under a contract because of an event outside of its control.

In English law, force majeure only applies if it is specifically covered in the contract - if it’s not covered, you can’t imply it into the contract.

Also remember that force majeure is applied differently in different countries - in a lot of continental legal systems, force majeure is specifically defined in their legal system and the defined approach can override contractual clauses. Also note that there is no EU law on this, so there is no uniform approach within EU countries.

What is Frustration?

Trying to work from home when your kids are making TikToks.

It is also another legal concept that may allow a party off the hook for its contractual obligations. Frustration is a common-law provision that could apply regardless of what the contract says.

It is generally quite hard to prove frustration as it basically requires the obligation to be impossible to deliver and the event has to be unforeseeable. An example where this could apply would be a holiday booking if the government restricts movement - it would be impossible to take the holiday due to the government changing the law, but the booking would need to have been made long before the Coronavirus and the foreseeability of it causing problems became an issue.

So, frustration may be something to consider if you have a contract without a force majeure clause. However, be wary of claiming that it applies unless (and until) you have strong grounds for doing so.

I need to cut costs - can I use force majeure to cancel contracts?

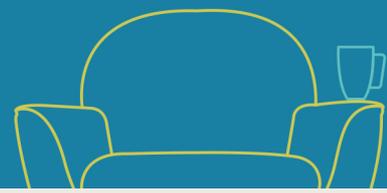
Force majeure allows you to not deliver or to delay delivery of an obligation under a contract - it does not allow you to forego a contractual right or benefit (e.g. to say you don’t want to receive services).

If you’ve signed a contract to receive goods or services and these can still be delivered, you have to comply with your obligations - receive the goods or services and pay for them (unless you are actually prevented from doing so by force majeure yourself).

An example I got asked about a few times last week was on services to offices (cleaning, fruit delivery etc.) which are no longer required due to staff working from home. This is a scenario where it is still possible for the suppliers to deliver the services and you cannot refuse to receive them simply because your business requirements have changed - you can choose not to receive them but would still need to pay for them (and may find yourself responsible for other supplier costs if you cancel improperly or refuse to cooperate).



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In this scenario, you will need to check your contract to see if you have any other right to suspend or terminate the services, or try and negotiate something with your supplier.

This is in contrast to another scenario. Say a supplier is due to provide services and you have a contractual obligation to make preparations for those services, for example by providing access to your premises, making facilities/equipment available, and/or having personnel available. If, due to the spread of Covid-19 and the recently announced lockdown, you have a significantly reduced workforce or have had to close entirely, force majeure is more likely to apply (assuming the clause doesn't apply to the supplier only) as you are **prevented from performing your obligations, which are necessary for the receipt of those services**.

If we get into even stricter lockdown and offices are forced to close, the situation in relation to even the simpler contracts (such as cleaning) may change, as it may not be possible for those services to be delivered due to force majeure and the contracts may be able to be terminated.

Government restrictions are changing rapidly and these will change how force majeure clauses are interpreted. **Get in touch** if you have any specific scenario you'd like us to look at.

Is Covid-19 a force majeure event?

Probably. But it depends on the wording of the force majeure clause.

Some clauses have exhaustive lists of events. If you have a clause like that and epidemic/pandemic is listed, then Covid-19 will be a triggering event.

If there is a clause with more general wording about "events beyond a party's reasonable control" or a non-exhaustive list, then Covid-19 is potentially a triggering event.

As we move into the territory of the Government restricting movements, then that is potentially another force majeure event - "act of government" is often specifically referenced.

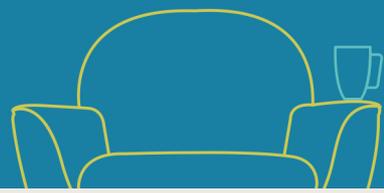
What else may be covered in a force majeure clause?

You may be in force majeure territory but there will be other things to look out for in the clause. There will normally be notice provisions - you will need to inform the other party if you cannot deliver/perform your obligations and may be required to keep the other party up-to-date. There may be a requirement to mitigate the event and provide evidence of what you've tried to do to get around the problem. If you're a supplier and your costs go up as a result of mitigation (for example, having to use more expensive components) that will be at your risk, unless the contract provides otherwise.

Most clauses will also provide that the force majeure event can only go on for so long before the party not affected can terminate the contract. It is very common for this period to be 30 or 60 days. This is an important consideration - in the current climate, a 30-day delay to a party's obligations may not be enough to keep the contract going through the crisis.



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How do I deal with new contracts?

If you're currently negotiating a contract, you have an opportunity to avoid any of the pitfalls and make sure you agree a force majeure clause that specifically deals with the situation we now find ourselves in. Have a sensible conversation with the other party now and agree how the force majeure clause should work. Some things to consider:

- agree that Covid-19 is a force majeure event;
- if you're working to a delivery timetable, consider how Covid-19 may affect delivery and change your delivery dates accordingly, or include flexibility to allow the parties to respond to changing circumstances;
- instead of a right to terminate after 30/60 days if force majeure applies, have something more flexible to try and come up with another solution instead of terminating;
- perhaps combine the above point with a long-stop when termination will be an option; and
- think about what the consequences of termination for force majeure should be - what is the best way to apportion risk/costs between the parties.

Whilst the situation with existing contracts may not be that clear - you can at least make sure any new contracts have been properly thought through.

For any questions that you may have on force majeure or contractual obligations, please email ian.grimley@roxburghmilkins.com or call on 07788 584308 / 0117 9281915.



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