



# Is coronavirus a force majeure event?

These straightforward FAQ explain what force majeure provisions are, how they work, and whether coronavirus is a force majeure event. This guidance covers the force majeure position in England, Wales and Scotland (which all work the same way), but will be relevant to a wider audience, because many international commercial contracts have a provision stating they're governed by the law of England and Wales. Before we get to COVID-19, let's start with the basics.

## **What is a force majeure provision?**

Force majeure provisions are contractual clauses that offer relief from performing some or all of the obligations in a contract. They usually apply when specified events occur: essentially, events beyond the control of the affected party that prevent them from performing some or all of the contract.

Force majeure is a contractual remedy under English law. So if a contract is silent on force majeure, English law will *not* imply it into the contract. Similarly, undefined references to force majeure in an English law contract, without any contractual definition or interpretation, will *not* have an implied definition at law.

This is different to some other (often civil-law) legal systems where force majeure is a legally defined concept and where courts may declare that a particular event, such as coronavirus, is a force majeure event.

Force majeure is typically *not* a feature in property leases.

## **When can I rely on force majeure?**

If the contract doesn't have a force majeure provision, you can't rely on force majeure.

If the contract does have a force majeure provision, the interpretation of it is *fact-specific* and *contract-specific*, so it's important to get legal advice early.

Generally speaking, you can rely on a force majeure event where it prevents or delays (to the standard required by the provision) your ability to perform your obligations under the contract.

It is highly unlikely you'd be able to rely on a force majeure provision simply because performance is more expensive, difficult or commercially undesirable.

Where part but not all of a contract is affected by a force majeure event, you and the other party should (unless the relevant provisions provide otherwise) continue to perform the unaffected part of the contract (including making payment of relevant charges). This is because, from a legal perspective, that unaffected part of the contract will continue to operate in full force and effect.

### **What else must I consider when interpreting my force majeure provision?**

All force majeure provisions must be considered and interpreted by reference to the other related provisions in the contract. An example of a related provision is the interpretation provision. "Force Majeure" definitions in contracts often contain lists and examples of applicable events. These must be reviewed to establish:

- whether any words like "including" or "for example" mean that the list of force majeure events should be read as an exhaustive or non-exhaustive list; and
- whether the examples in the definition are intended to limit the list or not – for example, depending on the interpretation provision, an "act of god" will probably include COVID-19, but the same phrase followed by a list of examples that all relate to meteorological events may not.

### **Is coronavirus a force majeure event?**

As above, the language of a force majeure provision typically identifies the events or circumstances in which the provision will apply. These are usually set out in a list of "force majeure events." The events in this list can be either specific or more general, but typically they are all things beyond the reasonable control of the affected party.

Subject to the guidance above on interpretation:

- lists that include "epidemic" and/or "pandemic" will likely cover COVID-19;
- other events or circumstances such as "acts of government," "acts of god," "acts of nature" and "civil emergency" (among others) may cover coronavirus; and
- events stated to be "beyond a party's reasonable control" are also likely to cover COVID-19.

However, none of the points in the three bullets above have been tested yet in the courts.

Even if COVID-19 is within the scope of your force majeure provision, before claiming force majeure you must consider carefully the impact of coronavirus on your ability to perform your contractual obligations and whether that impact meets the standard required by the provision. See above and below in this note for guidance on these points.

### **Is fault relevant to force majeure?**

Unless the force majeure provisions in the specific contract provides otherwise, if there is fault attributable to a party, this suggests that the circumstances are not beyond the reasonable control of that party and, therefore, that force majeure is not relevant.

## **Does mitigation apply to force majeure?**

Force majeure provisions often require the party seeking the relief to demonstrate they have mitigated, to the extent possible, any impact.

Also be aware that in many (but not all) cases, English law implies a provision into contracts obliging a party suffering loss to mitigate that loss.

## **How does business continuity and disaster recovery relate to force majeure?**

Often, a well-drafted force majeure provision will stop a party relying on it if that party did not operate the business continuity/disaster recovery provisions of the relevant contract.

Where a force majeure provision is silent on this matter, the extent to which a party did not operate the business continuity/disaster recovery provisions of the relevant contract are likely to be considered as part of the question of mitigation (see the preceding section).

## **So, in summary, what's required to rely on a force majeure provision?**

Each force majeure provision is worded differently, but typically you'll need to show that:

- the force majeure event is within the scope of the provision;
- non-performance or delayed performance was caused by the force majeure event and/or events outside your control; and
- you've attempted to mitigate the effects of the force majeure event.

## **Can force majeure help exclude or delay making payment?**

Unless the banking system collapses or some other force majeure event happens that actually prevents payment being made, it's unlikely that as a customer you'd be able to successfully rely on force majeure to excuse or delay making payments under a contract (and often, the contract will specify this explicitly).

That doesn't mean you'd need to pay for goods or services you don't receive due to a supplier being affected by a force majeure event – that would be highly unlikely under English law. But you'd be wise to make suspension of relevant payment obligations clear in any force majeure provisions, including an entitlement to refunds or credits if payments are to be made in advance.

Typically, force majeure is a remedy that benefits suppliers, as they tend to be responsible for most of the obligations related to performance, rather than customers, whose principal obligation is often confined largely to payment.

If the force majeure event affects only parts of the contract then, as noted above, a customer will be required to pay for the unaffected goods or services it receives.

## **What happens to the contract when I invoke the force majeure provision?**

This depends on the language of the provision. Typically, the affected party is excused from performing the affected obligations under the contract. However, provisions typically allow the unaffected party to terminate only after a specified period – see the next section below.

Exercise caution and take advice before invoking a force majeure provision: doing so where there's no force majeure event (as defined in the contract) may entitle the other party to claim that the contract has been breached, terminate it and claim for damages.

Sometimes, force majeure provisions are drafted to give termination rights to both the unaffected and affected parties.

### **When can I terminate under a force majeure provision?**

Termination rights are usually triggered (usually for one party, but sometimes for both) only where the force majeure event persists for a specified period of time, and only after this period may the party terminate the contract. A party seeking to invoke the force majeure provision to terminate the contract should also strictly follow the provision's notice requirements; failing to do so could render the termination ineffective, if the other party disputes it.

### **Is force majeure my only possible remedy?**

No. To assess the options available to you, a full review of the relevant facts and the contractual provisions should be carried out. Often, other clauses are as relevant – or even more relevant – than force majeure.

Here's a non-exhaustive list of other contractual provisions/regimes that could be relevant in circumstances when force majeure is being considered:

- business continuity and disaster recovery (see above)
- customer responsibilities and dependencies, relief events and excusing causes
- changes in law
- material adverse change
- most-favoured customer and minimum purchase/sale commitments
- liquidated damages and time of the essence
- set-off
- step in
- financial distress
- termination

Affected parties should also consider their non-contractual remedies, for example under the doctrine of frustration – see the next section.

### **What's the doctrine of frustration?**

If a contract doesn't have a force majeure provision that deals with the event in question, an affected party should consider whether they have a potential remedy under the common-law doctrine of frustration.

For frustration to apply, an unforeseen event must happen that is neither party's fault but that makes the performance of the contract impossible or radically changes the nature of the contract from what was intended when the parties entered into it. If proved, the remedies are similar to force majeure relief – but frustration is typically very difficult to prove.

If a contract has force majeure provisions that deal with the relevant event, frustration is unlikely to be applicable.