



# Alien concept

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FORCE majeure is said to mean in translation “superior force”, but the original French certainly conveys a more recognisable phrase and will, perhaps, generate a certain nostalgia for erstwhile fans of the group Tangerine Dream.

You have seen this phrase in contracts to which your organisation has subscribed. More important, what does it really mean? In simple terms, the phrase is apt to describe an event which constitutes a legal or physical restraint on the performance of the contract which is both unforeseeable and irresistible (and not caused by either party). It is well-established in France but, despite its quite frequent inclusion in contracts, it remains an alien concept to English common law. Mr Justice Donaldson once said “... the precise meaning of this term, if it has one, has eluded lawyers for years” (*Borthwick v. Faure* [1986]).

The advice is that parties to contracts governed by English law would do well to consider incorporating specific events that excuse them from further performance. In this respect, the idea of these clauses is not to exclude liability for breach (as does a standard exclusion clause). The existence of a force majeure event is not one which puts that party in breach — it merely excuses that party from further performance (albeit that the party relying on it will need to prove it, should the event in question be contested).

There is good reason to do this. First, setting out the events gives certainty to both parties. Moreover, even if this is done, it seems unlikely that it will exclude the application of the doctrine of legal frustration, assuming that the particular event arising is not covered by the force majeure clause. Frustration occurs, and the contract brought to an end, when, as a result of neither parties’ fault, unforeseen events commercially destroy the basis on which the parties have contracted. Second, a good force majeure clause will not only list the events, but will also deal with what is to happen with the contract if that event arises (and possibly require notices to be given about it). The contract can allow, for instance, temporary interruption to contractual performance pending a time lapse or further event permitting the parties to pause their obligations.

As ever, though, the drafting balance is difficult to achieve. The lawyers get blamed for suggesting over-complex clauses; but just using the phrase force majeure as a potential escape tunnel undoubtedly lacks precision. It does not, in isolation, give a true understanding of what event(s) the parties really want to agree as preventing further contractual performance.

Of course, the contractual context in which force majeure events can appear is diverse. The past year’s economic rollercoaster has meant that the benefit of some contracts, especially for charterparties and in commodity sales, soared high and then nosedived. It seems likely to be the case that force majeure in its simplest format was not designed to apply to contracts affected by these turbulent forces. However, it is certainly the case that a number of parties will have been debating the issue with some intensity.

Therefore, perhaps the lesson here is this. So far as possible, the parties look at the ambit of any contract to which they are asking or being asked to commit, and try to set out the specific events which they would both accept as a force majeure provision. In that way, the potentially more restrictive application of the doctrine of frustration is avoided and the parties actually then only have to contend with precisely what the contract stipulates. Of course, having an accurate crystal ball, or an office Derren Brown, would then come in rather useful.