FORCE MAJEURE – NOW WHAT?

A THREE-STEP FRAMEWORK FOR MITIGATION

COVID-19 has led many companies to seek shelter within the force majeure provisions of their contracts, and our earlier briefings on this can be found on our website[1]. But, having declared force majeure, what should you do next? Can you simply wait until it all blows over? The reality is that there is a continuing duty to mitigate the impacts of force majeure events. Here, we run over the basics and set out a three-step framework to assist you in protecting your position.

1 https://www.hfw.com/Knowledge-and-Insights

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Legal duty to mitigate

If you are seeking to rely on a force majeure clause, you will need to consider how to mitigate the impacts of the force majeure event.

In *Channel Island Ferries Ltd v Sealink United Kingdom Ltd*, the court established that a party wanting to rely on force majeure *"must not only bring himself within the clause but must show that he has taken all reasonable steps to avoid its operation or mitigate its results."* It is worth noting that the court will imply this duty in to a contract, even if the contract does not specifically provide for it.

Reasonable steps to mitigate

So what constitutes *"reasonable steps"*, and how far do you have to go in order to mitigate the impacts of a force majeure event?

Judicial guidance on mitigating the impacts of force majeure is limited. Nevertheless, there are a few cases we can look to which provide an indication of the court's expectations:

- **Channel Island Ferries v Sealink United Kingdom (1988)- as already referenced:** Due to an alleged force majeure event, the Defendant failed to make two named vessels available by bareboat charterparty under a contract. The court held that they had also failed to search for and tender alternative vessels. This prevented them from relying on the force majeure clause.[2]
- **Seadrill Ghana Operations Ltd v Tullow Ghana Ltd (2018):** The court emphasised that when considering reasonable steps to mitigate, a party should consider the interests of both contracting parties and not just its own. It also underlined the importance of the surrounding legal and factual context in evaluating reasonableness.[3]
- **Kawasaki Steel v Sardoil (the Zuiho Maru) (1977):** Although this case related to contractual frustration, it held that a charterer can and must source an alternative cargo if the intended cargo is delayed or destroyed. A similar approach may be taken with regard to force majeure.[4]

The common law doctrine of mitigation of damages may also provide some clues as to what is required. For instance:

- **British Westinghouse Co v Underground Electric Ry Co (1912):** The court considered that a mitigating party need not take any step, which a reasonable and prudent person would not ordinarily take in the course of their business.[5]
- **James Finlay & Co Ltd v NV Kwik Hoo Tong (1929):** In this case it was held that a mitigating party is not required to put his commercial reputation at risk.[6]

Let us take an example where a force majeure event means a company has insufficient cargo to load all chartered vessels. In such an instance, the company must consider how to allocate the available cargo. The legal position is that the charterer should allocate cargo reasonably, and in such a way the trade would consider proper and reasonable. This may be on a pro rata basis or in chronological order. Simply honouring contracts with more favourable rates, and declaring force majeure in respect of those which are more expensive, is unlikely to be considered reasonable.[7]

Finally, the duty to mitigate can go both ways. It is relevant not only to the party affected by force majeure, but also to the innocent counterparty. The latter may therefore be required to consider an offer of substitute performance by the party impacted by force majeure.[8]

What happens if you fail to mitigate?

Some legal commentators have framed mitigation as the gateway to force majeure. In other words, you can only

2 Channel Island Ferries Ltd. v Sealink U.K. Ltd. [1988] 1 Lloyd's Rep. 323

3 Seadrill Ghana Operations Ltd. v Tullow Ghana Ltd. [2018] EWHC 1640 (Comm)

4 Kawasaki Steel Corp. v Sardoil (The Zuiho Maru) [1977] 2 Lloyds Rep. 552

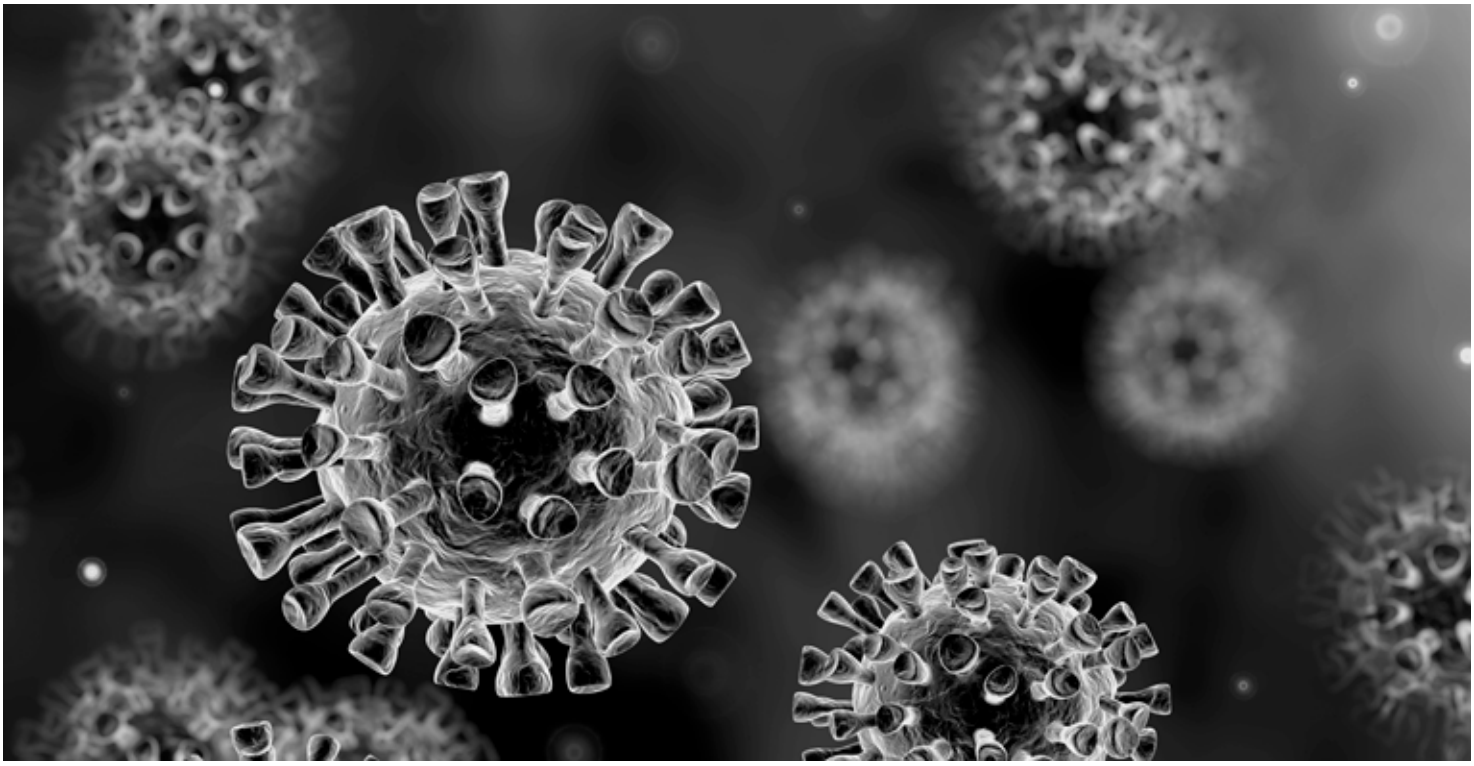
5 British Westinghouse Electric and Manufacturing Co. v Underground Electric Railways Co. [1912] A.C. 673

6 James Finlay & Co Ltd. v NV Kwik Hoo Tong HM [1929] 1 KB 400

7 50 Chitty on Contracts (33rd Edition) Chapter 15, Para 15-166,Pgs 1237 to 1238, Intertradex SA v Lesieur Tourteaux SARL [1978]

7.2 Lloyd's Rep. 509, 512 and Bremer Handelsgesellschaft M.B.H. v Continental Grain Co [1983] 1 LLR 269)

8 The Solholt [1983] 1 Lloyd's Rep. 605



rely on force majeure if you have taken reasonable steps to mitigate. Failing to do so may jeopardise your ability to rely on a force majeure provision. In practice, this may mean you become liable for breach of contract – a potentially costly outcome. Mitigation should therefore be considered a fundamental aspect of establishing force majeure.

It should be noted that the burden of proof to establish mitigation rests with the party seeking to rely on the force majeure provision. This means it is vital to keep documentary evidence demonstrating that all reasonable steps to mitigate had been taken, and may include the evaluation of various alternatives.

So how should you manage your risk?

The following three-step framework may assist in protecting your position during a force majeure event.

1) **Proactively take reasonable steps to mitigate** the impacts of the force majeure event. This may include deciding how best to allocate limited goods, or considering substitute performance. When choosing the right approach, the interests of both parties should be considered. A constructive dialogue with the contractual counterparty may be crucial here. The factual and legal context will almost certainly vary for each case. As such, a one-size-fits-all approach is unlikely to suffice.
2) **Set up a process to continually review and assess potential steps to mitigate** during the force majeure event. At present, there is legal uncertainty as to when the duty to mitigate ceases to be engaged. The safest approach is therefore to continually monitor the situation and act accordingly.
3) **Keep a documentary record** of the different mitigation options considered, and the steps taken. Remember that it is good practice to keep a written note of what was discussed during telephone calls and meetings. This could be especially important for recording the consideration of options which were ultimately discounted. Remember it is for you to prove that you took all reasonable steps. Remember that unless such documents are produced for the dominant purpose of litigation, they may not attract legal privilege. You may therefore be obliged to disclose them in legal proceedings.

The best course of action will vary significantly on a case-by-case basis. For tailored legal advice on your situation, please do not hesitate to contact your usual HFW contact, or the authors of this briefing.

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