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ENGLISH LAW FORCE MAJEURE CLAUSES: A 4-STEP CHECKLIST & FLOWCHART

To Our Clients and Friends:

Following the publication of our **4-Step Checklist and Flowchart** to review and assess force majeure clauses in the context of the COVID-19 pandemic, Gibson Dunn's London office has prepared a companion 4-Step Checklist & Flowchart to assist with the analysis of force majeure clauses under English law.

STEP 1: Does COVID-19 trigger the force majeure clause? *The first step is to consider whether the COVID-19 pandemic falls within the scope of the force majeure clause. It should be noted that the force majeure event does not have to be the COVID-19 pandemic itself; the consequences of it and the impact of those consequences on the parties are also relevant.*

A force majeure clause in a commercial contract will be construed in each case on its own terms.^[1] The Court must ascertain the objective meaning of the language based on the wording of the clause and the contract as a whole. Depending on the nature, formality and quality of drafting of the contract, the Court will give more or less weight to elements of the wider context in reaching its view as to that objective meaning.^[2] Market practice may also be relevant to the exercise of interpretation, provided that it is clearly evidenced.^[3]

A typical force majeure clause will stipulate that it is triggered by the occurrence of certain events beyond the reasonable control of the parties. The clause may list, by way of example or exhaustively, such events (e.g. an “act of God”, war or industrial action). If the clause specifically references an “epidemic”, “pandemic”, “disease outbreak”, “public health crisis”, or similar, the current situation relating to COVID-19 will almost certainly fit within that clause. In the absence of a reference to disease or public health crisis, COVID-19 might still be caught by a reference to government action as a force majeure event, including, “acts of civil or military authority”, “acts, regulations, or laws of any government”, or “government order or regulation”. Where such references are present, recently adopted laws regulating, among other things, the size of gatherings or mandating the closure of certain establishments may qualify as force majeure events.

The COVID-19 pandemic may also fall within the scope of a catch-all provision in respect of, for example, “events, circumstances or causes beyond the reasonable control of the parties”. This will depend on the language employed: the Court will consider the catch-all provision in the context of the entire clause^[4] but will not be bound to limit its application to events similar to those specifically listed in the clause.^[5]

STEP 2: What is the required impact on performance? *The second step is to review what performance is excused by the force majeure clause.*

A force majeure clause will commonly cover events that “*prevent*” a party from performing its obligations. With such clauses, performance must be physically or legally impossible; it is not sufficient for performance to be merely more difficult or unprofitable.^[6] It is a question of fact as to whether alternative means of performance are open to a party that claims performance has been rendered impossible.^[7]

By contrast, clauses excusing a party where performance is “*hindered*” by a force majeure event impose a lower standard than that of preventing performance. Words such as “*impeded*”, “*impaired*” and “*interfered with*” will likely be construed in the same way as “*hindered*”.^[8] Where a clause refers to “*delay*” caused by a force majeure event, this is also likely to be given its plain meaning and not construed so as to give rise to the impossibility standard.^[9] Changes in economic circumstances which affect the profitability of a contract will not, without more, constitute hindrances or interference sufficient to trigger a force majeure clause.^[10]

STEP 3: Has the party taken all reasonable steps to mitigate the event? *The third step is to consider whether the party can prove that it had taken all reasonable steps to avoid or mitigate the event or its consequences.*

The force majeure clause may expressly require the party to mitigate the circumstances or effects of force majeure.^[11] Even if there is no such express term in the force majeure clause, there is an implied obligation on the party to demonstrate that it took reasonable steps to avoid or mitigate the effects of the force majeure event.^[12] If a contract provides that a party’s obligation may be performed in a number of ways and that party seeks to rely upon a force majeure (or other exclusion) clause which bars one method of performance, the party has a duty to perform its obligation in one of the alternative permitted ways.^[13] The fact that a step to avoid or circumvent the force majeure event may be unprofitable does not necessarily lead to it being deemed unreasonable.^[14]

STEP 4: When must notice be given and are there requirements for the form of notice? *The fourth step is to review the contractual requirements, if any, for notice, including whether the contract requires a specific form of notice.*

Force majeure clauses may require the giving of notice and the provision of notice could be a condition precedent to reliance upon the clause; the failure to provide timely notice may prohibit a party from obtaining the benefit of a force majeure clause.^[15] Notice provisions may specify the form of the notice, to whom it must be sent, and the manner in which it must be sent. Additionally, many agreements will require that notices given thereunder must provide sufficient specificity to make clear why the relevant triggering event applies to a certain provision in a contract. Mandatory requirements in a notice provision, including those as to timing, will typically be applied strictly by the courts. Given the current work-from-home orders affecting very many businesses, it may be difficult to comply with all formal notice requirements in a contract, and clients may wish to propose alternative methods of providing notice with contract counterparties for so long as the current climate persists; it should be noted that

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some notice provisions may also contain deeming provisions pursuant to which compliance with certain criteria may result in deemed notice, even where actual delivery or “service” of notice is impossible. Gibson Dunn can advise on and assist clients with such correspondence – either notices required to be given or responses to notices received – especially where the client does not presently have an operational mailroom.

Step 1. Does COVID-19 trigger the force majeure clause?

Does the force majeure clause specifically reference an “ <i>epidemic</i> ”, “ <i>pandemic</i> ”, “ <i>disease outbreak</i> ”, or “ <i>public health crisis</i> ” (or similar)?	No <input type="checkbox"/>	Yes <input type="checkbox"/>		If yes, proceed to Step 2.
Does the force majeure clause refer specifically to government action (including “ <i>acts of civil or military authority</i> ”, “ <i>acts, regulations, or laws of any government</i> ”, or “ <i>government order or regulation</i> ”)?	No <input type="checkbox"/>	Yes <input type="checkbox"/>		If yes, proceed to Step 2.
Does the force majeure clause have a catch-all provision?	No <input type="checkbox"/>	Yes <input type="checkbox"/>		If yes, the force majeure clause may have been triggered, but this is not guaranteed. Whether the COVID-19 pandemic falls within the scope of the clause will depend on its precise wording, which the Court will interpret in the context of the entire clause and the contract as a whole.
Does the contract contain no force majeure clause or one that is too narrowly drafted to capture COVID-19?	No <input type="checkbox"/>	Yes <input type="checkbox"/>		If yes, there may be other legal theories available to discharge or excuse performance of the contract, including frustration, supervening

				illegality, or material adverse change/effects.
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Step 2. What is the required impact on performance?

Does the force majeure clause require only that performance be “ <i>hindered</i> ”, “ <i>delayed</i> ”, “ <i>impaired</i> ” or otherwise made more difficult?	No <input type="checkbox"/>	Yes <input type="checkbox"/>		If yes, the force majeure clause may have been triggered due to the extreme disruptions caused by COVID-19. Proceed to Step 3.
Does the force majeure clause require performance of obligations to be “ <i>prevented</i> ” or “ <i>impossible</i> ” before contractual obligations are excused?	No <input type="checkbox"/>	Yes <input type="checkbox"/>		If yes, the force majeure clause may have been triggered if the current government regulations specifically prohibit the fulfillment of contractual obligations. Proceed to Step 3.

Step 3. Has the party taken all reasonable steps to mitigate the event?

Does the contract require the party to mitigate the circumstance or effects of the force majeure?	No <input type="checkbox"/>	Yes <input type="checkbox"/>		If yes, the party must take reasonable steps to mitigate the force majeure event or its consequences. Inquiries should be made as to what steps have been taken by the party, and whether it is possible to demonstrate that they are “reasonable”. Proceed to Step 4.
Even if there is no express term in the contract to mitigate, can the party demonstrate that it has taken reasonable steps to mitigate	No <input type="checkbox"/>	Yes <input type="checkbox"/>		If yes, proceed to Step 4. Inquiries should be made as to what steps have been taken by the party, and whether it is possible to demonstrate that they are “reasonable”.

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the force majeure event or its consequences?				
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Step 4. When must notice be given? Are there requirements for the form of notice?

Does the contract require notice?	No <input type="checkbox"/>	Yes <input type="checkbox"/>		If yes, timely notice must be provided in accordance with the notice provision. Some notice provisions require notice <i>in advance</i> of performance due. Others required notice <i>within</i> a certain number of days of the triggering event. If the notice provision requires a prompt submission or a submission within a definite time period, compliance with the notice provision would be considered as a <i>condition precedent</i> .
Does the contract contain specific provisions for the <i>method</i> of notice?	No <input type="checkbox"/>	Yes <input type="checkbox"/>		If yes, notice provisions may specify the form of the notice, to whom it must be sent, and the manner in which it must be sent. Specific notice language may also be required.
Does the contract require specific <i>language</i> to give notice of a force majeure event?	No <input type="checkbox"/>	Yes <input type="checkbox"/>		If yes, determine whether required wording is present in any notice. Some contracts may have a form of notice attached as an exhibit to the contract.
Does the contract specify a specific <i>method</i> for delivery of such notice?	No <input type="checkbox"/>	Yes <input type="checkbox"/>		If yes, notice may be required by email, registered mail, or through use of a particular form addressed to specific people.

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- [1] *Classic Maritime Inc v Limbungan Makmur Sdn Bhd and another* [2019] EWCA Civ 1102.
- [2] *Wood v Capita Insurance Services Limited* [2017] UKSC 24.
- [3] *Crema v Cenkos Securities Plc* [2010] EWCA Civ 1444.
- [4] *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC and others* [2010] EWHC 40.
- [5] *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 K.B. 240.
- [6] *Tennants (Lancashire) Ltd v G.S. Wilson & Co. Ltd* [1917] AC 495.
- [7] *Bremer Handelsgesellschaft m.b.H. v Westzucker G.m.b.H.* [1989] 1 Lloyd's Rep. 582.
- [8] *Chitty on Contracts* (33rd Ed.), § 15-158.
- [9] *Fairclough Dodd & Jones v Vantol (JH)* [1957] 1 W.L.R. 136.
- [10] *Tandrin Aviation Holdings Ltd and Aero Toy Store LLC and others* [2010] EWHC 40 (Comm); *Thames Valley Power Ltd v Total Gas & Power Ltd* [2005] EWHC 2208 (Comm); *Tennants (Lancashire) Ltd v G.S. Wilson & Co. Ltd* [1917] AC 495.
- [11] *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640 (Comm).
- [12] *Chitty on Contracts* (33rd Ed.), § 15-155. See also *Channel Island Ferries Ltd v Sealink UK Ltd* [1988] 1 Lloyd's Rep 323, where it was held that a party must not only bring himself within the force majeure clause but must show that it has taken all reasonable steps to avoid its operation, or mitigate its results.
- [13] *Reardon Smith Line v Ministry of Agriculture, Fisheries and Food* [1963] AC 691.
- [14] *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640 (Comm).
- [15] See *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil* [2002] EWHC 2210(Comm); *Bremer Handelsgesellschaft m.b.H. v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109.



Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 pandemic. For additional information, please contact any member of the firm's Coronavirus (COVID-19) Response Team.

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