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COMMERCIAL DISPUTES **KNOW-HOW GUIDES**

FORCE MAJEURE

Force majeure refers to events which are beyond the control of the parties to a contract such as war, epidemic, geological disaster or an act of god, and which are likely to detrimentally affect the ability of a party to carry out their contractual obligations and may release them from the performance of those obligations. Parties need, however, to specifically include a force majeure clause in their contract.

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FORCE MAJEURE EVENTS

The courts have held that merely mentioning force majeure events in generality is at risk of being void for uncertainty ¹. Therefore, it is standard practice to specify the relevant events such as pandemic, terrorist attack, act of a government or natural disaster. The more events are specifically provided for within any clause, the greater certainty will be provided to all parties.

FORCE MAJEURE AND FRUSTRATION

The general legal principle is that the terms of a contract are strictly enforced, even when the circumstances surrounding the contract have changed to such a degree that the practical consequences of a contract are beyond the initial contemplation of the parties.

In rare circumstances, however, the legal doctrine of “frustration” can release parties from their obligations under the contract where, through actions which were not in control of any contracting party, the contract has become legally or physically impossible to fulfil. Examples are where the subject matter of a contract has been destroyed by a fire ² or a change in law has resulted in performance becoming illegal by an entity becoming the subject of sanctions ³. A contract will not be frustrated simply because it has merely become more expensive to perform ⁴ or the commercial purpose of the contract is no longer achievable. So, a force majeure clause is necessary if the parties wish to agree situations where they are entitled to suspend or terminate their obligations. Typically, the contract would specify a list of force majeure trigger events, the extent of the impact required upon a party's ability to comply with its obligations under the contract and the consequences of the clause being triggered.

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RELIANCE ON A FORCE MAJEURE CLAUSE

Unlike frustration, which only takes effect where it is impossible to comply with a contract and terminates the contract entirely, force majeure clauses will often provide for a lower bar. The clauses are drafted to take effect where a performance is prevented, hindered or delayed by a force majeure event. Whilst “prevented” is analogous to frustration where it is physically or legally impossible to do something, “delayed” and “hindered” provide for a lower threshold. A force majeure clause will also provide additional flexibility compared with frustration in that so long as the force majeure event persists, the obligations of the affected party are suspended rather than the contract being immediately terminated. Nevertheless, to provide certainty, a long stop date should also be included stating that if the contractual obligations are not able to be complied with for a set period then a party may terminate the agreement.

In order to avoid any party unfairly utilising a force majeure clause to its benefit, the courts have held that the force majeure event must be the sole cause of a party’s inability to perform their obligations under the contract⁵. In addition, the standard rules of causation continue to apply so that where a party would have not been able to perform the obligation whether or not the force majeure event occurred, they will be prevented from relying upon the force majeure event to relieve them of the consequences⁶.

- 1 *British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd* [1953] 1 WLR. 280
- 2 *Tylor v Caldwell* (1863) 3 B.&S. 826
- 3 *Denny Mott & Dickson Ltd v James B Fraser & Co Ltd* [1944] A.C. 265
- 4 *Tsakiroglou v Nolee Thorl* [1962] AC 93
- 5 *Intertraded SA v Lesieur-Tourteaux Sarl* [1978] 2 Lloyd’s Rep. 509 (19 April 1978)
- 6 *Classic Maritime Inc v Limbungan Makmur SDN BHD* [2019] EWCA Civ 1102.

This is part of a series of practical know-how guides for those involved in commercial disputes whether the dispute has led to litigation or not. They provide basic information on a wide range of disputes topics but are not a substitute for specific legal advice.

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