

# Contract clauses & COVID – Protection from future outbreaks

The COVID-19 pandemic has highlighted the importance of contractual clauses such as force majeure and resulting termination rights that, prior to the pandemic, were largely considered ‘boilerplate’ clauses and accordingly were often not the subject of much pre-contractual scrutiny. The pandemic has compelled contracting parties to reconsider the way they approach and negotiate the drafting of these clauses, particularly given the ongoing nature and development of the pandemic, and the possibility of other outbreaks in the future. This article considers certain main clauses to focus on in commercial contracts with an eye on the possibility of mitigating the impact of future outbreaks and restrictions, as well as some key drafting points to consider.

## Defining a force majeure event

A party needing to rely on such a clause will want to include a wide definition of force majeure events, to include any event which is outside their reasonable control. They will also want any examples that are listed to be stated to be non-exhaustive, although the list should ideally include express reference to matters such as epidemics and pandemics – “natural event” may not be enough in the absence of the general catch-all wording – as well as government guidance and legislation.

You should also consider how foreseeability is dealt with and whether the parties want to qualify or restrict the scope of the drafting to events that are foreseeable, reasonably foreseeable or not at all.

Applying this to COVID-19, although the scale of the current pandemic was unforeseeable, this may not be the case for a future outbreak of COVID-19, or even – potentially – for future similar pandemics. Parties to a contract accordingly need to consider the extent to which COVID-19 can constitute a force majeure event in future. One way of addressing this is to include a separate clause addressing COVID-19, which cross-refers to other clauses (including force majeure and termination) and sets out how the risk of future outbreaks is to be allocated between the parties. It could also include an agreement between the parties as to what is considered to be “foreseeable” at the date of the contract.

## Key considerations

- Consider including a separate contractual provision that addresses contractual risk allocation in the light of current and foreseeable pandemic-related restrictions.
- Consider the definition and effects of a force majeure clause, as well as notice and mitigation requirements.
- To the extent that a clause operates to limit or exclude the liability of a party then it must be clearly drafted and in reasonable terms as it will be construed strictly and against the party seeking to rely on it.

## Impact on performance

The common formulation of force majeure clauses usually requires a party relying on the clause to show that performance is either prevented or hindered as a result of the force majeure event. In some cases, over the past few months, COVID-19 has not prevented or hindered performance. It has instead simply made performance more costly. Therefore, when drafting force majeure clauses in the future, the performing party may want to include a mechanism to enable it to be triggered if performance becomes economically unviable. However, this would need to be drafted in very clear terms given that force majeure clauses are construed strictly against the party seeking to rely on them.

Many clauses are also drafted in the present tense to address the current effect (e.g. "...prevents or hinders performance..."), rather than the *likely* effect on performance. Parties may therefore consider it appropriate to include the ability to give notice of an event that may end up being a force majeure event, to enable a dialogue to open between the parties around the variation of contractual obligations.

## Effects of triggering a force majeure

A force majeure typically suspends performance of the contract for a specified time period. As the duration of the pandemic is unpredictable, including a termination right may be prudent. Contracts sometimes provide for the continuation of payment obligations even where a force majeure clause has been triggered such that the paying party is not receiving any services or goods. Paying parties drafting such clauses now may therefore want to consider the suspension of such obligations or the express inclusion of clawback provisions.

## Notices

Consider the appropriate level of detail that should be included in the notice when a party seeks to rely on a force majeure clause. As a receiving party, you will likely want to understand the expected duration and details of the effects of the event on performance. As a non-performing party, given the uncertain nature of an event such as the coronavirus pandemic, you may want to include an express provision which states that all details in a force majeure notice are provided in good faith and are non-binding. It is however critical that the party giving the notice ensures that it complies with any contractual notice requirements to ensure the notice is valid.

## Mitigation of force majeure events

As usual consider the level of mitigation efforts required (for example, reasonable endeavours/all reasonable endeavours/best endeavours), but also consider whether to specify in further detail how the prioritisation and allocation of limited resources may work following a force majeure event. As the party whose obligations are affected by force majeure, such that you may have limited resources to deliver over perhaps several contracts, you will want discretion to be able to act reasonably in allocating those resources. However, as the paying party, you will want to ensure that your contract is prioritised over others.

## Force majeure and liquidated damages clauses

Liquidated damages provisions tend to operate in certain types of commercial contracts (including IT services and outsourcing contracts). They allow the receiving party to claim liquidated damages relating to a delay in the provision of services or goods that is not the result of a force majeure event. Parties should therefore be mindful of when a receiving party will be entitled to liquidated damages if there is a delay caused by COVID-19 restrictions, especially if the restrictions are not unforeseeable and therefore potentially not covered by the force majeure provisions. It is important to be as clear as possible about the circumstances in which such a clause will apply.

There is also a small risk that such a clause could be considered a penalty clause and therefore unenforceable. However, this is unlikely to be the case in a contract between sophisticated commercial parties, provided that the clause is either drafted as primary obligation (rather than a secondary obligation that only kicks in upon a breach of contract) or set out an explanation as to what the legitimate expectation is of the receiving party in enforcing the liquidated damages clause.

## Force majeure and termination rights

Some force majeure provisions give one or more parties the right to terminate if the contract has been suspended for a specified period of time. Parties should consider whether to include such a right in order to get out of a contract if there is a future, unforeseeable outbreak or similar pandemic.

Parties may also want more flexibility in the current climate. This may mean including rights of termination for convenience, to allow a party to mitigate its outgoings or obligations depending on the development of the pandemic. The inclusion of a right to terminate for convenience may also assist a non-performing party in limiting its exposure to damages in any subsequent contractual dispute.

## Conclusion

Despite the ongoing pandemic, business continues in the “new normal” and commercial contracts continue to be negotiated and agreed. This requires parties to factor into those contracts the realities and risks, both foreseeable and unforeseeable, of future outbreaks and similar pandemics, as well as to ensure that any future contractual disputes are managed in a responsible and reasonable manner.

*For an overview of the meaning and interpretation of force majeure across European jurisdictions please refer to the [CMS Expert Guide to Force Majeure](#).*



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