

## Commercial Update March 2020

### Force Majeure and COVID-19; Space Sector Contracts

*In the first of a series of commercial contract briefings prompted by the growing number of enquiries we are receiving due to the unprecedented impact on business and general life that the COVID-19 virus is causing, Alden Legal looks at the practical application of Force Majeure clauses in commercial contracts.*

#### What does a Force Majeure clause do?

The intention of a Force Majeure clause is to relieve a party of some or all of its obligations under an agreement where circumstances outside its reasonable control impact its ability to comply. The clause will often define the types of event that might be classed as Force Majeure, impose notification and mitigation obligations and provide for no fault termination rights.

#### **Key action points for companies:**

- **Review your most important supply and customer contracts as soon as possible – do they include a Force Majeure clause?**
- **Does the COVID-19 pandemic (or any related government action) fall within the definition of a Force Majeure event?**
- **If it does, what are your notification and mitigation obligations?**
- **Can Force Majeure lead to termination? Consider this in light of the entire supply chain and anticipate how you might address this for both customers and suppliers.**

#### It must be an express provision

English law does not imply the availability of rights in respect of Force Majeure events. If there is no provision in the agreement, the parties will not be able to avail themselves of the Force Majeure principle. The clause should include a definition of what amounts to the Force Majeure circumstances which could be a general reference to events beyond the parties' reasonable control or a list of specific events and quite often comprises a combination of the generic with specific events. In the satellite context, sector specific circumstances might include launch failure, satellite malfunction or transmission failure beyond what might be reasonably foreseeable.

#### Is COVID-19 an event of Force Majeure?

This will depend on the precise language of the Force Majeure clause. Whilst some clauses may contain a reference to pandemics or epidemics, this is not usually the case. The terms "act of God" and "disaster" often appear in Force Majeure clauses, but these are typically construed as referring to natural events such as earthquakes, floods and storms and are unlikely to cover COVID-19.

A Force Majeure clause will often include catch all language such as "beyond the reasonable control of a Party". The question of whether COVID-19 will fall within this will depend on the factual context of the agreement and may differ from agreement to agreement.

In addition to the virus itself, we have seen significant government action including to restrict the movement of people. If the definition of a Force Majeure event includes government actions either explicitly or through a catch all provision, then it will again be a matter of analysing the factual situation and circumstances for that agreement.

## Prevent, hinder and delay

In order to be able to invoke the clause, a party will usually have to be “prevented”, “hindered” or “delayed” in performing its obligations by the Force Majeure event. “Prevented” imposes a high threshold. It will not be sufficient that to comply is now prohibitively expensive, rather it must be impossible for the party to comply either physically or legally. “Hindered” and “delayed” are significantly less onerous thresholds and in each case should be assessed in the context of the precise language of the clause.

## Obligations vs benefits

A Force Majeure clause is intended to relieve a party from its obligations. Where a party is unable to receive the benefit of the agreement because of COVID-19 it would ordinarily not be able to invoke the clause. To use the topical example of an airline ticket, the airline may be able to invoke the Force Majeure clause because government restrictions prevent it from complying with its obligation to provide the flight but the passenger will not be able to invoke the clause because it is deprived of the benefit of receiving the flight.

## Notification and mitigation

Force Majeure clauses often include an obligation on the party wishing to invoke the clause to: (a) notify the counterparty within a certain timeframe of being aware of the Force Majeure event (e.g. “as soon as reasonably possible”); and (b) to then take reasonable steps to mitigate the impact of the Force Majeure event.

Therefore, if you may wish to rely on the relief provided by a Force Majeure clause you should now be reviewing your primary agreements and assessing whether you need to give notice to protect your position. Whilst courts are likely to show some leniency in the current circumstances, it would be advisable to commence this exercise as soon as possible as a failure to do so may prevent you obtaining relief.

The clause will often include an obligation to use reasonable endeavours to mitigate the Force Majeure event and to resume performance as soon as possible. The nature of the mitigating actions and the likely timescale to resumption are dependent on the applicable facts.

## Termination

Agreements will often contain a right for one or both parties to terminate the agreement where a Force Majeure event continues for an extended period. Given the likely economic consequences of the current crisis we anticipate that a number of companies will look to exit agreements where performance has been significantly impacted by the crisis. In addition to reviewing agreements which you may wish to consider terminating in the current circumstances, you should also give consideration as to which agreements the counterparties may be considering terminating and what the potential knock on consequences for your business may be.

This briefing considers Force Majeure clauses under English law, if your contracts are formed under another law, the analysis may differ. This briefing provides general guidance and does not constitute legal advice.



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