



COLLYER BRISTOW

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.

COMMERCIAL DISPUTES **KNOW-HOW GUIDES**

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.

COMMERCIAL DISPUTES **KNOW-HOW GUIDES**

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 Noble 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. For further guidance on the topic please contact Robin Henry at Robin.Henry@collyerbristow.com or on +44 (0) 7943 503 198 or contact any member of the commercial disputes team.



ROBIN HENRY

Partner - Head of Dispute Resolution Services

+44 20 7470 4429
+44 7943 503198
robin.henry@collyerbristow.com



JEFF ROBERTS

Partner

+44 20 7470 4441
+44 7831 27743
jeff.roberts@collyerbristow.com



STEPHEN ROSEN

Partner

+44 20 7468 7208
+44 7770 986494
stephen.rosen@collyerbristow.com



DAVID VAUGHAN

Partner

+44 20 7468 7232
+44 7808 870142
david.vaughan@collyerbristow.com



ROGER BILLINS

Consultant

+44 20 7470 4522
+44 7714 683080
roger.billins@collyerbristow.com



CRAIG DEUHRASS

Senior Associate

+44 20 7468 7265
+44 7947 531962
craig.deuchrass@collyerbristow.com



GAVIN KRAMER

Senior Associate

+44 20 7468 7256
+44 7956 381277
gavin.kramer@collyerbristow.com



NICHOLA LEACH

Senior Associate

+44 20 7468 7209
+44 7793 168795
nichola.leach@collyerbristow.com



PETER PRATT

Senior Associate

+44 20 7468 7271
+44 7774 601576
peter.pratt@collyerbristow.com



JEAN-MARTIN LOUW

Associate

+44 20 7470 4592
+44 7796 712840
jean-martin.louw@collyerbristow.com



ISOBEL MCNAUGHT

Associate

+44 20 7468 7359
+44 7947 532122
isobel.mcnaught@collyerbristow.com



RHIANNON THOMPSON

Associate

+44 20 7470 4443
+44 7734 048799
rhiannon.thompson@collyerbristow.com



COLLYERBRISTOW.COM



@COLLYER_BRISTOW



@COLLYER-BRISTOW-LLP



@COLLYERBRISTOW

Disclaimer: The information and opinions contained in this document are for general interest and information purposes only and are not intended to constitute specific legal, commercial or other professional advice. It should not be relied on or treated as a substitute for specific advice relevant to particular circumstances. While we seek to ensure that the contents are not misleading or outdated, you should obtain specific legal advice before making or refraining from making any business or personal decisions. Collyer Bristow LLP is a limited liability partnership registered in England under number OC318532, registered office St Martin's Court, 10 Paternoster Row, London, EC4M 7EJ, and is authorised and regulated by the Solicitors Regulation Authority. Any reference to a partner means a member of the LLP or an employee with equivalent standing and qualifications. A list of the members is available for inspection at the above address. This firm maintains professional indemnity insurance in accordance with the rules of the Solicitors Regulation Authority. © 2023 Collyer Bristow LLP.

