



# COVID-19 Briefing: Force Majeure and Frustration in Commercial Contracts

If you are a business owner, it is almost certain that the coronavirus (COVID-19) has had a significant impact on your business.

The government response is evolving, sanctions are slowly being lifted and we are all now experiencing some degree of release from the lockdown.

As the UK and its businesses return to some form of normality, many businesses are now realising the significant effect that COVID-19 has had upon them. In many cases businesses may be returning midway through contracts; only to find themselves unable to complete contracts due to lack of base materials; or finding that the other contracting party is unable to proceed.

Fraser Dawbarns are fielding a number of enquiries and concerns from commercial clients in relation to the impact of COVID-19 on contractual matters and how to manage their staffing issues, particularly where there has been a drop in customer demand. Many businesses have reached the stage where the furlough scheme is being pulled back and they are returning employees to work.

We have prepared a number of helpful guides in relation to staffing issues and other areas affected by COVID-19. These can be found at:

[www.fraserdawbarns.com/guides-and-information/](http://www.fraserdawbarns.com/guides-and-information/)

## FORCE MAJEURE

COVID-19 has affected businesses adversely in a number of areas; causing problems with the supply chain, rising and ongoing unexpected costs and changes in demand. If those with whom you are contracting are experiencing problems in honouring their obligations under a contract that you have with them, you may have heard the term “force majeure”. Indeed, if you are experiencing problems with meeting your contractual obligations you may have extracted this term from your own terms and conditions.

Whilst force majeure is not accurately defined in English law, it does appear in many contracts.

A force majeure provision within a contract will usually allow a party to excuse themselves from their delay, part delay, or failure to perform their side of a contract, where a contracting party is prevented from doing so due to an event outside of its control.

Whilst contracts vary depending on the circumstances and every contract usually must be considered on its own merits and within its own particular set of circumstances, they generally have the following:

1. A description of what the contracting parties would consider to be a “force majeure” event, such as, act of God, epidemic, adverse weather, terrorist event, industrial action, government intervention, and an unexpected change in the law, import and export embargo restrictions. Just the fact that economic circumstances change, and even before the COVID-19 pandemic these were incredibly fluid, would not generally be considered to be a force majeure event however the causes

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of that may be and something like COVID-19/coronavirus has not been experienced on such a scale by so many before.

2. It is important that you examine your contracts to see whether the clause provides an exhaustive list of occurrences that will enable you to take the benefit of such a clause.
3. The force majeure event must prevent or obstruct a contracting party from performing its contractual obligations. It will not usually assist if performance is possible but due to COVID-19/coronavirus has proved more difficult or expensive. There may be several clauses within the contract in relation to the pricing structure that may allow some movement in relation to price.
4. Any contracting party seeking to rely on a force majeure clause must still use its best endeavours to overcome the event, it is for them to prove that the force majeure event applies, not for the other contracting party to disprove it.
5. Many force majeure clauses refer to an epidemic; pandemic; or disease and these clauses are likely to apply in the present circumstances of COVID-19. If no such reference is made to disease, pandemic, or epidemic, then it is possible that simple reference to "an act of God", there are many that would consider COVID-19 to be a natural phenomenon despite the various rumours as to its root cause.
6. Some clauses may not be immediately identified as force majeure but will have reference to "any event outside the reasonable control of the affected parties which will not have been reasonably foreseen by either party. If you consider that a force majeure clause does apply in the circumstances, you then have to leap a further hurdle to ensure that it applies to the particular circumstances that have arisen. A definition may be contained within the contract but has COVID-19 actually stopped performance in its tracks? You may find it more difficult to get products to your customers or source your raw materials. Further, social distancing and the lockdown could certainly make it difficult for you to deliver your product to your customer on time. Contrary to this, however, your customer will often struggle to rely on the same clause as their obligation is often to simply pay for the goods and take delivery. This may not be impossible as a result of the force majeure event even in circumstances where they may find themselves without a ready market due to the lockdown for the product that they ordered. This would particularly be prevalent in the hotel, restaurant, and entertainment sector, particularly bearing in mind where the lockdown came in at the start of Spring.
7. If a force majeure event will apply it is important that notice be given to the other contracting party as soon as possible in accordance with the notice terms in the contract, as if the notice is invalid the affected party will not be able to rely on force majeure.
8. Furthermore, when drafting the notice it is important to consider to what extent the affected party should try to overcome the force majeure event. Often a clause will suspend a party's obligations but will not allow them to terminate them.

9. A contract's termination clause can often allow the other party to terminate if the force majeure event continues for a particular period of time.

## PRICING CHANGES

It is likely that as a result of the COVID-19 pandemic that raw materials, transport costs, and other expenses will increase quite substantially. Where a contract is more expensive to perform, the parties should consider any pricing clauses to see whether those factors can be taken into account to increase the contract price. On occasion contracts can make provision for increases in shipping or the cost of provision of the raw materials.

If there is a performance clause in the contract with credits where certain levels are achieved earlier rather than provided for, or, indeed, to the contrary, penalties are charged for delay.

Reference to the pricing clauses may enable a party to adjust the price rather than seek any form of damages with the result that the poor performing party will not be in breach of contract but will be subject to a financial penalty for which there should be no argument so long as the contract makes adequate provision.

## FRUSTRATION

If the situation facing the contracting parties falls outside of the force majeure or there is inadequate provision for force majeure within the contract, it may be possible for one or other of the contracting parties to allege that the contract has been frustrated.

Frustration of contracts occurs where performance has been rendered impossible. Unlike force majeure which enables a contract to remain in place, simply suspended, the remedy for frustration is termination of the contract with each party being discharged from the performance of their obligations.

A frustrating event is one that occurs after the contract and is so fundamental striking at the very origin of the contract and is any event beyond that contemplated by the parties when they originally entered into the contract. This would appear fitting with the COVID-19 pandemic.

The frustrating event cannot be due to the fault of either party, for which the contract would then allow the affected party to terminate and provision for liquidated damages.

The frustrating event must make further performance impossible, illegal, or completely different from that originally contemplated by the parties when the contract was originally entered into.

The entertainment industry will no doubt have a number of issues in relation to frustration of contracts, particularly in relation to cancelled concerts and musical events such as festivals, as the government banned public gatherings.



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## CHANGE IN THE LAW

Whilst not a frustrating or a force majeure event, contracts may provide for the parties to have the ability to review performance in circumstances where there has been a change in the law. COVID-19 has seen emergency legislation introduced by the government.

If the contract provides a change in the law, it may well allow either party to vary or renegotiate the terms or indeed provide for a method of termination.

## CONCLUSION

Now that the COVID-19 restrictions are being eased and the government is reducing the severe effects of the lockdown, both on the general public and on businesses, it is important that your contracts are examined, particularly if you are experiencing difficulty in your performance or indeed that of the other contracting party.

Often it is in the best interests of both contracting parties to negotiate supplemental terms to allow them to continue to do business rather than simply lead to the termination or notice clauses and start to threaten repudiation, rescission, and the like, or to instigate arbitration or Alternative Dispute Resolution clauses.

It is better to be forewarned of any potential issues that are likely to arise in the future once you have understood your contractual obligations.

We can review your contracts with you if you have any concern whatsoever and can obviously assist in renegotiating terms.

## CONTACT US

For more information on force majeure and related matters, please contact Marcus Chapman by telephone on 01354 602886 or by email at [marcuschapman@fraserdawbarns.com](mailto:marcuschapman@fraserdawbarns.com).

Marcus is based in the March office at Fraser Dawbarns where he is a Senior Associate in the Civil Litigation department.

## PEACE OF MIND THROUGH DIFFICULT TIMES

In uncertain times, the only thing we can say for certain is that nothing will stay the same for long.

It is entirely possible, therefore, that new legislation will have been introduced which will mean that all or part of this briefing no longer reflects the current law.

Because of this, we ask you to consider that, although correct at time of printing, information in this sheet may no longer be up to date and it is always best practice to consult with a lawyer about anything contained in this briefing.

Although our office doors are closed, our lawyers are still available to help answer any of your questions about this or any other legal concern you have.

**Please contact Fraser Dawbarns directly for up-to-date information on your specific circumstances.**

## LOOK OUT FOR OUR OTHER COVID-19 BRIEFINGS

- [Coronavirus and Business Interruption Insurance](#)
- [Winding Down the Furlough Scheme](#)
- [Life After Furlough](#)
- [Child Maintenance on a Reduced Income](#)
- [Coronavirus Guidance for Employers and Employees](#)
- [Holding Company Meetings During Lockdown](#)
- [Reopening the Housing Market](#)
- [The Changing Face of Litigation](#)
- [Making a Will Under Lockdown](#)
- [Child Contact and the Coronavirus Lockdown](#)
- [Commercial Tenancies and Rights of Forfeiture](#)
- [The Three Month Ban on Evicting Tenants](#)
- [Debt Recovery Under Lockdown](#)

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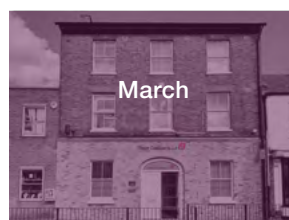
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