FORCE MAJEURE – A PRACTICAL SUMMARY

WHAT IS FORCE MAJEURE?

Force Majeure is a French term which translates to a *'superior or greater force'* and can be summarised as an unforeseeable event or circumstance that prevents one or both parties from performing their contractual obligations. It is a principal that works on the basis that if an event occurs which is unforeseeable at the time of entering into a contract and is outside of the control of the parties, the relevant party should not be held liable for failing to perform its obligations as a result of that event.

It is a principal which arises under civil law for governing contractual agreements and is not recognised under UK Common Law. The term *Force Majeure* therefore has no legal definition or meaning in the UK and is governed exclusively through contractual interpretation. This will arguably prevent the UK government (unlike civil law countries) from simply declaring a certain event such as COVID 19 is a *Force Majeure* event for the purpose of resolving potential disputes which may arise. This means, in order for *Force Majeure* to apply, it must be defined within the Contract and as there is no general legal meaning or application of *Force Majeure* outside of what is drafted in a contract, the application of *Force Majeure* will be different for each and every contract it applies to dependant on the definition within that contract. In the event a contract does not include a *Force Majeure* clause, neither party

will be able to rely on *Force Majeure* as a basis for relieving itself of performing its obligations under the contract. In this instance other contractual remedies may apply or the parties may be able to rely on the common law principle of Frustration.

WHAT ARE THE KEY POINTS TO CONSIDER?

Assuming a contract does include a *Force Majeure* clause, this will not automatically excuse a party from performing its obligations as *Force Majeure* will only apply to the specific events referred to in the clause (unless it includes wording which indicates the list is not exhaustive). The precise wording of the clause must therefore be given careful consideration in order to establish whether it applies to a particular event.

Once it has been established that an event falls within the specified meaning, consideration should also be given to the level that performance is required to have been affected. *Force Majeure* clauses often include requirements for performance to have been prevented, hindered or delayed.

Prevention is the most onerous requirement and in this instance the party wishing to relieve itself of its obligations would need to demonstrate that performance of its obligations are either legally or physically impossible as a result of the *Force Majeure* event. The party would therefore not be relieved if the conditions under which the contract is to be performed have simply become more difficult or less profitable. In the current COVID 19 situation, this may lead to arguments that the requirement for social distancing on site has not prevented performance, it has simply made it more onerous.

It should also be noted that reliance on *Force Majeure* is not likely to succeed if a Party's performance was already being or was likely to be prevented by some other event or default such as under resourcing or failure to secure materials etc. It is typically a requirement that the *Force Majeure* event is the only reason performance is prevented although some clauses may only require it to be the dominant cause.

Parties should also be aware that the occurrence of a valid *Force Majeure* event will not relive them of their obligations for the remainder of the contract. Relief will only be provided for the period that the event is active.

Before invoking *Force Majeure*, the parties should also consider other remedies available to them under the contract such as EOT and variation clauses or possibly even a separate commercial agreement. All of these may provide an acceptable level of compensation to allow the parties to

continue performing their obligations on a mutually acceptable basis without the risk of unintentionally triggering other mechanisms within the contract such as termination.

If no alternative remedy is available, the *Force Majeure* clause should be reviewed in conjunction with the wider contract documents in order to assess its effect on other contractual clauses as it may act as a trigger for terminating or suspending the contract which may not be the long term or ultimate intention of the parties. The contract should therefore be read as a whole when considering the possible use of *Force Majeure*, and it should never be read or applied in isolation for short term relief.

If a party does choose to invoke the *Force Majeure* clause, it is important to ensure the correct contractual procedure is followed and any timescales or notification requirements are strictly adhered to. Failure to do so may jeopardise any potential claims.

Once the decision to invoke *Force Majeure* has been made, the timing could prove crucial. For example, the current COVID 19 outbreak was only declared as a pandemic by WHO on 11 March 2020 therefore any claim based on a pandemic occurring before this date is unlikely to succeed.

WHO BEARS THE COSTS?

As well as setting out the specific events and procedures to be followed, the *Force Majeure* clause will also typically apportion the risk for these events between the parties. This may include an express provision for one party to bear all of the costs or for costs to be shared. However, in cases where the contract is silent, each party would ordinarily bear its own costs. Again, this should be taken into consideration if a party is seeking financial compensation for a *Force Majeure* event as the opportunity to recover costs may be better served under an alternative remedy.

FORCE MAJEURE – A PRACTICAL SUMMARY

SUMMARY OF STEPS TO TAKE BEFORE INVOKING FORCE MAJEURE CLAUSE