

Common Issues with *Force Majeure* Clauses

1. It is commonplace to see *force majeure* clauses in many different types of contract. They range from the very detailed, where the drafters appear to have spent inordinate amounts of time dreaming up every possible catastrophe that could befall the parties, to the very vague. It is perhaps unfortunate for those parties facing litigation over the precise meaning of a *force majeure* clause that there is no general doctrine of '*force majeure*' under English law, unlike the position in French law from which the term derives. In essence, whether or not such a clause applies to a particular circumstance entirely relies on the precise wording used and the proper construction of the contract as a whole. This could lead to a frustrating process; as one leading commentator noted '*one cannot be sure what meaning a court will give to [a force majeure clause]. At best a significant amount of time is likely to be wasted in arguing about the proper construction of the clause*'¹.

2. Let us start with an example of a very general force majeure clause:

'Force Majeure: where a party is affected by a force majeure event or circumstance, they shall not be liable for any failure or delay in performance of their obligations under this contract if such failure or delay is caused by that force majeure event.'

'A force majeure event is any event which is not due to the fault of the party seeking to rely on this clause, beyond the reasonable control of the parties and could not have been reasonably avoided.'

3. There are many instances of more specific clauses in the case law which often list a series of events as 'examples' of *force majeure* events, such as 'riot, war, invasion, earthquakes, floods, fire, Act of God, strike, industrial disputes' and then tag additional wording to the end of the clause to the effect '*or any other causes beyond the parties' control*'.

4. There are a number of issues that could arise with these clauses and which could give rise to litigation, five of which are discussed below:

¹ Mckendrick, *Force Majeure and Frustration of Contract*, 2nd ed. at p.59

- 4.1. What counts as a '*force majeure*' event or 'other cause beyond the parties' control'? Do the courts have any specific principles in respect of events of *force majeure*?
 - 4.2. Whether the event must be 'beyond the reasonable control' of the parties;
 - 4.3. Does the event have to prevent performance? Or only make it more onerous or difficult?
 - 4.4. The meaning of 'fault';
 - 4.5. Does the *force majeure* event have to be unforeseeable?
- (a) Type of event
5. As is often the case with fairly niche areas of contract law, an unfortunate side-effect of the lack of principles guiding the courts' approach to this area is that unwitting parties may assume too much to their cost. Such parties, particularly those who may not have had the benefit of extensive legal advice on the precise construction of this type of clause, could run the risk of drafting too wide a clause without realising the broad range of events which can count as a *force majeure* event. Even with such legal advice, there is a serious risk that parties still end up arguing over which events count (unless of course they narrow their clause to specified events only).
 6. The term '*force majeure*' translates literally from the French as 'superior force'. This can invoke a sense that such an event must be catastrophic and outside the parties control, similar to 'Act of God'. A quick internet search of the term results in numerous definitions and explanation which have the same theme: an extraneous and extraordinary event, usually demonstrated by examples such as floods, earthquakes, strikes and wars. However this may not be the case, as discussed below, which could lead to parties losing out.
 7. The courts have devoted some time to considering this issue. In *Lebeaupin v Crispin* [1920] 2 KB 714 McCardie J attempted to work out the type of event which would count as a *force majeure* event in English law, despite the lack of any general doctrine. At p.719-720 he noted that the meaning of the phrase went

beyond 'vis major' or Act of God and that it could apply to an embargo or accidental breakdown of machinery, but that miscalculation or financial difficulty would not count. However he went on to note that such a clause would have to be construed in each case with a '*close attention to the words which precede or follow it, with due regard to the nature and general terms of the contract*'.

8. Some commentators, for example in *Benjamin's Sale of Goods* 10th ed, have attempted to give a general impression of what would and would not count as a *force majeure* event (for example, that external catastrophic events would count, and financial issues or mistakes would not²). It is tempting to try and give a general sense of what a court would regard as a *force majeure* event, and encourage a more principled approach to this area. However, this could lead parties into a false sense of security; whether or not a clause will count will depend on the words used in the clause itself and the general construction of the contract, and no such summary can sensibly be done on the basis of the current law.
9. It may be thought that the courts would have taken a more structured approach when faced with clauses which specify a number of events in the *force majeure* provision which are then followed by the words '*or any other causes beyond our control*' or similar. At the very least, it could be expected that the preceding specified events guide the interpretation of the latter words. The answer to this is not straightforward.
10. Initially, the courts were reluctant to apply the *ejusdem generis* rule to construction of contracts, see Mr Justice Devlin in *Chandris v Isbrandtsen-Moller Co Inc* (1949) 83 Ll. L. Rep. 385 at p.392 '*[t]he ejusdem generis rule means that there is implied into the language which the parties have used words of restriction which are not there. It cannot be right to approach a document with the presumption that there should be such an implication.*' This was later cited by Staughton J in *Navrom v Callitsis Ship Management SA* [1987] 2 Lloyd's Rep 276 in relation to a *force majeure* clause.
11. However, there are also cases which suggest that meaning can be drawn from the events specified before such general words, for example *Sonat Offshore SA v*

² At 8-081; also see *Chitty on Contracts*, 32nd ed. at 15-163

Amerada Hess Development and Texaco (Britain) [1988] 1 Lloyd's Rep 145. The clause in that case was limited to events which were similar to those listed before the general words '*other cause beyond the reasonable control of such party*' on the basis that if such words applied to any such cause there would be no need for the preceding events listed (which were in a catastrophic vein, such as riot, war, act of God and fire).

12. Although these positions seem to conflict, in fact they can both be seen as consistent with general principles of contractual interpretation. Mr Justice Hamblen considered this in *Tandrin Aviation Holdings Limited v Aero Toy Store LLC* [2010] EWHC 40 (Comm) and noted at [44], in deciding whether a *force majeure* clause applied to the '*cataclysmic downward spiral of the world's financial markets*', that although there was no requirement to construe the phrase '*any other cause beyond the Seller's reasonable control*' *ejusdem generis* with specific examples set out in the clause (in that case act of God, war, fires and the like) '*it is telling that there is nothing in any of those specific examples...which is even remotely connected with economic downturn, market circumstances or the financing of the deal*'.
13. It seems therefore that the process of interpretation and construction is to consider the terms laid out before the general words used and determine their effect on the clause as a whole, without resorting to the specific *ejusdem generis* rule. Admittedly, this may mean that there is no difference in the outcome of that process of interpretation and it does lead one to wonder whether such a fine distinction is required at all. However, by adopting a more general approach to contractual interpretation, rather than the *ejusdem generis* rule, all the terms and circumstances of the case can be taken into account. This may result in a fairer result for both parties, rather than a strict application of principle.
14. Interestingly, it seems that despite the emphasis on general interpretation of the words used in a clause, there is one event which does have a general rule: an increase in price (or indeed financial impact in general) has generally been held to be insufficient by the courts. In *Tandrin* Hamblen J noted at [40] that '*it is well established under English law that a change in economic/market circumstances, affecting the profitability of a contract or the ease with which the parties*'

obligations can be performed, is not regarded as being a force majeure event.' This seems surprising as a general rule, but in fact it accords with other common aspects of the clause. For instance, in the absence of clear wording the courts do not regard increased difficulty of performance to be sufficient³, and in determining whether the event is 'beyond the reasonable control' of the party it has been held that reasonable steps, including increasing wages of workers, are within the control of a party (see below)⁴. This in turn suggests that despite the theme of general interpretation only, in this instance at least, a court may well rely on or at least draw from dicta from the case law in deciding the effect of an event is sufficient (unless of course the parties have expressly included events such as financial difficulty).

(b) Whether the event has to be beyond the parties' reasonable control

15. In contrast to the preceding discussion on the type of event which would count, whether that event has to be beyond the control of the parties is fairly straightforward. Although the courts are careful to note that any particular clause will rely on its wording, the general theme is that the event must be outside the control of the party seeking to rely on it.
16. This is often explained by reference to whether a party could have avoided the event by taking reasonable steps. For example, in *Channel Island Ferries Ltd v Sealink* the court found that a *force majeure* clause covering strikes 'beyond the control' of a party did not cover strikes that could be settled by taking reasonable steps for example increasing wages. Similarly, in *B&S Contracts and Design Ltd v Victor Green Publications Ltd* the court found that the claimants had acted unreasonably in refusing to pay the full amount of severance pay demanded by its workers to avoid a threatened strike, and therefore could not rely on the *force majeure* clause in its contract with the defendants⁵.

³ See below, *Channel Island Ferries Ltd v Sealink UK Ltd* [1988] 1 Lloyd's Rep 323

⁴ See *Channel Island Ferries Ltd v Sealink* and *B&S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419 as referred to above

⁵ See also *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery* [2003] 1 Ll Rep 1 Aikens J at [53]

(c) Does there have to be physical or legal impossibility, or is increased difficulty sufficient?

17. As noted above, *force majeure* clauses are dependent on their wording and do not in general appear to be restricted in any particular regard as a matter of law; rather they must be construed in accordance with their precise wording and the general interpretation of the contract. As a result, there is no reason why parties cannot specify the degree to which the obligation is prevented, for example that such obligation has become more onerous.

18. However, in the absence of such wording, it does not follow that a court could interpret this type of clause to include increased difficulty. There is no authority which expressly states that a *force majeure* clause ought to be interpreted narrowly against the party seeking to invoke it. However, as a matter of general principle and drawing from the similarities with such clauses and exclusion clauses, it follows that there ought to be a requirement for clear and express wording the very least. It seems to be that in the absence of any clear wording that increased difficulty would suffice, a party would have to show either legal or physical impossibility⁶.

19. If we take the example clause set out above, ‘delay’ is sufficient to bring it into operation, as long as the relevant event ‘caused’ the failure in performance. This particular clause is very widely drafted but not uncommon in *force majeure* terms and the courts have had to grapple with the meaning and extent of the ‘delay’. In particular, readers will be unsurprised to learn that ‘delayed’ is not to be treated as equivalent to ‘prevented’, but circumstances which ‘hinder’ performance may fall within the clause⁷. This of course does not mean that the clause necessarily becomes easier to satisfy in respect of the other causal requirements, but it could have the effect of significantly extending its effect. For example in *Tennants (Lancashire) Ltd v CS Wilson & Co Ltd* [1917] AC 495 the *force majeure* provision included the term ‘hindering’ delivery of the goods and the sellers were entitled to rely on it when, following the outbreak of the First World War, they were prevented from using their principal supplier in Germany even though there

⁶ See Parker LJ in *Channel Island Ferries Ltd v Sealink UK Ltd* at p.327

⁷ *Chitty* at 15-159 and *Benjamin* at 8-078 referring to *Fairclough, Dodd & Jones v Vantol* [1957] 1 WLR 136

was a small English supply they could have used. This is perhaps unexpected: being unable to use a supplier when there are other suppliers available does not sound like it would invoke a force majeure clause and relieve that party of its obligations under the contract.

20. Looking specifically at whether failure by a third party, or inability to use a specific third party, would suffice, it seems that this is dependent, as ever, on the precise wording of the clause and the surrounding circumstances of the contract as a whole. In *PJ Van der Zjiden Cross* [1975] 2 Lloyd's Rep 240 a contract for the sale of frozen Chinese rabbits included a term stating '*should the sellers fail to deliver...or to effect shipment in time by reason of war, flood...or any other causes beyond their control*' then they were entitled to cancel the contract. The court held that the clause did not operate to entitle the sellers to cancel the contract when they were let down by their Chinese suppliers since this event did not prevent them performing by other means. In particular, they had failed to show that they could not have bought such goods elsewhere. In contrast, in *Ford & Sons (Oldham) Ltd v Henry Leatham & Sons Ltd* (1915) 21 Com. Cas. 55 a contract for the sale of wheat included a clause giving the seller an option to cancel '*in case of prohibition of export blockade or hostilities preventing delivery of wheat to this country*'. Just before the First World War prohibitions on the export of wheat were imposed by a number of countries, including some of the sellers' suppliers. The court held that even though the US and Canada had not imposed such prohibitions the seller could rely on the clause.
21. It is difficult to distinguish these cases on their wording alone, although it can perhaps be said that in the the former case the clause required a direct link between the *force majeure* event and the failure to deliver, whereas the latter could be interpreted as being drawn more widely⁸. A further distinction, which takes into account the whole contract, was noted by Hamblen J in *Bunge SA v Nidera BV* [2013] EWHC 84 (Comm) at [26] that the contract in *Ford & Sons (Oldham) Ltd* was a domestic sale which did not require any export or import of the wheat, and the clause was probably designed to cover any effect on the market price. In any event, a more recent case supporting the argument that default by a supplier could

⁸ See the commentary in Treitel, *Frustration and Force Majeure*, 3rd ed. at 12-027

suffice as a *force majeure* event is *Coastal (Bermuda) Petroleum Ltd v VTT Vulcan Petroleum SA* [1996] CLC 1510 where it was held by Saville LJ that a seller's immediate supplier could fall within the clause, as per p.1514 '*so far as the sellers are concerned, there has been a fortuitous event preventing them from performing*'⁹. This does not mean that failure by a third party supplier to deliver will invariably, or even usually, constitute a *force majeure* event sufficient to bring it within this type of clause. However, it reinforces the point that everything turns on the wording of the clause, and if parties wish to exclude this type of happenstance, they should probably say so.

(d) The meaning of 'fault'

22. In some clauses it is specified that the *force majeure* event must not be due to the fault of one or both of the parties. In determining whether or not the event is due to the fault of a party, there are significant overlaps with whether or not the event was within their reasonable control, as discussed above. Aside from this, there is not much consideration of the meaning of 'fault' in itself in relation to *force majeure* clauses. In some case the words 'fault or negligence' will be specified, and this usually means actionable negligence¹⁰ as opposed to the more colloquial use of the term. This is likely to be due to the difficulty in showing that it was in fact one party's 'fault' without a further test as to whether or not they should be prevented from relying on the *force majeure* clause as a result.
23. One of the leading commentators considers that the law in this area is still open¹¹, and as this is often subsumed in the discussion of 'reasonable control' (if 'fault' is specified at all) it may remain open for the foreseeable future. In any event, the general principle that a party cannot rely on or take advantage of his own wrongdoing would presumably operate and could potentially cover 'faults' which fall outside of negligence and default under the contract.

⁹ This is doubted in the commentary, see *Benjamin* at 8-081 and *Chitty* at 15-163 where it is suggested that failure by a third party to fulfil his contract would not suffice to form a *force majeure* event. However the cases set out above appear to cast doubt on this broad generalisation, and therefore interpretation will entirely depend on the contract wording in question.

¹⁰ As per Lord Bingham in *The Super Servant Two* [1990] 1 Lloyd's Rep 1 referring to the principles on exclusion clauses and negligence in *Canada Steamship Lines Ltd v R* [1952] AC 192

¹¹ McKendrick at p.77

24. Parallels can be drawn with self-induced frustration, where the meaning of ‘fault’ is discussed in more detail in the commentary, albeit not to any great extent¹². The overriding theme appears to be that there must be some wrongful conduct which amounts to ‘*deliberate commission of a wrong or to want of care and diligence*’, which would presumably rule out genuine accidents or mistakes. Of course this then engages whether or not an act, omission or possibly mistake, was ‘beyond the control’ of a party¹³, but this will depend upon the circumstances of a particular case¹⁴.

(e) Foreseeability of *force majeure* events

25. The final issue addressed in this article is whether or not the *force majeure* event has to be unforeseeable. At first glance, it might be thought that this is obvious; if the parties had foreseen an event which would prevent obligations under the contract being performed, they would (or should) have contracted for it. Indeed, the French doctrine of *force majeure* requires that the relevant event must be unforeseeable. Indeed, the oxford English Dictionary defines the legal definition of *force majeure* as ‘*unforeseeable circumstances that prevent someone from fulfilling a contract*’.

26. However Staughton J in *Navrom* doubted that this was the case in English law, and there is no principle of English law to that effect¹⁵. For example in *SVS Gas Supply and Trading SAS v Naftomar Shipping and Trading Co Ltd* [2005] EWHC 2528 (Comm) Christopher Clarke J held that the fact that bad weather could have been foreseen did not affect the operation of the *force majeure* clause and cited Staughton J in *Navrom* to the effect that some wars, strikes or abnormal weather could be foreseen but it was more a question of causation as to whether the foreseen event caused a party’s failure in performance.

¹² Treitel refers to the definitions of ‘fault’ in the Sale of Goods Act 1979 and the Uniform Commercial Code: the ‘wrongful act or default’ or ‘default, breach or wrongful act or omission’ at 14-007

¹³ For example, in *Channel Island Ferries Ltd v Sealink* (cited above) the court found that a *force majeure* clause covering strikes ‘beyond the control’ of a party did not cover strikes which could be settled by taking reasonable steps for example increasing wages

¹⁴ It should be noted that as per *The Marine Star (No 2)* [1996] 2 Lloyd’s Rep 383 a supplier’s default does not necessarily amount to a fault on the part of the contracting party so as to prevent reliance on the *force majeure* clause.

¹⁵ McKendrick at p.79

27. Although this may seem counter-intuitive, a *force majeure* clause may simply be the parties' method of dealing with possible (and foreseeable) future events. Indeed in a shipping context a bout of 'abnormal' weather on the high seas is unlikely to be unforeseeable; this is often precisely what a *force majeure* clause is designed to cover. This also means that the other requirements of a clause, for instance that the event is beyond the reasonable control of the party and that performance has been prevented, are all the more important in determining whether or not the clause bites.
28. This brief look at some of the common issues in respect of *force majeure* clauses has demonstrated the lack of general doctrine in this area. As is often the case with contract law, the wording used by the parties is paramount and the courts' main aim is to determine the proper interpretation of the clause using general principles of construction. However, there are some overarching, and often subtle, guidelines that the courts do follow when engaging the interpretative process. It follows that if parties wish their *force majeure* clause to include or exclude a particular circumstance, they should spell it out. Failure to do so could not only lead to litigation cost misery (for everyone but the lawyers involved, for whom such an open area of law is filled with delightful possibility) but also to serious consequences in respect of whether or not they are liable under the contract.

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26 April 2018