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Articles: Force Majeure events during COVID



The disruption caused by the COVID-19 pandemic continues to affect vessel owners and charterers' ability to perform existing contracts. This has resulted in an increased focus on force majeure clauses in charterparties.

As a matter of English law, "force majeure" is purely a contractual term and the scope of its operation is defined by what has been included within the relevant clause of the particular contract.

Force majeure clauses

A force majeure clause must be clearly drafted and will usually include:

- a list of specific force majeure 'events'
- what the remedy (or remedies) will be if a force majeure 'event' occurs
- an obligation to report the 'event'

Whether the COVID-19 pandemic constitutes a force majeure 'event' will depend on the wording of the force majeure clause.

A force majeure clause may include specific wording stating that a pandemic would provide contractual relief to one or both parties; however, it may not be this clear.

Proving force majeure

A force majeure clause will usually provide that performance must be "prevented", "hindered" or "delayed" by the force majeure 'event'. It is for the party seeking to rely upon a force majeure clause to prove that the specific facts fall within the protection of the clause. They must therefore prove the following:

- that there has been a force majeure 'event' as defined in the specific clause
- that, because of the force majeure 'event', they have been prevented, hindered or delayed (as per the wording of the clause) from performing the contract
- that the circumstances were beyond their control

- that there were no reasonable steps that could have been taken to avoid or mitigate the force majeure 'event' or its consequences.

The collection of evidence is crucial when seeking to prove force majeure. Such evidence may include written correspondences, notices, government warnings, communications from an agent or port authority, official publications and news reports.

The impact of COVID-19

Restrictions imposed at ports due to COVID-19 may present immediate issues for owners and charterers in respect of performing a contract and may also result in disputes further down the line.

Contractual issues that may arise include port closures preventing the loading or unloading of cargo or determining when the virus started to circulate in a particular country or region.

Disputes may also arise in respect of whether secondary effects of COVID-19 (for example, lack of pilots or berthing slots) would be covered by a force majeure clause which contains a sweep up provision such as *"any other cause outside of [the party's] reasonable control"*. In instances where performance would not have occurred regardless of the COVID-19 pandemic, causation may also be disputed – as most force majeure clause wording will require proof that performance would have taken place *but for* the effects of the event.

Check your terms

Owners and charterers wishing to invoke force majeure in respect of COVID-19 will need to closely review the terms of the relevant force majeure clause and should collate all evidence which would help them prove force majeure.

Additionally, they should be careful to follow any reporting requirements set out in the clause.

If you have any claims or queries relating to force majeure, then we recommend you contact your usual FD&D claims handler.

Find out more by reading our earlier article 'What is Force Majeure?' [here](#).

ARTICLE CONTRIBUTORS



•
Sarah McCann

Office
+44 191 232 5221

Mobile
+44 788 018 6264

Email
sarah.mccann@nepia.com

Office Location
UK (Newcastle)



Office Hour Emergencies +44 191 232 0999