



# COVID-19 Factsheet

FORCE MAJEURE

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# FORCE MAJEURE

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## Introduction

The World Bank forecasts the deepest global recession since World War II, with a baseline forecast of 5.2% contraction in global GDP in 2020. It further expects to see a majority of countries enter recession, with advanced economies projected to shrink by 7% in 2020 (Global Economic Prospects, World Bank Group, June 2020).

As the pandemic has progressed, strict border closures, travel restrictions and the consequent collapse in demand for air traffic, with its congruent increased cargo costs, have all conspired to impact global supply chains dramatically. Supplier delivery times have increased, and inventories have been depleted. Such is the impact that global trade is expected to have declined by 13.4% in the first half of 2020 (Global Economic Prospects, World Bank Group, June 2020).

Although a recovery is forecast as we enter into the second half of 2020, the bad news is that it is expected to be very weak. Such is the extraordinary nature of the crisis, it is thought significant time will be needed for fear to fade, new practices to emerge and for green shoots to replace those companies which were not able to survive.

Given this tremendous strain many businesses now face, it is only wise to consider the issue of "force majeure" and how it might impact upon commercial relationships moving forward. It is prudent for all concerned to review their contractual obligations to ensure one is positioned as strongly as possible concerning possible "force majeure" claims.

Goodwill can be extended only so far and, some five months into the crisis, we are now witnessing an uptick in necessary legal action being brought by companies around the world, arguably left with few other options. As would be expected, one of the first defences many look to is "force majeure". The question then is whether it can be relied upon as a defence against contractual breach due to COVID-19 and if so, do the particular contracts in question allow for it in the relevant jurisdiction?

This document provides a summary of the main issues one may consider. Given the complexity of these matters in an international context, it is essential to note that this document has been prepared as a summary only for general information and is not intended as legal advice. Please contact us for advice pertaining to your specific circumstances.

### EMAIL

admin@bakering.global

### TELEPHONE

+44 (0)20 1234 5678

### WEBSITE

bakering.global

### REGISTERED OFFICE

Office 7, 35 Ludgate Hill,  
London, EC4M 7JN

### REGISTERED COMPANY

09787114



## Why is 'Force Majeure' particularly important?

Force Majeure clauses are written into contracts so as to amend the parties' liabilities under the contract where particular extraordinary and unforeseeable events take place which are outside of their control and which prevent them from fulfilling their obligations.

Such clauses, depending on their drafting, will absolve the party(ies) in question from part or all of their performance under the contract, or grant rights such as the ability to delay performance or terminate the contract.

Some are additionally worded to provide for the allocation of costs between the parties in such a scenario, overriding the general principle otherwise that costs will be borne by the party that incurred them.

Force majeure is of particular importance presently because, unlike most relevant events to date, the current crisis is truly global. As such, multiple supply chains and contractual relationships are impacted concurrently. This disruption, in turn, exerts enormous additional pressures on all concerned, meaning parties are now more likely to seek to rely on such causes, irrespective of the relationship damage it causes which ordinarily would curtail such actions. It also makes fighting reliance on force majeure much more onerous on companies, being as they are now having to manage multiple cases simultaneously across a variety of jurisdictions with varying legal, commercial and relational implications.

Force Majeure clauses are thus incredibly powerful, with potentially enormous ramifications for contracting parties. Their importance is made all the more critical by virtue of the fact that such terms can be viewed very differently by different jurisdictions. In English and Scots law, for example, force majeure is a tool of contract law whereby its operation will turn on the party seeking to rely upon it persuading the court that it is applicable based upon a variety of factors generally important in such contractual disputes, such as the wording of the clause, how the contract was entered into by the parties and the specific circumstances which have led to the dispute. In other parts of the world, however, force majeure is regarded as a general legal concept subject to the designation of particular events as 'force majeure' by the courts.

Four broad consequences commonly flow from the successful application of a force majeure clause; suspension of performance until the 'force majeure event' has ceased, termination of the contract, compensation, or negotiation of the contract terms in light of the 'force majeure circumstances'.

### EMAIL

[admin@bakering.global](mailto:admin@bakering.global)

### TELEPHONE

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### WEBSITE

[bakering.global](http://bakering.global)

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## Broad principles

In addition to the particular considerations below, for a party to rely upon a force majeure clause, they must be able to prove that their delayed/non-performance is due to circumstances beyond their control which they could not have taken "reasonable steps"/"all reasonable steps"/"best endeavours"/"all reasonable endeavours" to have foreseen nor (irrespective of higher costs) to avoid or mitigate its consequences. Furthermore, the party seeking to rely upon the clause must also ensure they abide by all relevant procedures pertaining to such in the contract; failure to do so can result in failure of force majeure relief, especially as concerns the obligation to give notice within specified time limits and other criteria.

Given the commonly hugely significant ramifications of these clauses, there are of course strict limits to such provisions. For example, the fact that an unforeseen and perhaps extraordinary event has occurred so as to render performance commercially unviable would not be sufficient reason to claim force majeure. Furthermore, the event in question must be the reason for non-performance; if more than one event has conspired against performance but not all are considered force majeure events, then it is unlikely the party can rely upon such a clause.

There are commonly three consequences of a force majeure event which such clauses are drafted to cover; prevented performance, hindered/impeded/impaired performance, and delayed performance:

- 🔍 "Prevented" has a high burden of proof required and generally means performance is proven to be legally or physically impossible – commercially unviable won't meet the standard.
- 🔍 "Hindered" provides for a lower standard, such as where performance of the contract, although possible, would, for example, necessitate breaking other agreements. Again, however, commercial viability would not ordinarily be considered sufficient.
- 🔍 "Delayed" performance is a lower standard still, whereby it is only necessary to prove that the event in question has made it substantially more difficult to discharge performance within the contractually agreed timeframe.

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## Wording: Specific Events

Although there are significant variances across jurisdictions, broadly speaking force majeure clauses will either list specific events the clause covers or will describe broad circumstances the clause is to be applied in.

Relevant to the current crisis will be any wording relating to “disease”, “epidemic” or “pandemic”. One should also look to terms such as “natural disasters” and “acts of God” which may also be serviceable terms for a party to rely upon.

However, the most relevant specific clause as regards the COVID-19 crisis is likely to be ‘an act of government’, insofar as the government has exercised legal powers to close businesses, mandate quarantines, and restrict travel. Some difficulty is likely to occur where such measures have been “recommended” rather than legally mandated, as was the case at differing points in various countries.

If the event in question has not been included in the list of specified events then, unless the clause specifically states that the list is intended to be non-exhaustive, it will likely prove difficult to argue the event in question was nonetheless intended to be covered by the force majeure clause.

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## Wording: Broad circumstances

Alternatively, the clause may be drafted so as to cover particular broad circumstances rather than specific events; usually, this means the term refers to events 'outside of the control' of the party. The party in question will nonetheless need to show that they could not have foreseen nor taken action to prevent their non-performance. Given the COVID-19 crisis is unprecedented in almost all living memory, it is thought that courts will be quite accommodating in interpreting the event as being outside of the control of the party in such cases.

## Wording: Both

Some contracts will include a list of specific events, followed by a broader catch-all phrase, such as "any other events beyond our control". In such cases, although dependent upon the broader circumstances and wording in the contract as a whole, the general principle is that the broader term will be interpreted broadly so that it will apply to all other events, not just events similar to those specific events listed prior to its appearance in the contract.

## Wording: Force Majeure Event

At least from the English and Scots law perspective, "force majeure" in itself has no legal meaning. It requires definition and qualification in the contract and will be understood in terms of contractual interpretation. Indeed, without such clarification in the agreement, a standalone reference to "force majeure" may well be void for uncertainty. Nonetheless, where the term can be interpreted in relation to the broader contractual wording, the COVID-19 pandemic and consequences thereof are likely to be deemed covered by such a clause.

## Wording: None

This will vary greatly depending upon the jurisdiction. However, for English and Scots law, at least, if there is no force majeure clause in the contract, then it cannot be relied upon for relief of non-performance. In such cases, a party may look to other terms in the agreement as a means of relief, such as clauses pertaining to price reviews upon the occurrence of certain events, termination available under specified circumstances, or the common law principle of frustration which bring all parties obligations to an end immediately (and is arguably hard to prove).

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admin@bakering.global

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## What if I receive a force majeure notice?

- 👉 Challenge procedure – has the party adhered to all notice requirements and any other stipulated procedures in the contract pertaining to their reliance on force majeure?
- 👉 Challenge the event – generally speaking, the event in question must be extraordinary and unforeseen for it to be covered by the force majeure provision. It is debatable for instance, whether a pandemic is unforeseeable given they have occurred many times in the past and there have been repeated warnings of such recently before the present pandemic. Government reactions around the world, however, could perhaps more reasonably be claimed to have been unprecedented, unforeseen and the consequences thereof unavoidable as per most drafted force majeure clauses.
- 👉 Challenge causation – generally, successful reliance on force majeure requires the event in question to be the sole/substantive reason for non-performance due to it making performance physically impossible or illegal. Is there another reason, partially or wholly, that the party has not performed – in particular, is it merely now very inconvenient or commercially unviable, rather than impossible or illegal?
- 👉 Consider the indirect implications and consequences – is the party merely using their claim of force majeure to exert pressure as part of an attempt at a broader rebalancing of your commercial relations with them? Equally, will rejection of their reliance on force majeure have wider commercial consequences insofar as your ongoing or broader commercial dealings with them?

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## High-level country considerations

The complexities of force majeure across jurisdictions require tailored legal advice. That said, a top-line consideration in prioritising your preparedness might be to consider how heavily dependent you will be on the strength of your contracts in such cases vs more at the mercy of statute in the given country. You theoretically have more control over the former than the latter. There are many considerations, but, our assessment of the aforementioned may provide at least a starting point for prioritisation of your activities.



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Country	More reliance on contract interpretation or overriding statute?
Albania	Contract
Argentina	Statute
Australia	Contract
Austria	Contract
Belgium	Statute
Bosnia & Herzegovina	Contract
Brazil	Statute
Bulgaria	Statute
Canada	Contract
Chile	Statute
China	Statute
Denmark	Statute
Dominican Republic	Statute
El Salvador	Statute
Finland	Contract
France	Statute
Georgia	Contract
Germany	Statute
Guatemala	Statute
Honduras	Statute
Hong Kong	Contract
Hungary	Statute
Italy	Contract
Japan	Statute
Kazakhstan	Statute
Lithuania	Statute
Luxembourg	Statute
Netherlands	Statute



North Macedonia	Statute
Paraguay	Contract
Poland	Contract
Portugal	Contract
Russia	Statute
Serbia	Statute
Singapore	Contract
Slovakia	Statute
Spain	Contract
Sweden	Contract
Switzerland	Contract
UAE	Statute
UK	Contract
Ukraine	Statute
Uruguay	Statute
Uzbekistan	Statute
Vietnam	Statute

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## Conclusion

We hope this summary has raised awareness of the issue of force majeure and how it may become an important issue in the near future. As can be observed, the considerations are many and become increasingly complex with multinational supply chains.

If you are interested to understand your risk profile given your specific circumstances, please do not hesitate to contact us for tailored legal advice.

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