

Are you as familiar with the concept of *force majeure* as you could be? Most businesspeople will understand it as providing relief for parties when their legal obligations are disrupted by extraordinary events. However, the nuances around when *force majeure* applies and how it operates in practice are often less well known.

This can be problematic, given the increasing frequency with which the topic is being discussed in commercial relationships across the globe. In market environments that are being characterised by more disruption and uncertainty, clients want to know more about *force majeure*. This update is our attempt to shed some light on the subject, discussing what *force majeure* is and some of the key issues associated with relying on it. While our analysis focuses on the position under English law (and while the specifics of any *force majeure* analysis will be driven by the relevant contractual wording in question), it is hoped that the concepts we discuss can provide a helpful backdrop to *force majeure* in commercial relationships more widely.

As an overarching comment, most supply chain agreements contain a contractual provision addressing events of *force majeure*, the relevant qualifying events or circumstances, information regarding certain prescribed mitigation measures and the details of the consequences of the *force majeure* on the performance of the contract.

Often, however, *force majeure* clauses fall into the “boilerplate” category of contractual terms that are not actively negotiated between parties. The reason behind this is typically due to the provision’s limited (or nil) impact on the more heavily negotiated contractual terms underpinning the commercial bargain. As such, these provisions can be something of an afterthought, copied into the contract from a preexisting precedent or a similar (though unrelated) sale and purchase agreement, without any real discussion or negotiation of their terms. The problem with this is that when *force majeure* situations arise, they are rarely straightforward and can involve various overlapping legal and factual complications. Quite often, parties are left without any clear answer as to how the *force majeure* clause will apply, or whether it will even do so at all.



In recent years, trading markets across the US, Europe and Asia have witnessed numerous *force majeure* declarations in response to supply chain issues. As a result, market players had to quickly determine the scope and application of their *force majeure* provisions to determine whether these provisions could be validly invoked and what the best strategies to handle contested declarations should be. Many market participants presented with a *force majeure* event or a counterparty declaring *force majeure* found that their preexisting expectations were not aligned with how the *force majeure* provision in their contract was actually worded. In some instances, these clauses were not fit to address the complex issue(s) at hand.

In this piece, we provide an overview of the typical issues we regularly encounter in practice.

First, what actually is *force majeure*? Under English law, it is best understood as a label given to a type of clause that is regularly employed in contracts to address disruptive events. More specifically, *force majeure* clauses generally operate to delay or suspend the performance of contractual obligations upon the occurrence of a particular event. What this means, first of all, is that there needs to be an underlying contract, and a *force majeure* provision within it, for the concept to be of any relevance to a particular legal relationship. Moreover, it confirms that the starting point of any examination into whether *force majeure* applies must start with an analysis of the relevant contractual clause. Under English law, *Force majeure* has no meaning outside the rubric of a contract; it is not some kind of innate legal principle that applies universally.





So any consideration of *force majeure* issues depends on what the underlying *force majeure* clause says. Here, it is the specific language of each clause that is crucial. And because that language varies from contract to contract, it can be difficult to generalise between them. What constitutes *force majeure* under one contract may not have the same effect under another. This is why whenever *force majeure* issues arise, it is important to have a good grasp on what the specific clause requires and provides for, and how it relates to the facts at hand.

What are the relevant considerations here? While their specific wording will often vary, certain features of *force majeure* clauses are commonplace. Often, the clause will:

- Set out the specific events or type of event that will trigger the relief. This is the origin of the elongated list of various catastrophic events that many businesspeople will have seen in a contract, but *force majeure* clauses can include more general characterisations of disruptive events that also serve as a trigger. Where a specific event is not described in a clause, issues of contractual interpretation can apply as to whether the parties intended that particular thing to operate in this way.
- Stipulate what is to happen when that trigger occurs. That can include not only the type of relief (for example, the suspension or mere delay of contractual obligations), but also any attendant requirements for the party seeking to benefit from it. This can include having to take reasonable steps to continue performance (as to which, see further on below).
- Contain procedural requirements in situations of *force majeure*, such as a requirement to notify the other party, or set out what is to happen if the disruption persists for a protracted period of time. For example, many contracts give the parties a right to bring the contract to an end if the *force majeure* continues past a certain point.

Forming an understanding of what the actual wording of a *force majeure* clause provides in these key respects is thus an important first step.

English law will also generally impose certain additional expectations on parties who try to rely on *force majeure*. Because of the nature of these clauses, courts have tended to interpret them as only applying in circumstances where the triggering event is beyond the control of that party, and where the disruptive effects could not have been avoided through the taking of reasonable steps. What this means, in practice, is that even if an event that is specified in the clause occurs, a party will not generally be entitled to simply “fold their arms and do nothing” (although this will always be subject to what is actually stated in the provision).<sup>1</sup>

*Force majeure* disputes can also often involve complex questions around causality. Situations where the true cause of a party’s inability to perform the contract is its own oversight or poor decision-making are unlikely to trigger *force majeure* relief.<sup>2</sup> However, in the real world, where there are various factors contributing to an episode of disruption, disentangling the root causes can be difficult and unpredictable.

Some other general principles can be drawn on the question of what a party must do before it is able to claim *force majeure*. The UK Supreme Court has recently clarified that while a party will be required to use reasonable endeavours to continue performing the contract, this will not generally require them to accept an offer of performance that is different from what is expressly provided by the contract.<sup>3</sup> Separately, courts have found that events that merely make the contract more difficult or expensive to perform should not tend to assist a party seeking *force majeure* relief. However, and once again, courts can be expected to give effect to the plain wording of a *force majeure* clause; so if the actual clause imposes obligations that are qualitatively different to the above, then parties can expect those provisions to prevail.

<sup>1</sup> *Bulman & Dickson v Fenwick & Co* [1894] 1 QB 179.

<sup>2</sup> Lewison K, *The Interpretation of Contracts* (8th ed, 2024), ¶ 13.32.

<sup>3</sup> This was the conclusion of the UK Supreme Court in finding a party relying on *force majeure* had been entitled to do so when sanctions made it more difficult for them to receive payment under a charterparty agreement in US dollars, as the contract mandated. This was despite an offer by the paying party to do so in euros, which the contract did not provide for. *RTI Ltd v MUR Shipping BV* [2024] UKSC 18, [2024] 2 WLR 1350.



However, at its core, what a party must show by way of taking reasonable endeavours to continue performance is context specific. Case law suggests that an obligation to use reasonable endeavours will require a party to explore reasonable avenues for performance that are open to them, but not to act in a way that is contrary to their own reasonable commercial interests unless the contract expressly requires it.<sup>4</sup> Drawing these points together, we suggest that parties will be well served approaching a potential *force majeure* situation by asking what could reasonably be done in response to it.

So, applying these points to a disruptive event in a supply chain contract, the specific wording of the relevant *force majeure* clause will be important. So too will be the availability of alternative sources of supply, the supplier's ability to procure them and the extent to which the contract envisages substitute methods of supply, because these are all things that will dictate whether performance of the contract according to its express terms (not in some other extracontractual way) can reasonably continue or not. If the contractual terms permit alternative supplies and such supplies are reasonably available, then the fact they are more expensive may not by itself give grounds for a declaration of *force majeure*. On the other hand, a party is unlikely to be deprived of an ability to rely on a *force majeure* provision for a failure to explore alternative modes of performance that would never have been realistic. Arguably the clearest conclusion one can draw from hypothetical scenarios like this is just how fact dependent *force majeure* disputes will be, and how complex they can often become.

As outlined above, it is certainly critical in the first instance to establish an understanding of the relevant contractual provisions governing *force majeure* relief in a particular situation.

However, depending on the wording of that provision and the facts of the case, there are likely to be other factors that determine whether *force majeure* applies, the process that must be followed in order for it to do so, and the impact that it may have on the contract moving forward. This strongly points in favour of bringing legal advisers into the conversation as early as possible when formulating a strategy, rather than doing so based on snap judgments.

At a time of heightened economic uncertainty, with a growing number of risks on both the supply and demand sides, it is perhaps unsurprising that *force majeure* is once again featuring in more conversations between contractual counterparties. Inevitably, one's memory is drawn back to the height of the COVID-19 pandemic, when the topic was the subject of an avalanche of market alerts from law firms around the world. The situation is arguably different now. Then, the nature and universality of the disruption was difficult for anyone to argue with, limiting the scope for disagreements. The landscape today is more complex, and the pitfalls of relying on *force majeure* without a sure footing to do so are more pronounced. Parties may not be able to predict the unpredictable, but having a firm grasp of what to do when it hits can be almost as useful as any crystal ball.

## Contacts



### Tim Flamank

Director, London  
T +44 207 655 1062  
E [tim.flamank@squirepb.com](mailto:tim.flamank@squirepb.com)



### Maximilian G. Rockall

Partner, London  
T +44 20 7655 1354  
E [max.rockall@squirepb.com](mailto:max.rockall@squirepb.com)



<sup>4</sup> *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] EWHC 292 (Comm) [35].