

Samuel Pepys would be smiling to himself if he lived today. His diary reveals that, even during the worst of the Great Plague in 1665-66, he kept up his visits to London's pubs, albeit less frequently. Fast-forward to 2020, a trip to the local hostelry is now back on the cards. We all hope that the virus is contained, and social distancing measures are gradually eased so that our towns and cities may indeed be busy again by Christmas.

In the meantime, force majeure and frustration of contracts have become hot topics. This article will aim to set out the key principles of force majeure.

Firstly, it should be made clear that force majeure is a clause which allows a party or parties to an agreement to avoid performing it in some way. However, that is dependent on certain events as specified within the agreement occurring.

I emphasise that "force majeure" is a contractual remedy. It is not set out in statute and is not a legal doctrine. Indeed, the courts have held struck down contractual clauses for lack of clarity, for example, a provision stated:

*"Subject to force majeure conditions that the government restricts the export of the material at the time of delivery."* (See **British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd** [1953] 1 WLR. 280).

The above clause was found to be too vague and uncertain as to have any precise meaning even though there were a number of force majeure conditions known in the particular trade, there was no evidence that any had been agreed within the contract. Although, see **Lebeaupin v Richard Crispin & Co** [1920] 2 K.B. 714, which held that epidemics fall within the terms of force majeure where that term is not specifically defined by the term of the contract [Chitty on Contracts 15-163].

Also, bear in mind that the clause does not have to be labelled "force majeure" for it to be effective. There is a need to consider whether the clause is anticipating an event outside the control of the parties that may prevent the performance of the agreement.

The reason why a party may want to rely upon a force majeure clause is because the party relying upon the clause will not be liable for the failure to perform the agreement.

However, the first question for practitioners is whether the force majeure clause has been properly defined. If it has not, it may not be possible for a party to rely upon it.

Standard force majeure clauses contain the following:

- 1) A clause stating that a party who is unable/ delayed, in being able to perform the agreement due to a force majeure event is not to be regarded in breach of the agreement.

- 2) Performance of the agreement may be suspended during the duration of the force majeure event.
- 3) The ability of the party that is not affected to terminate the agreement if the other party is unable to perform it remains for a certain period of time.

The question that practitioners will have at the forefront of their minds is: “When and in what circumstances can a party rely on a force majeure clause?” The answer can only be gleaned following a careful examination of the force majeure clause.

After considering the question whether the particular event is captured by the force majeure clause, we move on to consider if the party relying upon the clause has been hindered or delayed in the performance of the contract. Again, this is a factual question requiring an analysis of the particular circumstances existing at the time of the alleged event.

The third issue to examine is whether the failure to perform the agreement was due to circumstances beyond the control of the party relying upon the clause; and, finally, some force majeure clauses require a party to mitigate. If there is such a provision, consideration as to whether there any steps that could have been taken to avoid or reduce the effect of the force majeure event or its consequences should be given.

In trying to answer some of the questions, there is a need to consider whether what is preventing performance of the agreements is a force majeure event. A force majeure event is one which is outside of the control of the party seeking to rely upon it. Although, it should be noted that some events may be specifically included or excluded by the agreement.

Further, when performing the factual analysis, it is important to ask whether performance of the contract has been, for example, specifically effected by the covid-19 virus or is it because of government guidance (ripple effect). Trying to fit the factual event in to the clause of the contract may become difficult where what may have prevented performance of the contact was only guidance.

The covid-19 pandemic might be argued to be a force majeure event as it was outside a party’s reasonable control, it is a pandemic, government action has been required, there has specific legislative provision to address its affect.

Also, do not overlook any notice requirements that may exist for the purposes of reliance upon the force majeure clause.

Some more points to have in mind is whether the Unfair Contract Terms Act 1977 applies. This would be in the context that the provision in question must meet the test of reasonableness under section 3(2) of the Act. In addition, the Consumer Rights Act 2015 will need to satisfy the Act’s test of fairness and transparency.

In addition, practitioners should not overlook any catchall clauses that cover the particular scenario you are facing.

I will conclude by saying that if the particular agreement does not contain a force majeure clause or one that is capable of reliance, the doctrine of frustration may apply. For more guidance on the frustration of contracts, I would direct readers to the very useful article written by Martin Langston. The following link can be used to access it:

<https://www.stiveschambers.co.uk/content/uploads/2020/04/But-seriously-what-next-Article-by-Martin-Langston.pdf>



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**3 August 2020**