

COVID-19: Force Majeure claim triage tool

- 1 This tool is intended to assist your company (**you**) in a situation where:
 - (a) you are party to multiple contracts governed by English law, which are not all on the same terms and/or have been made with different counterparties;
 - (b) an event with major economic impacts (i.e. the COVID-19 pandemic) has occurred;
 - (c) your counterparties have told you that, as a result of this event, they believe they are entitled to stop performing some or all of their obligations under their contracts with you (and that you cannot compel them to perform, or sue them for damages as a result of non-performance); and
 - (d) your counterparties base what they are saying to you (wholly or in part) on the existence of **FM clauses** in their contracts with you (and, as such, they are making **FM claims**).

The tool can also be used to assess the likely strength of FM claims you are thinking of making.

- 2 By an **FM clause**, we mean a provision:
 - (a) whose title or text includes the words "force majeure";
 - (b) that describes (either in generic terms or by listing them) events beyond the control of the parties and of the type often referred to in force majeure clauses (e.g. acts of God, war, civil unrest, government action, an outbreak of epidemic/pandemic disease); and
 - (c) that states or implies that such events can (with or without the performance of certain formalities by either party, such as making a formal notification) act as a trigger for suspending the obligations (or relieving liability) of one or both parties under the contract.
- 3 We assume that, when faced by any given FM claim in these circumstances, you will, in broad terms, ultimately react in one of the following ways:
 - (a) **accept**: treat the claim as valid and operate the FM clause as the claimant proposes. This may seem attractive, but you may prejudice your position in other cases if you accept when there is room for doubt as to whether the FM clause actually applies;
 - (b) **resist**: treat the claim as invalid and press the claimant to perform as per the contract. If you take this approach, you should make your case as strong as possible from the outset; or

- (c) **negotiate**: be prepared to accept some failure in performance by the claimant, but not through operation of the FM clause (e.g. give a waiver, use a different clause in the contract to resolve, or agree some form of compromise such as an extension of time for performance). This approach may often be preferable for a variety of reasons, but you need to be careful e.g. not to vary the ongoing agreement more than you intend, or to make concessions that could be used against you in other claims involving the same, or similar, facts, contractual terms or counterparties.
- 4 This tool does not, and cannot, provide legal advice on any individual case. Rather, it is designed to help you form a quick initial view as to how to respond to each FM claim. In those cases where you think you want to resist or negotiate in response to a claim, it can also help you prepare to carry out your strategy. The tool does this by setting out a series of questions to be considered in relation to each FM claim, and summarising some relevant general principles of law. The tool should also help you to:
- (a) allocate legal and other resources efficiently between different FM claims; and
 - (b) record your decision-making quickly and systematically in a consistent framework.

That is why we have left the third column in the table below blank, so that you can use it as a template for reviewing individual claims. If you would like to receive a Word version of the document, please contact [Adam Brown](#).

No.	Question	Answer / Action	Notes
Part A: General questions about the contract and the FM claim			
[INSERT HERE DETAILS OF THE FM CLAIM UNDER REVIEW: WHO IS THE CLAIMANT, WHAT IS THE CONTRACT, ANY RELEVANT REFERENCE NUMBERS]			
1	<p>Governing law:</p> <p>Does the FM claim relate to an agreement under English law?</p>		If the answer is no, stop here. This tool only aims to provide guidance for English law contracts.
2	<p>FM clause?</p> <p>Does the agreement contain (or have incorporated within it by reference) an FM clause?</p>		If the answer is no, stop here and clarify on what basis the FM claim is being made because, under English law, you cannot have an FM claim without an FM clause. You may want to look at questions 22, 23 and 24 to determine what other approaches may be open to you or the FM claimant in the circumstances.
3	<p>Notifying the FM claim – formal requirements:</p> <p>Has the claimant followed whatever process is laid down in the FM clause for notifying its claim?</p> <p>FM clauses often state that a party that wants to declare FM after a trigger event must, for example:</p> <p>(a) give notice to the other party (FM notice);</p> <p>(b) do so in a particular form/at a particular time;</p> <p>(c) (in some or all cases) prove/provide evidence of the trigger event/its effects?</p>		If the claimant has not followed the procedure specified in the FM clause, it may not be entitled to FM relief (even if other criteria for relief set out in the FM clause are satisfied). However, the question whether compliance with the notifications requirements is actually a condition precedent to the availability of FM relief may not be an entirely straightforward matter of interpretation. You should seek legal advice before relying on apparent non-compliance with notification requirements as a reason for rejecting an FM claim outright. You should keep a record of any formal notification under the FM clause.
4	<p>Express option to reject the FM claim?</p> <p>Does the FM clause provide for FM relief to be automatic when the trigger event occurs or is (correctly) notified, or does it state e.g. that the recipient of the FM notice is entitled to reject the FM notice? If so, on what grounds/subject to completion of what formalities?</p>		Your ability to reject an FM claim will not depend entirely upon whether the FM clause says you are able to do so. However, if the clause does include an express right to reject FM claims, it is important to follow the specified procedure when exercising that right, to prevent the claimant from raising successful procedural objections to the rejection.
5	<p>FM claim not unhelpful in practical terms?</p> <p>Does the proposed suspension of contractual obligations present a problem for you in current market conditions?</p>		If, in practical terms, the FM claim and its consequences do not present you with a problem, you may want to stop here and just accept it. However, have a look at Part B below first.

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6	<p>Obligations from which relief is sought: What obligation does the claimant want to be suspended:</p> <p>(a) supply of goods or performance of a physical service;</p> <p>(b) performance of a non-physical service; or</p> <p>(c) payment of money?</p>		<p>The question assumes, to some extent, that the claimant is seeking relief from particular obligations, rather than suspension of the whole contract, which may not be the case. It is just a marker to note that a COVID-19 FM claim is inherently less likely to succeed if the obligation concerned does not fall into category (a); and that the unavailability of funds (see category (c)) is generally not a valid basis for an FM claim.</p>
7	<p>Factual basis of claim (1) – impossibility: Does the claimant say performance is:</p> <p>(a) completely/literally impossible (and/or illegal); or</p> <p>(b) just much more difficult/onerous/expensive than expected?</p>		<p>COVID-19 and/or measures taken by government in response to COVID-19 make some activities impossible/illegal. They also make a wider range of activities more difficult to carry out. Claimants will only be able to sustain an FM claim in category (b) if the FM clause is drafted in suitably wide terms (see further questions 11, 17 and 18).</p> <p>Check the Dentons COVID-19 global government announcements tracker for further details of government measures.</p>
8	<p>Factual basis of claim (2) – law or disease: Does the claimant allege FM impacts arise from:</p> <p>(a) COVID-19-related change in law/other government-type action; or</p> <p>(b) other direct/indirect impacts of COVID-19?</p>		<p>Many, if not most, successful FM claims are likely to be based on government measures rather than the incidence of COVID-19 itself. It is important to be clear about which category the claim falls into before reviewing the wording of the FM clause itself (see further question 16). Is the direct impact of COVID-19 on your counterparty itself, or e.g. its sub-contractors (see question 18)?</p>
9	<p>Factual basis of claim (3) – causation: Is the claim based on:</p> <p>(a) COVID-19 impacts alone; or</p> <p>(b) COVID-19 impacts combined with other impacts?</p>		<p>This may not be clear from what the claimant says. However, as a general rule, if the problems with performance that it has identified as the basis for an FM claim have more than one cause, and not all of those causes fall within the defined range of FM trigger events (see question 17), the claim is likely to fail unless there is room to argue (given the drafting of the FM clause) that the designated FM trigger events are clearly the principal cause. A point to consider further if you want to resist the FM claim, e.g. on the grounds that a counterparty that was already</p>

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			struggling financially is using FM as a smokescreen for its general weakness, which is not a valid excuse for non-performance. Also, FM relief will only apply to obligations affected by the FM event, not the contract as a whole.
10	<p>Factual basis of claim (4) – claimant action:</p> <p>Has the claimant, by doing or failing to do something, (arguably) caused or exacerbated the circumstances it is claiming as FM? If so, did the claimant's act or omission arguably represent negligence on the claimant's part?</p>		As with question 9, with which this partly overlaps as regards the possibility of multiple causation, the answer may not be immediately obvious. However, negligence on the part of the FM claimant will generally be fatal to its claim. So again, a point to consider further if you want to resist the FM claim.
11	<p>Exceptions to the FM mechanism:</p> <p>Does the FM clause provide for the FM remedy not to apply in certain cases where the requirements for it to apply might otherwise be thought to be fulfilled – for example:</p> <ul style="list-style-type: none"> (a) where the trigger event is the failure of one party's sub-contractors to perform its obligations; (b) where the claimant has failed to perform to a particular standard (and could have avoided the consequences of the trigger event if it had performed to that standard); (c) where there are just generally difficult conditions in the market; (d) lack of funds? 		<p>These kinds of specific exception are a good place to start if you want to resist the FM claim and the facts allow you to argue that an exception applies.</p> <p>It is common for payment obligations to be expressly excluded from FM relief, and for economic hardship-type events to be excluded from the contractual definition of FM.</p> <p>Contracts with government entities may adopt more stringent exclusions, on the basis that government, in a broad sense, is more in control of things like changes in law than a private sector party.</p> <p>In the category of exceptions for market conditions, an example of the sort of thing excluded as a result might be where a producer of goods seeks to be relieved of its obligations to take supplies of one of its inputs from a supplier, on the grounds that the market for the goods has temporarily disappeared.</p>
12	<p>When was the agreement entered into?</p>		Potentially relevant to question 18.

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<p>Part B: Questions about your relationship with the claimant and other counterparties</p> <p><i>Note: We use the term associate here to refer to (i) any member of a company's corporate group (direct or indirect parent/holding or subsidiary undertaking); and (ii) any other company or business (including a contractual joint venture) in which the company or members of its corporate group have an equity or analogous interest. It may also be worth extending the class of associates to include any company or business that owes you or an undertaking in category (i) or (ii) a significant amount of money.</i></p>			
13	<p>Intrinsic importance of the contract:</p> <p>Is this particular contract, in itself, really important for your/your associates' business – for example:</p> <ul style="list-style-type: none"> (a) would you describe your counterparty/its associates as key suppliers/customers; (b) is the value of goods or services you are supplying under the contract particularly large; (c) is it a particularly good/valuable contract for you; (d) how easy or difficult would it be to replace it (e.g. to find an alternative supplier if you are the buyer); (e) would your counterparty's non-performance cause you/your associates significant difficulties in performing other contracts/complying with law or regulation? 		<p>If the answer to all of question 11 is no, you may still want to consider the remaining questions in Part B because they show ways that the FM claim could have a "precedent value" (and your handling of it could cause difficulties later even if, in itself, it is not problematic). If the answer to any of these questions is yes, then you will want to review the FM claim (and the questions in Parts C and D) carefully, regardless of the answers to the remaining questions in this part.</p>
14	<p>FM risk in other contracts on same terms:</p> <p>Do you/your associates have other contracts on the <u>same terms</u> with a counterparty that is (likely to be) in a similar position to the claimant under this contract (regardless of whether any of these contracts is currently the subject of an FM claim)?</p>		<p>A factor to bear in mind in deciding (i) how closely to scrutinise the FM claim; and (ii) on an overall approach to dealing with the FM claims arising from contracts on the same terms.</p>
15	<p>Different/similar roles:</p> <p>Do you/your associates have multiple contracts with the claimant/its associates? If so:</p> <ul style="list-style-type: none"> (a) are you and they generally in the same roles (e.g. buyer/seller of goods, provider/recipient of services) in all these contracts; (b) are there some contracts between you/your associates and the claimant/its associates where 		<p>Unless the answer to the initial question here is no, or there is a good reason to suppose that these other contracts are not at risk of an FM claim, then the answers to (a) and (b) are factors to bear in mind in deciding (i) how closely to scrutinise the FM claim; and (ii) on an overall approach to dealing with the claimant (and other possible claims referred to here that may arise).</p>

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	<p>the motivation to make an FM claim is likely to be stronger on your side than theirs;</p> <p>(c) do the provisions of the contract/other contracts between you and your associates/the claimant and its associates contain cross-default or cross-termination provisions that could be triggered by (unjustified) use of the FM clause in the contract (or its termination)?</p>		<p>If the answer to (c) is yes, the relevant cross-default or cross-termination provisions will need to be reviewed very carefully.</p>
Part C: Questions about the FM clause			
16	<p>FM trigger wording (1) – structure:</p> <p>Is the trigger for FM described:</p> <p>(a) just conceptually (e.g. as the occurrence of an "event beyond the control of either party that renders performance of either party's obligations impossible"); or</p> <p>(b) conceptually and with a list of specified events (e.g. wording as in (a) above, plus "including war, civil unrest..."; or</p> <p>(c) just with a list of specified events; and</p> <p>(d) in the case of (b) and (c), how close does any list of specified events come to referring to the relevant COVID-19 impact (e.g. "act of God", "epidemic/pandemic", change in law/government action, government measures in response to epidemic/pandemic)?</p>		<p>There can be no valid FM claim unless the FM clause describes the events that can trigger the FM remedy in terms that are either broad enough (see point (a)) or specific enough (see points (b), (c), and (d)) to cover the events to which the claimant refers.</p> <p>The wording of the FM clause needs to be considered very carefully to identify whether the event relied on is or is not within the ordinary meaning of the language used, taking account of its context. This is an issue on which expert legal advice should be taken, because the rules of contract interpretation are nuanced. For example, a point that often arises when interpreting FM provisions is that, where general/"catch-all" wording follows a specific list of events, the general wording may need to be interpreted in light of the specific wording. There is case law on the meaning of some of the terms that may be used (e.g. act of God), but context will also be important.</p>
17	<p>FM trigger wording (2) – impact of event:</p> <p>Does the FM clause require that, in order for FM relief to apply, the trigger event:</p> <p>(a) makes performance impossible (using language like "prevents" or referring to a party being "unable" to perform its obligations), or merely that it delays performance or makes it significantly more difficult/onerous/expensive (which may be signalled using words like "impede" or "hinder");</p>		<p>There will be no valid claim unless the description of the effect of the trigger event in the FM clause matches what has actually happened. The claimant must provide some evidence that the facts match the scope of the FM clause – e.g. what has happened and how it has prevented, hindered or delayed performance. However, the claimant would not usually be required to prove that it would have performed but for the FM event (just that the FM event e.g. prevents or impedes performance). If the claimant relies on government measures making</p>

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	<p>(b) that it has this effect in respect of all, or only some, of a party's obligations?</p> <p>Does the FM clause require that the specified effect (whether delay, impossibility or other impact on performance) should be such as could not have been avoided or overcome by the claimant, acting reasonably?</p>		<p>performance impossible, do they actually have that effect or is there a way round? If the contract does not require performance to be made impossible, how difficult is "too difficult"? Examples would include that compliance would involve breaching other contracts or breaking up the business.</p>
18	<p>FM trigger wording (3) – foreseeability:</p> <p>Does the FM clause require the relevant circumstances e.g. not to have been foreseen/reasonably foreseeable by the parties, in order to count as a trigger event?</p>		<p>Again, the facts need to match the requirements of the FM clause. If there is a clear requirement that the trigger event was not reasonably foreseeable in the FM clause and the contract was entered into after e.g. the point when drastic government measures in response to COVID-19 became widespread (mid-March 2020), the claimant will struggle.</p>
19	<p>Basic effect of properly made FM claim:</p> <p>What effects does the FM clause say follow from (successful) giving of the FM notice? For example:</p> <p>(a) does the nature of the FM remedy depend on when the FM event occurs (e.g. in a long-term contract that covers both construction and operation of a facility, pre-operational FM may just extend deadlines);</p> <p>(b) all of both parties' obligations suspended, with no liability for damages for non-performance? Or do some parts of the contract remain in effect (e.g. pre-existing obligations);</p> <p>(c) for how long are obligations suspended (by default/in first instance)? Is duration of suspension defined by reference to continuation of FM circumstances, or a certain number of days/weeks/months;</p> <p>(d) does duration of suspension depend on when FM notice is given, for example;</p> <p>(e) what happens when the "default" suspension period expires? Option to extend, or terminate?</p>		<p>The answers to these questions may shape your choice of response to an FM claim. Assuming the claimant is entitled to make the FM claim, does the relief provided by the FM clause give you (or the claimant) a result you can live with? Or would the underlying problems caused by COVID-19 be better dealt with by negotiation, for example?</p>

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20	<p>Link to termination of contract:</p> <p>If the FM clause gives a right to terminate:</p> <p>(a) what further condition (beyond the trigger event) must be fulfilled before the right to terminate can be exercised – is it objective or subjective;</p> <p>(b) who has that right to terminate – is it automatic in some circumstances; and</p> <p>(c) is there provision to true up the parties' positions on termination (i.e. to avoid "unjust enrichment" of one party as a result of the termination)?</p>		<p>See comments on the previous question.</p> <p>There may be a "prolonged FM" clause that allows (i) either party or sometimes (ii) the non-affected party to terminate after a period (ranging from three or six months to two or three years in major projects.) If it looks likely that termination will follow on from the operation of the FM clause (and likely timescale of COVID-19-related difficulties) in any event, consider whether it might be better to negotiate early termination now.</p>
<p>Part D: Dealing with and mitigating the consequences of FM</p> <p>Note: FM claims may be a symptom of other problems in a counterparty's business. Financial stress of counterparties may need to be addressed in other ways that go beyond the scope of this tool. Also beyond the scope of this note are some of the practical steps that it may be necessary or desirable to take in order to deal with the immediate impacts of a counterparty's non-performance, such as finding an alternative supplier if you are the buyer under a contract for goods or services.</p>			
21	<p>Mitigation of FM:</p> <p>What (other than activating the FM clause) can/could be done to mitigate the impact of the FM:</p> <p>(a) by the claimant (and/or its associates); or</p> <p>(b) by you (and/or your associates)?</p> <p>(For example, making an insurance claim.)</p> <p>Does the FM clause impose a specific duty on the parties to try to mitigate the effects of the FM?</p>		<p>Whether or not the FM clause expressly requires them to do so, the parties should be prepared to take steps to mitigate the adverse impacts of the FM event. For the party claiming FM in the COVID-19 context, this might mean, for example, reorganising its operations to allow employees to work in a "socially distanced" manner. This may affect the length of time during which a state of FM that fulfils the requirements of the FM clause can be said to exist.</p> <p>Some clauses require the party claiming FM to make reports at certain intervals about whether the FM is continuing.</p>
22	<p>Contractual alternative(s) to FM claim:</p> <p>Does the agreement concerned (including any standard/framework terms that may have been incorporated into it by reference) include any other clauses that fits the facts better or may provide either party with a (better) solution to the circumstances in which one or both of them find themselves – for example:</p>		<p>If the FM clause does not provide an ideal solution to the problems faced by the parties (or indeed if there is no FM clause), it may be that one of these other types of clause (if included in the contract) provides a solution (or a better solution). Where both types of clause are present, it may be that both should apply: e.g. FM to ensure relief from obligations that cannot be performed, and change in law for later recovery of increased costs.</p>

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	<ul style="list-style-type: none"> (a) a change in law clause; (b) a "material adverse change" clause; (c) a "hardship" clause; or (d) other clauses permitting the terms of the contract to be adjusted to take account of new circumstances? 		
23	<p>Frustration: Could it be said that:</p> <ul style="list-style-type: none"> (a) a change in circumstances has occurred; (b) the change was outside the control of the parties; (c) the contract does not provide for the changed circumstances; (d) the change was not contemplated by the date when they made the contract; and (e) as a result of the change, it would be unlawful or impossible to perform as per the contract, or performance would be radically different from that contemplated by the parties when they made the contract? 		<p>If there is no FM clause, and all of conditions (a) to (e) are satisfied, it may be possible to claim that the contract has been frustrated and is discharged. Frustration is a rule of general English contract law so no particular provisions need to be included in the contract.</p> <p>However, claims for frustration are assessed very stringently and no assumption that frustration applies should be made without expert legal advice, given in full knowledge of the relevant facts. Incorrectly asserting that a contract has been frustrated may itself amount to a breach of contract, entitling the other contracting party to claim damages or potentially terminate the contract.</p>
24	<p>Breach and termination: If you disagree with the claimant that the FM clause or another contractual provision operates to relieve it of its obligations, and you cannot negotiate a compromise (or terminate the contract for convenience in accordance with its terms), would you be prepared to claim against your counterparty for breach of contract, or terminate – either based on general principles of contract law (repudiatory breach of contract) or on a specific provision in the contract that states that the relevant form of non-performance is an event of default?</p>		<p>It may or may not be practicable to take legal action to try to compel your counterparty to perform. It is unusual for courts (even if the case can be heard quickly enough to make a difference) to order specific performance rather than payment of damages for failure to perform contractual obligations.</p> <p>You should assert the right to have the counterparty continue to perform, continue to comply/tender performance yourself, and start to build the case for a damages claim or termination.</p> <p>Terminating for alleged breach of contract should never be taken without careful factual analysis and expert legal advice, as it can backfire severely.</p>