FORCE MAJEURE CLAUSES:
Points to consider for commercial parties in light of COVID-19

NORTHRIDGE

	Steps / points to consider[1]	Commentary	Sources
Force majeure must be expressly included[2]	Is there *express* wording dealing with what happens if an event occurs outside a party's control (whether or not the exact words "force majeure" are used)?	If there is no express wording of this kind, parties should consider whether: 1. The doctrine of frustration applies.[3] 2. In the event of a change in the law making it illegal for certain obligations to be performed, it may be possible to argue that those obligations have been discharged.[4] 3. There are any applicable general termination rights in the contract (i.e. voluntary termination where there is no fault/breach). 4. There are any general mechanisms for amending the contract e.g. fees payable under the contract.	
Trigger events	Does the trigger wording include reference to:		
	〉 Pandemics, epidemics, disease or similar?	〉 It is likely that COVID-19 would fall within the meaning of "*disease*" or "*infectious disease*". 〉 On 11 March 2020, the WHO declared COVID-19 a pandemic (pandemic refers to the wide geographic spread of a disease and therefore COVID-19). 〉 It is also arguably an "*epidemic*" in the UK (a term which refers to a wide-spreading disease, but not necessarily over a wide geographic area).	
	〉 Acts of god?	Includes "*storms*", "*tempests*" and other "*natural accidents*". It is unclear from the authorities whether the outbreak of COVID-19 would fall within this category. Note that the authorities emphasise that acts of god will not arise where a party has not taken reasonable care to protect itself in	*Nugent v Smith* (1876) 1 C.P.D. 423

[1] Note that it is the responsibility of the party seeking to rely on a force majeure clause to show that the circumstances fall within the terms of that clause.
[2] This note considers commonly used phrases and provisions in force majeure clauses. It is possible, however, that a force majeure clause that is too widely drafted may not pass the reasonableness test under section 3(2) of the *Unfair Contract Terms Act 1977* (which applies to clauses which seek to limit or exclude liability; there are different rules for consumer contracts which are outside of the scope of this note). If that is the case, the clause would be void.
[3] At common law the doctrine of frustration will operate to terminate a contract automatically when a subsequent event occurs, which is (a) unexpected; (b) beyond the control of the parties; and (c) makes performance of the contract impossible, or renders the relevant obligations radically different from those contemplated by the parties at the time of contracting. In practice, invoking frustration is a high bar. If there is a force majeure clause and it can be argued that it anticipates or covers he relevant event, frustration will not be applicable given the requirement for the event to be 'unexpected'. By way of illustration of the application of the doctrine of frustration, in the case of *Metropolitan Water Board v Dick, Kerr & Co Ltd* [1918] AC 119, under a contract made in July 1914, a reservoir was to be constructed and to be completed in six years. Due to a change in the law during the First World War, the contractors were obliged to cease work. The court held that the contract was frustrated by supervening impossibility. The interruption was of such a character, and likely to last so long, that if the work was to be resumed after the war, it would be a different undertaking altogether.
[4] Although the case law in this area is not particularly well developed, there are instances of the courts deciding that a party should be discharged from *particular* obligations that have become illegal (i.e. legally impossible) by a subsequent change in the law. This is not the same as frustration, which brings the contract to an end automatically. However, it shares some features with frustration, in that the supervening event (the change in the law) must be (a) unexpected/unforeseeable; and (b) not something the parties could guard against (i.e. mitigate). See *Baily v De Crespigny* 217 (1869) LR 4 QB 180 and *Canary Wharf (BP4) T1 Limited & Ors v European Medicines Agency* [2019] EWHC 335 (Ch) at [173]. This will not necessarily excuse an obligation to pay fees under a contract, merely the obligation to perform what has subsequently become an illegal obligation.

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		relation to such acts of god e.g. an unseaworthy ship sinking in a storm would not be covered.	
	〉 Strikes or labour disturbances?	Many clauses expressly state that strikes or labour disturbances of the party's *own* employees or contractors do not fall within the definition of force majeure event. Even if this is not expressly stated, it may be arguable (depending on the drafting) that the event must still be one which is "*beyond the reasonable control*" of the party and a particular strike may in fact be within a party's control i.e. the party could accede to the demands of the striking individuals to prevent the strike from going ahead.	
	〉 Rulings or decisions of relevant government, court or authorities?	Wording such as this may be an effective trigger where, for example, the Italian government has restricted the movement of people across the country.	
	〉 General words such as "*any other reason beyond that party's reasonable control*" after a specific list?	The catch all words are limited to events similar to the ones in the specific list, unless the words "*without limitation*" or equivalent are included.	*Sonat Offshore SA v Amerada Hess* [1998] 1 Lloyds Rep 145
	〉 Only general words such as "*any reason beyond that party's reasonable control*"?	Context is important, but it is arguable that the outbreak of COVID-19 would fall within these general words. Previous authorities have suggested that this wording may cover "*war*", "*strikes*" or actions of a state such as embargoes. It will not include bad weather (although an "*abnormal tempest*", could fall within a force majeure clause), funerals, the rising cost of fulfilling a contract or the other party's financial arrangements.	*Lebeaupin v Richard Crispin and Company* [1920] 2 KB 714; *Thames Valley Power Ltd v Total Gas & Power Ltd* [2005] EWHC 2208; *Tandrin Aviation Holdings Ltd v Aero Toy Store* [2010] EWHC 40
	Caused by own actions / inaction	Note that if a party requests action to be taken to bring about a force majeure event (e.g. asking the government to issue a travel ban), that may not then be considered to be outside that party's control and therefore not a force majeure event. "*A man cannot rely on his own act, or negligence, or omission, or default, as "force majeure.""*	*Lebeaupin v Richard Crispin and Company* [1920] 2 KB 714
	Caused by sub-contractors	A party cannot rely on a force majeure clause (unless there is express drafting to the contrary) where the relevant event was within the party's own contractual control e.g. if it has delegated certain obligations to a sub-contractor, any failure of performance by that sub-contractor will still be within the party's "control". The party's remedy would be to sue the sub-contractor for damages for breach of contract.	*Great Elephant Corporation v Trafigura Beheer BV (The Crudesky)* [2013] EWCA Civ 905

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		Parties should also take note of the requirement to mitigate in these circumstances (see below).	
	Caused by suppliers	The above principles are likely to apply in the case of a failure by suppliers. However, the specific wording of the force majeure clause may assist. For example, in a sale of goods case the clause provided expressly that "*Neither party shall be liable for any breach, delay or non-performance hereunder which directly or indirectly results from or is cause [sic], in whole or in part, by […] interference with sellers [sic] means of supply*". The Court of Appeal agreed that a failure by the seller's supplier meant it did not have liability to the buyer by reason of the wording of the force majeure clause.	*Coastal (Bermuda) Petroleum Ltd v VTT Vulcan Petroleum SA ('The Marine Star')* [1996] C.L.C. 1510
Link between trigger event and performance	Consider the requirements for a link between the trigger event (see above) and the issue(s) with performance:	There is authority to suggest that the force majeure event must be the sole cause of the issue(s) with performance, but the case law also acknowledges that it depends on the interpretation of the contract (see below).	*Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640 at [79]
	〉 Must the trigger event have "*caused*" or be the "*reason*" for the issue(s) with performance – or must the issue(s) be "*as a result of*" the trigger event?	Likely that a causal link would need to be established. This is usually a factual question. The courts will generally determine whether this is the case on the facts by applying the usual "*but for*" test.	
	〉 Must the issue(s) with performance "*arise from*" the trigger event?	Arguably, this is wider than a direct causal link.	
	〉 Must the issue(s) with performance merely be "*in connection with*" the trigger event?	Wider than a causal link. The Court of Appeal has suggested that these words would allow a party to recover sums beyond those merely caused by the trigger event: "*the words "in connection with" […] are widely regarded as being as wide a connecting link as one can commonly come across. In themselves they do not express the need for a causal connection, although of course they do express a need for a connection of some kind*."	*Campbell v Conoco* [2002] EWCA Civ 704 at [19]
Impact on performance	Must the trigger event "*prevent*" performance?	The party seeking to rely on the clause must show that performance has become physically or legally impossible, not merely more difficult or unprofitable – and if another route for performance is possible, a party is unlikely to be considered to have been "prevented" from performing. E.g. If the government in a relevant jurisdiction announced a ban on public gatherings and/or restricted the movement of people in particular affected areas – it could be argued that holding an event in contravention of such rules would mean performance would be legally impossible.	See for example *Dunavant Enterprises Inc v Olympia Spinning & Weaving Mills Ltd* [2011] EWHC 2028 (Comm) at [29], [32]; and *Classic Maritime Inc v Limbungan Makmur and another* [2018] EWHC 2389

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		It may also be possible to argue that a decision by a government that an event (e.g. a sporting or entertainment event) must take place behind closed doors could make it impossible to perform for suppliers or companies who are not permitted to attend under the terms of the decision to hold the event behind closed doors.	
	Does the contract refer to the event "*hindering*" performance?	This has a wider scope than "*prevent*" and will generally be satisfied if performance has been made substantially more onerous. However, a mere increase in the cost of performing the contract, wouldn't be sufficient.	
	Is there provision for "*delayed*" performance?	Again, this has a wider scope than "*prevent*".	
	What does the clause say about partial performance? i.e. where some obligations, but not all, are affected by the trigger event	A party may not be prevented – legally or physically – from performing all its obligations. Consider whether the clause requires the continued performance of those obligations even if other obligations have been prevented e.g. in a sponsorship agreement, online and social media exposure may still be possible even where specific events have been cancelled or postponed.	
Payment of fees in a force majeure situation	Does the force majeure clause specify whether or not fees should remain payable if a force majeure event occurs?	If it does, fees will remain payable unless and until the force majeure event ends or the agreement is terminated (depending on the wording).	
	If there is no such express wording, consider the wording of the payment obligation in the context of the goods and/or services to be provided under the contract.	Depending on the drafting of the payment obligations in the context of the goods and/or services to be provided under the contract (in particular, whether the payments are allocated, apportioned and/or linked to the happening of specific events or to the provision of specific goods and/or services), it may be possible to argue that a failure to provide some of those goods and/or services (as a result of a force majeure event) amounts to a total failure of consideration such that amounts paid or due to be paid for those goods and/or services should be returned or are not payable (respectively). In many cases, however, the starting point would be for the parties to discuss this commercially to see if an agreement can be reached.	*Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32 *Giedo van der Garde BV v Force India Formula One* [2010] EWHC 2373 (QB)

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		By way of further explanation, the applicable common law principle is that a party who has paid money and received nothing for it is entitled to recover the money paid.[5] For an example of this principle in a sporting context (although not involving a force majeure event[6]), driver Giedo van der Garde entered into agreements with the Force India Formula One team under which, in return for the driver paying $3million, he would have the benefit of testing in their car for 6000km (including a right to test the car during Friday practice sessions before races, which was contingent on the driver obtaining the relevant licence) and various other related sponsorship rights. The contract did not break down how that $3million related to the different services/rights. In the event, the required licence was not obtained, and the driver only tested the car for approx. 2000km. The judge found that: 〉 The fact that *some* services under a contract may have been provided is not necessarily a bar to restitution (i.e. return of monies paid where someone has been unjustly enriched) or total failure of consideration [323]. 〉 The key question is whether the court can apportion the monies paid or due under the contract to the different services provided or not provided under the contract: 〉 Express words make this task easier (i.e. the contract breaks down the sum payable in relation to the different services). 〉 But, even if express words are not included, it may still be possible to apportion the contract sum, for example, on a *pro rata* basis [323].[7] 〉 In this case: 〉 The sponsorship rights were "*collateral or incidental*" to the "*essential bargain contracted for*" i.e. the right under the contract to test drive the car and therefore did not need to be apportioned	

[5] One of the leading cases is the House of Lords case of *Fibrosa v Fairbairn Lawson Combe Barbour*. In that case, the English seller agreed to provide machinery to the buyer under a contract made in July 1939. The buyer paid for the machinery, but before it could be delivered the delivery location was occupied by the German army. The contract was thereby frustrated. The House of Lords held that the buyer was entitled to recover the money paid because there had been a total failure of consideration.

[6] If the express terms of the contract deal with the position on fees in the event of a force majeure event, the common law principles outlined here are unlikely to be applicable. In the absence of express words, the common law principle regarding total failure of consideration arguably applies.

[7] However, the judge noted that apportioning *pro rata* may not be possible in every case, as some contracts may not involve an even distribution in the value of the services to be provided. For example, where the services involve training of an apprentice, the training is obviously more involved at the beginning while the apprentice is getting up to speed. Apportioning the training fees on a per day basis would therefore not be appropriate [256].

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		separately. If they had not been incidental, the judge accepted apportionment in relation to those rights "*would be difficult if not impossible*" [327 - 329]. 〉 However, the existence of the contingent right to Friday testing (which was considered "*qualitatively different*" from the general right to testing miles [351]) meant that apportionment was not possible in the absence of express words indicating how the overall sum of $3million should be apportioned.	
Process requirements	Are there any notice or other procedural requirements?	Check the wording of the force majeure clause as well as the requirements of any general 'Notices' clause. If the notice requirements include a requirement to provide information on the force majeure event (including likely extent and duration), it is recommended that the party seeking to rely on the clause compiles clear evidence which can be presented to the counterparty.	
	Are the notice or process requirements expressed to be a condition or pre-requisite for obtaining the benefit of the consequences below?	If they are, the party seeking to have the benefit of the force majeure clause must ensure that it follows these to the letter.	
Mitigation	Are there express mitigation requirements?	If so, the party seeking to rely on the force majeure clause should ensure it complies with these provisions.	
	If not, duty to mitigate may be implied.	The authorities suggest that a party seeking to rely on a force majeure clause (referring to events beyond a party's control) can only do so where it can show it took reasonable steps to avoid or mitigate the event and its consequences. Given the requirement to take reasonable steps to avoid the event (as well as its consequences), parties should consider what business continuity steps may be taken to minimise so far as possible the impact of COVID-19 on their contractual obligations. This may involve early discussions with counterparties and customers on possible options.	*Channel Island Ferries Ltd v Sealink UK Ltd* [1988] 1 Lloyd's Rep 323
Consequences / options	What are the consequences in the contract? Depending on the words in the contract and the context, the consequences may include a combination of:		
	〉 Innocent party precluded from bringing a breach of contract claim (and terminating for breach)	〉 For example, "*A party shall not be in breach of this Agreement if […]*" suggests that one consequence is that the innocent party cannot found a claim in breach of contract if the force majeure clause is engaged. If the clause states that a party is "*excused*" from performing in these circumstances, that may also preclude a breach of contract claim. 〉 Further, if a party is not in breach or excused from performance, this may prevent the innocent party from terminating (under the common law or any express terms) for breach.	

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	〉 Innocent party precluded from bringing any claims or recovering other costs.	For example, it may be argued that "*No party shall be liable […]*" does not only preclude a breach of contract claim, but also a claim in tort (negligence).	
	〉 Suspension of performance and/or extension of specific timelines / deadlines.	Depending on the drafting, performance under the contract may be excused, delayed or suspended. This usually precedes an ability by one or both parties to terminate the contract after a period of time (see below).	
	〉 Option to terminate (by one party / both parties).	Depending on the drafting, the option to terminate may be available where a force majeure event continues for a particular period of time. However, careful consideration will need to be given to whether performance of a one-off obligation could be capable of being 'continuing' and whether the option is only applicable where there is a complete failure to perform all obligations – or merely a failure to perform one obligation.	
	〉 Automatic termination.	Depending on the drafting, the provision may be construed to bring the contract to an end automatically i.e. without one party opting or electing for termination.	
	〉 Renegotiation of terms.	There may be a mechanism for a renegotiation of terms in the force majeure clause itself or by reference to existing provisions.	
	〉 Carve out for payments under the contract.	Some contracts specify that a force majeure event will not excuse any party from paying sums due under the contract.	
Consequences if it's not a force majeure event	Repudiatory breach.	If a party relies on a force majeure event to cease performing its obligations under the contract, and it is in fact not entitled to do so, that party could be taken to be in 'repudiatory breach' of the contract. To be repudiatory, a breach must deprive a party of substantially all of the benefit of the contract. The counterparty would be entitled to accept that repudiation (which would bring the contract to an end) or affirm the contract and treat it as continuing. The attractiveness of accepting a repudiation of the contract is that the party may recover more in damages than it would usually be entitled to.[8] Therefore, if there is any doubt as to whether a force majeure event has occurred, it is recommended to engage in commercial discussions to resolve the issue and (if appropriate) agree that a force majeure event has occurred and next steps.	
Insurance and other contracts /	Check relevant insurance contracts for cover and any notification requirements.	Declaring a force majeure event may impact on insurance arrangements so these should be checked carefully e.g. there may be strict notification requirements.	

[8] In cases of repudiatory breach, a party may recover damages for the loss of the contract i.e. the future profits it should have made under the contract but for the termination by the other party's repudiation.

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other points to consider	Check loan agreements or other funding agreements.	Force majeure events may result in events of default and/or material adverse change in loan and other funding agreements (e.g. for key contracts or where a party's overall financial condition may be impacted).	
	Check provisions in related contracts.	If a force majeure event occurs in relation to the 'main' contract you are considering, ensure you have considered all other related contracts with third parties and suppliers etc. In particular, what are your termination rights in relation to those contracts? Wider business continuity discussions with those parties may be advisable. As a drafting point, where there is a chain of suppliers / agents which may be impacted by a force majeure event, it is advisable for the force majeure wording (especially for any party in the 'middle' of a chain, such as an agent) to be 'back-to-back' or at least considered together at the point of negotiation for consistency.	
	Duties to employees.	Employers are responsible for health and safety and are required to do whatever is reasonably practicable to protect the health, safety and welfare of their employees and other people who might be affected by their business. Employers should take proportionate action to protect their employees. Failure to do so could expose employers to negligence or health and safety related claims, and could invalidate insurance policies. These obligations should be considered together with the requirement to mitigate in relation to a force majeure event (see above).	
	Privilege.	Parties discussing these issues internally should: 〉 Keep written communications to a minimum (especially purely commercial discussions, which are not likely to be covered by privilege). 〉 Only share discussions with, and advice from, lawyers (including in-house lawyers) on a 'need to know' basis internally (and only share with external parties where there is a 'need to know', there are confidentiality obligations in place and the reason/purpose for sharing should be outlined expressly when sharing). 〉 Mark communications with lawyers (including in-house lawyers) on rights and obligations under the contract as "privileged & confidential".[9]	

[9] Simply labelling a document as privileged is not determinative. Whether something is privileged is a matter of substance, but labelling discussions with lawyers as "privileged" is nevertheless good practice.