

Force Majeure Clause

A force majeure clause is a clause in a contract that excuses one or both parties from fulfilling their part of the contract if they are unable to do so due to an unexpected incident. The event, which could be a natural disaster, an epidemic, or an action by the government, is called a force majeure event.

In the UK, a force majeure clause has to do more with the contract than with the legal system. Depending on what was written in the contract, one or both parties may have the right to terminate the contract, be excused from performing their part, or get an extension of time.

In other countries, the government can classify COVID-19 a force majeure event. But in the UK, whether COVID-19 comes under a force majeure event or not depends on the wording of the contract.

How to find out if COVID-19 qualifies as a force majeure event?

- Read the contract carefully, giving special attention to every word under the force majeure clause.
 - The clause may have a specific list of events that come under force majeure e.g., terrorist attack, epidemic, earthquake, act of government etc. If the clause mentions epidemic or pandemic, then it clearly includes COVID-19. If an act of government is mentioned, COVID-19 would still be considered a force majeure event since restrictions were put in place by the government.
 - The clause may allow room for a broad range of events by mentioning that “any event beyond reasonable control” would be a force majeure event. In such a case, the Court may decide that COVID-19 is a force majeure event because of its unprecedented nature. The Court will also see if its genuinely causing difficult to a party in fulfilling its role. But the party will have to show that performing their task is really beyond their control.
 - The clause may mention a few events and say that the list is non-exhaustive. Or it may mention a specific list and then add “and any other event beyond control.” In these cases, too, COVID-19 would be covered.
 - It is very likely that COVID-19 is a force majeure event under many force majeure clauses. However, since the matter is highly fact-sensitive and it’s hard to determine whether the force majeure clause applies, it is best to consult a legal expert before taking action.

- Suppose the contract does not make it clear that COVID-19 could qualify as a force majeure event, then you need to take another route. Check to see if the contract contains details about triggering the force majeure clause if an event

has impacted the performance. Usually, the contract will mention that, for a certain impact on the performance, the party can be relieved from liability.

Discussing about the impact on performance, the clause may use wordings such as:

- The event has **"prevented"** the performance (*which means it is physically or legally impossible to perform the task*)
- The event has **"hindered"** the performance (*which means it is now more difficult or less profitable to perform the task*)
- The event has **"delayed"** the performance (*which means it is not possible to perform the task in the time period specified in the contract*)

If the event has **"prevented"** the performance, it would come under a force majeure event and the party would be relieved. But if the event **"hindered"** or **"delayed"** the performance, the party may not be relieved from liability.

So, please read the clause carefully and see how COVID-19 and government restrictions have impacted your performance. Then you will know if you can trigger the force majeure clause or not.

Finally, remember that the force majeure clause can be triggered if:

- The force majeure event was the reason why you could not perform the task or had to delay.
- The situation is really beyond your control.
- You could not take any measures to reduce or avoid the impact of the event.

Steps to take if you want to trigger the force majeure clause

After making sure that COVID-19 and its restrictions would give you a chance to trigger the force majeure clause, you must take the following steps:

1. Read the contract carefully to check the procedure mentioned in it for triggering the clause and ensure to follow it.
2. Check to see if there are any alternatives to perform the task or if there is a way you can minimise losses for the other party.
3. As soon as possible, send a notice to the other party that you are triggering the force majeure clause. In your notice, be careful with your wording. Make sure to specifically refer to the words of the contract and also mention how your performance has been impacted due to COVID-19. It would be unwise to mention that you cannot perform the task because of increase in costs.
4. Have a written document with you containing all the details of the matter. For example, what is the problem you are facing, why are you unable to perform the task, what steps did you take to avoid the problem or mitigate the loss etc. The more details you have, the stronger your case would be.

What if the force majeure clause does not apply?

In a case where the force majeure clause does not apply, you can first try to speak directly to the other party and consider making alterations to the contract. It may be possible to come to an agreeable solution in which both parties face minimum losses.

However, if the other party does not agree with you, your last option would be to "frustrate" the contract. Remember, though, that it is not easy to "frustrate" a contract. Frustration of a contract is only possible if you can prove that a particular event has made it impossible for you to fulfil the contract and that, under these circumstances, it is unfair for the other party to demand the performance of task.

Has the cost of fulfilling the contract drastically increased? Are government restrictions making it highly difficult for you to fulfil the contract? Such reasons are not sufficient for frustrating a contract. You will have to show that it is really impossible to perform the task.

What happens when a force majeure clause take effect?

When a force majeure clause is invoked, one of the following things can happen

- The contract is terminated
- The party is given an extension of time
- The party is excused from performing the task and it does not have to pay for damages

If the party is excused or the contract is terminated, the party will have to return advance payments as well as non-refundable deposits.

If any additional costs were incurred due to non-performance, the party that incurred the cost will have to pay for it unless otherwise mentioned in the contract.

Although Force Majeure is a contract-based clause and has nothing much to do with the legal system, the Court can have a final say on whether the clause applies and how it applies. The Court will make a decision based on the contract in consideration.