

CONTENT

[Introduction](#)[Defining Force Majeure Events](#)[Limitations on Force Majeure Clauses](#)[COVID-19 Pandemic](#)[Compliance with Government Requests](#)[Relying on Force Majeure Clauses](#)[Get in touch](#)[Contact](#)

INTRODUCTION

As the impact of COVID-19 grows, it is becoming increasingly apparent that supply chains are being significantly impacted. Businesses are closely reviewing their rights and obligations under contracts which they perceive as being at risk as a result of the on-going disruption. In particular, the question has regularly arisen as to whether a force majeure clause excuses a party from performing their obligations or from performing them within a previously agreed time period.

A force majeure clause typically excuses one or both parties from performance of the contract in some way following the occurrence of certain events. The underlying principle is that on the occurrence of certain events which are outside a party's control, that party is excused from, or entitled to suspend performance of all, or part of, its obligations.

Such clauses may be used in contracts because of the limited remedies available to parties under common law when a contract becomes impossible to perform. In the absence of an express clause, the common law doctrine of frustration may apply. Frustration only applies in certain restricted circumstances when the contractual obligation has become incapable of being performed. It may offer limited relief and remedies to the parties.

KEY DEFINITIONS

Force Majeure - "unexpected circumstances, such as war, that can be used as an excuse when they prevent somebody from doing something that is written in a contract" (*Cambridge Dictionary*).

Act of God - "such a direct and violent and sudden and irresistible act of Nature as the defendant could not, by any amount of ability, foresee would happen, or, if he could foresee that it would happen, he could not by any amount of care and skill resist, so as to prevent its effect" (*Nugent v Smith*)

Frustration – "frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract". (*Davis Contractors Ltd v Fareham*).

DEFINING FORCE MAJEURE EVENTS

Force majeure events are usually defined as acts, events or circumstances beyond the reasonable control of the party concerned. In any contract, the relevant clause(s) do not have to be labelled "force majeure". In some cases, language such as "Act of God" may be used. To identify any relevant sections of a contract, look for clauses which anticipate that there may be some sort of supervening event beyond the control of the parties. This may be factual such as a pandemic causing staff to be ill and unable to work; or legal, such as restrictions imposed in reaction to a pandemic which might prohibit staff from travelling and cause them to be unable to work – either of which may affect the performance of a contract (and be beyond the control of the parties).

Such clauses may be very specific in the events listed but may also be general. For example, some refer generally to acts of government, or to performance having to be lawful, or to any event out with the party's control which prevents them from performing the contract. The precise wording of the clause and the allocation of risk between the parties provided for by the contract as a whole, will affect to what extent this clause can be used. Where the term 'pandemic' has been used that will clearly cover COVID-19. Where no relevant event is specified it will become a question of interpretation. Second, this restrictive approach to force majeure clauses has echoes of the traditionally strict approach taken to exemption clauses. But the modern approach to exemption clauses is to apply "normal" principles of construction because the clauses are subject to statutory regulation under the Unfair Contract Terms Act 1977 (UCTA).

RELYING ON FORCE MAJEURE

Force majeure clauses are often construed restrictively and subjected to 'implied limitations' when discussed in court. For example, in the case of *Metropolitan Water Board v Dick Kerr & Co* [1918] AC 119, the clause purported to cover delays "howsoever caused". Despite this very wide language, the House of Lords held that the clause nonetheless did not cover substantial delays caused by the First World War: properly construed, the force majeure was only intended to cover minor delays.

Subject to express language in each specific case, businesses should consider whether the following apply:

1. Can you prove that the specific force majeure clause is relevant and the facts fall within its scope?
2. Can you prove that non-performance was beyond your control and, furthermore, that you have not assumed responsibility for this non-performance?

-
3. Could you have mitigated the impact?
 4. Do particular clauses of the contract exclude foreseeable/foreseen events?
 5. If nothing in steps 1-4 disbar you from bringing a claim, is there a particular process to notify the other in the contract?
 6. It is likely that relying on force majeure will bring *suspension of performance* (or exclude liability for non-performance) rather than an automatic discharge of performance (as in frustration). If it is the former, then you can turn to common law or express/implied provision in the contract.

It is always worth bearing in mind that any Force Majeure clause is still a matter of contract, negotiated and agreed among the relevant parties, and so the terms in which the clause are drafted will always need to be carefully considered in the context of the contract as a whole.

FRUSTRATION – KEY PRINCIPLES

If force majeure is not available to the party or parties, then parties can look to the principle of frustration. Frustration occurs when a supervening event materially impacts one or more parties' ability to perform the contract.

For frustration to occur, the parties' knowledge, expectations and assumptions are taken into account with regard to risk, alongside the ability to perform the contract at a (reasonably) later date and the nature of the supervening event itself. With regard to COVID-19, if a business does not have staff to manufacture, to deliver or be delivered to then one or more of these factors may give rise to a claim of frustration.

A recent case showed that a European company could not claim frustration due to Brexit because in the lease there was an option to sub-let all or part of the building. The event (Brexit) did not therefore strike at the heart of the contract because the company had negotiated for itself an option assign the occupancy/rent to another party (*Canary Wharf (BP4) T1 Limited v European Medicines Agency*). This would be the same as if a taxi was booked to go to a town which was holding a horse race, but the race was cancelled (*Herne Bay Steam Boat Company v Hutton [1903] 2 KB 683*). There would have to be an explicit or implicit statement in the contract tying the obligation to a specific future event occurring. See also the case of *Krell v Henry [1903]* where a flat to be rented to view the King's coronation (event) was deemed frustrated by the coronation not happening.

CONSEQUENCES OF FRUSTRATION

Instead of temporarily stopping a contract (like force majeure usually does) frustration discharges a contract: if a sufficiently material event strikes at the heart of the contract, then it cannot be performed. In such an event, what reliefs may be claimed?

Firstly, statutory reliefs may be available. This would be through a claim via the Law Reform (Frustrated Contracts) Act 1943 which, in brief provides for claims for money paid before discharge (Section 1(2)) and claims for recovery of non-money benefits (Section 1(3)).

Secondly, a claim under common law may be possible under the principle of "unjust enrichment", i.e. for a complete failure of consideration being provided by the non-performing party. This does give rise to some issues where 'part' of a contract has already been performed.

GET IN TOUCH

Should you have any questions to the topics covered in this article, please get in touch with your Rooney Nimmo contact or any of the persons below.

CONTACT



John Nimmo

Founding Partner
Tel: +44 (0)7811 458 506
john.nimmo@rooneynimmo.co.uk



Dawn Robertson

Partner
Tel: +44 (0)7779 939 665
dawn.robertson@rooneynimmo.co.uk



Edward Sloan

Founding Partner
Tel: +44 (0)7715 380 367
edward.sloan@rooneynimmo.co.uk



Grant Docherty

Partner
Tel: +44 (0)7877 283 645
grant.docherty@rooneynimmo.co.uk



Max Scharbert

Managing Partner
Tel: +44 (0)7803 817 451
max.scharbert@rooneynimmo.co.uk



Scott Nelson

Partner
+44 (0)7926 198 527
scott.nelson@rooneynimmo.co.uk

rooneynimmo.com

Edinburgh • London • New York • San Francisco • Beijing • Shenzhen • Hong Kong

The information given in this document is for guidance only and does not constitute legal or professional advice. You should always consult a suitably qualified lawyer on any specific legal problem or matter. Rooney Nimmo assumes no responsibility for such information contained in this document and disclaims all liability in respect of such information.

“Rooney Nimmo” or the “firm” is an international legal practice that includes Rooney Nimmo Ltd, Rooney Nimmo P.C. and their affiliated and associated businesses. Rooney Nimmo Ltd is a limited liability company registered in Scotland with reg. no. SC474342, is regulated by the Law Society of Scotland (reg. no. 20865) and is registered with the Solicitors Regulation Authority in England & Wales (reg. no. 628335). ♦ Affiliate locations. Neither Rooney Nimmo nor any of its affiliates has any control over, or acts as an agent of, or assumes any liability for the acts or omissions of, the other.

The word “partner” or “principal” is used to describe a partner or member of Rooney Nimmo Ltd, Rooney Nimmo P.C. and their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Rooney Nimmo Rooney Nimmo Ltd or Rooney Nimmo P.C., do not hold qualifications equivalent to members.

For more information about Rooney Nimmo, the partners and their qualifications, please visit www.rooneynimmo.com.

Attorney advertising. Where case studies are included, results achieved do not guarantee similar outcomes for other clients.

© Rooney Nimmo Ltd 2020. All rights reserved.