

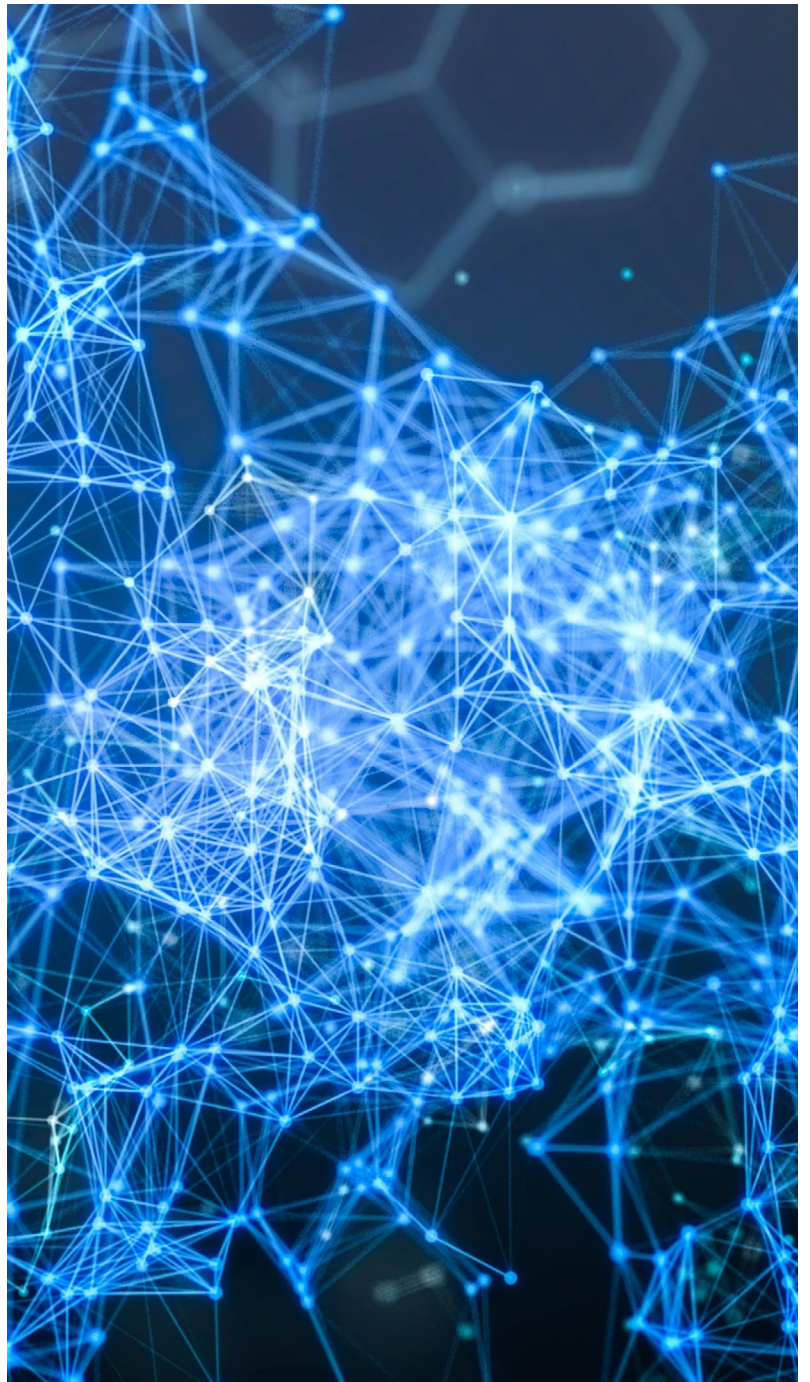


HERBERT  
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# COVID-19: FORCE MAJEURE: A GLOBAL PERSPECTIVE

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The COVID-19 pandemic has exposed businesses to a heightened risk of legal implications arising across their global supply chains. The economic cost of COVID-19 is mounting, and the virus will ultimately impact almost every sector due to several factors including supply chain disruption, suppressed demand resulting from uncertainty, and travel restrictions.

Given this unprecedented disruption to "business-as-usual", parties are likely to review their contractual arrangements and consider whether there are any grounds on which they may seek to delay or avoid performance (or liability for non-performance), or suspend or terminate their contracts.

Force majeure clauses are intended to address circumstances in which a supervening event has prevented or delayed the performance of a contract. As such, parties across the supply chain may look to force majeure clauses as an avenue for relief in the wake of COVID-19. Equally, in some jurisdictions, there may be a statutory entitlement to invoke force majeure independent of any contractual provision.

This table provides a high-level overview of the approach taken to force majeure in key jurisdictions. The table is not a substitute for legal advice and does not purport to be fully comprehensive. Furthermore, readers should be mindful that the construction and impact of force majeure clauses is highly fact-specific.



Jurisdiction	Common law doctrine and/or statutory/standard definition	Relevant tests	Effect
<b>Australia</b>	<p>No.</p> <p>Application and scope will depend on how the particular force majeure clause, if any, is drafted.</p>	<p>The onus is on the party seeking to rely on a force majeure clause to prove it applies, which generally involves establishing that:</p> <ul style="list-style-type: none"> <li>the circumstance that has occurred is within the scope of the force majeure clause and outside the party's control;</li> <li>the circumstance caused the required degree of effect under the clause (prevents, hinders, renders impracticable or other formulation) on performance (without any intervening voluntary act, or failure to mitigate);</li> <li>the force majeure clause provides relief against that effect on performance; and</li> <li>any requisite notice has been given.</li> </ul>	<p>Varies depending on how the relevant clause is drafted. May include:</p> <ul style="list-style-type: none"> <li>extending time for performance;</li> <li>excusing failure to perform; or</li> <li>allowing suspension or termination of the contract.</li> </ul> <p>Most force majeure clauses will also provide a right to terminate on notice, or for the contract to terminate automatically, if the force majeure event continues beyond a specified period of time.</p>
<b>China</b>	<p>The term "force majeure" is defined in both the General Provisions of Civil Law and the Contract Law of the People's Republic of China. It is "an objective event which is unforeseeable, unavoidable and insurmountable by the parties".</p> <p>Parties are also free to agree in the contract a broader scope of application and relief for similar events, which will generally be given effect to. However, in that case, the contractual provisions will apply, as supplemented by the force majeure provisions at law to the extent relevant, to those events which meet the requirements of "force majeure" under law. In contrast, those other events which do not meet the requirement of "force majeure" under law will be afforded relief and/or entitlement only as agreed between the parties.</p>	<p>The onus is on the party seeking to rely on the statutory force majeure entitlement to prove that it applies. As a matter of PRC law, this generally involves establishing that:</p> <ul style="list-style-type: none"> <li>the event is "objective", ie it occurred with no fault or intention of any party to the contract involved;</li> <li>the event is unforeseeable; and</li> <li>the event is unavoidable and insurmountable, ie the affected party is unable to avoid the occurrence of the event or its consequences despite having taken reasonable measures. This further requires: <ul style="list-style-type: none"> <li>establishing a causal link between such event and contractual performance;</li> <li>establishing that requisite notice has been given; and</li> <li>establishing that the affected party was not already delayed in its performance thereby causing it to be impacted by the event (ie had it not been for that party's prior delayed performance, the event would not have prevented performance).</li> </ul> </li> </ul>	<p>Statutory consequences vary, depending on whether force majeure prevented the performance of particular contractual obligations or the fulfilment of the object of the contract:</p> <ul style="list-style-type: none"> <li>if force majeure prevents a party from performing its contractual obligations, that party may be excused from performance and be exempted from liability for failure of performance partially or wholly, depending on the facts and circumstances;</li> <li>if force majeure renders the object of the contract unable to be fulfilled at all, either party may terminate the contract by giving the other party notice.</li> </ul> <p>Note however that, if upon receipt of the force majeure notice, the other party fails to take measures to mitigate its losses arising from the non-performance of the affected party, it shall not be entitled to claim the portion of its losses resulting from its failure to mitigate.</p>

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England & Wales	<p>No.</p> <p>Application and scope will depend on how the particular force majeure clause, if any, is drafted.</p>	<p>The onus is on the party seeking to rely on a force majeure clause to prove it applies, which generally involves establishing that:</p> <ul style="list-style-type: none"> <li>the circumstance that has occurred is within the scope of the force majeure clause and outside the party's control;</li> <li>the circumstance caused the required degree of effect under the clause (prevents, hinders, renders impracticable or other formulation) on performance (without any intervening voluntary act, or failure to mitigate);</li> <li>the force majeure clause provides relief against that effect on performance; and</li> <li>any requisite notice has been given.</li> </ul>	<p>Varies depending on how the relevant clause is drafted. May include:</p> <ul style="list-style-type: none"> <li>extending time for performance;</li> <li>excusing failure to perform; or</li> <li>allowing suspension or termination of the contract.</li> </ul> <p>Most force majeure clauses will also provide a right to terminate on notice, or for the contract to terminate automatically, if the force majeure event continues beyond a specified period of time.</p>
France	<p>Yes.</p> <p>Article 1218 of the French Civil Code (enacted 2016) specifically provides a statutory regime for force majeure in French law governed contracts, even where the contract does not contain a force majeure provision.</p> <p>However, the French statutory regime of force majeure is not mandatory, and the parties can opt out of it completely or vary it by including force majeure clauses in their contracts.</p>	<p>In the absence of specific contractual clauses providing otherwise, a party may invoke force majeure provided that the following three conditions, set out at Article 1218 of the French Civil Code, are satisfied:</p> <ul style="list-style-type: none"> <li>the event must have been beyond the control of the non-performing party - this is unlikely to be problematic, as by definition, a pandemic such as COVID-19 is beyond any party's control;</li> <li>the event in question was not reasonably foreseeable at the time of entering into the contract; and</li> <li>the non-performing party cannot avoid the effects of the alleged force majeure event with appropriate measures and is therefore unable to perform its contractual obligations. The French courts will consider whether performance of the contract was actually impossible, as opposed to excessively onerous.</li> </ul> <p>French courts have wide powers of interpretation and their assessment of force majeure - especially with respect to conditions (ii) and (iii) above (ie unforeseeable and unavoidable circumstances) - will largely be assessed on a case-by-case basis.</p>	<p>Article 1218 of the French Civil Code provides that an event of force majeure justifies the suspension or termination of a contract, even if the contract does not contain a provision in that respect. In particular:</p> <ul style="list-style-type: none"> <li>if performance of the contract is temporarily impossible, the obligation is only suspended, unless the resulting delay justifies termination of the contract;</li> <li>if performance of the contract is no longer possible and cannot be discharged in the future, the contract is terminated and the parties are discharged from their obligations. This will be particularly relevant for contracts where time is of the essence.</li> </ul> <p>However, parties should always review any force majeure clauses in their contracts, as contractual terms can vary the above statutory rules and, for instance:</p> <ul style="list-style-type: none"> <li>extend time for performance;</li> <li>excuse failure to perform; or</li> <li>require a party to perform its obligations even if a force majeure event occurs (in which case non-performance could result in the payment of damages).</li> </ul>

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<b>Germany</b>	No.  Application and scope will depend on how the contractual force majeure clause is drafted.	The onus is on the party seeking to rely on force majeure to prove it applies. The relevant test first and foremost depends on the wording of the contract clause. Absent a conclusive definition of force majeure, one has to interpret the clause. The relevant test usually involves the following: <ul style="list-style-type: none"> <li>• establishing that the prerequisites for a force majeure event under the clause are met;</li> <li>• establishing that the specific contractual performance is hindered by the force majeure event, taking into account all circumstances of the case;</li> <li>• establishing that the impact of the force majeure event cannot be mitigated;</li> <li>• adherence to contractual notification requirements.</li> </ul>	Varies depending on how the relevant clause is drafted. May include: <ul style="list-style-type: none"> <li>• obligation to mitigate impact for counterparty;</li> <li>• extending time for performance;</li> <li>• excusing failure to perform; or</li> <li>• allowing suspension or termination of the contract.</li> </ul> Many force majeure clauses will also provide a right to terminate the contract if the force majeure event continues for a specified period of time.
<b>Hong Kong</b>	No.  Application and scope will depend on how the particular force majeure clause, if any, is drafted.	The onus is on the party seeking to rely on a force majeure clause to prove it applies, which generally involves (depending on the drafting of the clause) establishing that: <ul style="list-style-type: none"> <li>• the circumstance that has occurred is within the scope of the force majeure clause and outside the party's control;</li> <li>• the circumstance caused the required degree of effect under the clause (prevents, hinders, renders impracticable or other formulation) on performance (without any intervening voluntary act, or failure to mitigate);</li> <li>• the force majeure clause provides relief against that effect on performance; and</li> <li>• any requisite notice has been given.</li> </ul>	Varies depending on how the relevant clause is drafted. May include: <ul style="list-style-type: none"> <li>• extending time for performance;</li> <li>• excusing failure to perform; or</li> <li>• allowing suspension or termination of the contract.</li> </ul> Most force majeure clauses will also provide a right to terminate, on notice or automatically, the contract if the force majeure event continues beyond a specified period of time.

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Indonesia	Yes but very generic and will be overridden by contractual terms.	<p>The onus to prove the applicability of force majeure lies with the party seeking to rely on it, regardless of whether or not the contract contains a force majeure clause.</p> <p>If the contract does not contain a force majeure clause, the party seeking to rely on force majeure must prove:</p> <ul style="list-style-type: none"> <li>the nexus between the force majeure event and the inability or failure to perform its obligation(s) under the contract;</li> <li>that the event is outside of its control; and</li> <li>ideally for evidentiary purposes, the party seeking to invoke the force majeure clause has informed the other party of the force majeure event. This requirement, however, is typically contractual in nature and the basic legal position does not necessarily provide for this requirement.</li> </ul> <p>If the contract includes a force majeure clause, the party seeking to rely on the clause must prove it has satisfied the contractual requirements, which generally involves establishing that:</p> <ul style="list-style-type: none"> <li>the circumstance that has occurred is within the scope of the force majeure clause and outside the party's control;</li> <li>the circumstance caused the required degree of effect under the clause (prevents, hinders, renders impracticable or other formulation) on performance without any intervening voluntary act, or failure to mitigate;</li> <li>the circumstance is the sole reason for the failure to perform;</li> <li>the force majeure clause provides relief against that effect on performance; and</li> <li>any requisite notice has been given.</li> </ul>	<p>If not specifically agreed upon by the parties, it would generally excuse the failure to perform or late performance and exempt the party from paying compensation for loss, cost and interest.</p> <p>If agreed upon by the parties, the effect varies depending on how the relevant clause is drafted. However, it may include:</p> <ul style="list-style-type: none"> <li>extending time for performance;</li> <li>excusing failure to perform; or</li> <li>allowing suspension or termination of the contract.</li> </ul> <p>Most force majeure clauses will also provide a right to terminate the contract if the force majeure event continues for a specified period of time.</p>

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Italy	<p>The Italian Civil Code (Article 1218) recognises the concept of supervening “impossibility”. However, since the test to be met is very high, parties to a contract usually include <i>ad hoc</i> force majeure clauses aimed at relaxing the Civil Code test. Application and scope will depend on how the particular force majeure clause, if any, is drafted.</p>	<p>If no specific force majeure clauses are included in the contract, a party may still try to invoke the occurrence of force majeure under Article 1218 of the Italian Civil Code. According to this provision, a party can avoid liability for failure to fulfil an obligation if it can demonstrate that:</p> <ul style="list-style-type: none"> <li>• it was impossible for that party to perform its obligations (supervening impossibility);</li> <li>• the impossibility was due to causes not attributable to the party invoking force majeure; and</li> <li>• the impossibility is “absolute” and “objective” (ie a “subjective” impossibility may not excuse the non-performing party).</li> </ul> <p>Usually, the standard text of <i>ad hoc</i> force majeure clauses set out:</p> <ul style="list-style-type: none"> <li>• unforeseeability and unavailability tests;</li> <li>• a non-exhaustive list of events;</li> <li>• an exclusion of payment obligations and company strikes;</li> <li>• an information obligation within an agreed timeframe; and</li> <li>• a duty to mitigate in good faith (this is actually in line with a mandatory provision of the Italian Civil Code).</li> </ul>	<p>Depending on the text of the relevant clause, these usually include:</p> <ul style="list-style-type: none"> <li>• excusing failure to perform;</li> <li>• extending time for performance (but an obligation of each party to bear its own costs incurred due to occurrence of force majeure);</li> <li>• relief of the non-affected party from the obligation to pay the consideration strictly related to the obligations that are not performed due to force majeure; and</li> <li>• prompt resumption of the relevant obligations upon end of the force majeure events.</li> </ul> <p>Most force majeure clauses will also provide either party with a right to withdraw (<i>recesso</i>) on notice, if the force majeure event continues beyond a specified period of time.</p>



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Japan	<p>No.</p> <p>Application and scope will depend on how the particular force majeure clause, if any, is drafted.</p> <p>Parties may alternatively seek to rely on the Japanese Civil Code rules on impossibility of performance or change of circumstances.</p>	<p><b>Contractual Force Majeure</b></p> <p>A contractual force majeure clause will be valid and enforceable provided it is not in violation of Civil Code provisions (eg good faith, anti-abuse of rights, public order, etc.) and/or consumer protection law. The onus is on the party seeking to rely on a contractual force majeure clause to prove it applies, which generally involves establishing that the force majeure event:</p> <ul style="list-style-type: none"> <li>• occurred beyond the reasonable control of the affected party;</li> <li>• could not have been avoided or mitigated by the affected party taking reasonable steps; and</li> <li>• has caused or resulted in the affected party being prevented from or delaying in performing any of its obligations under the agreement.</li> </ul> <p>Depending on the provisions, the party seeking to rely on a force majeure clause may also have to give notice or provide a certificate from an authority regarding the force majeure event.</p> <p><b>Japanese Civil Code provisions</b></p> <p>The courts will only consider the Civil Code provisions if there is no force majeure clause in the contract. In this regard, we note that Japanese courts will interpret contracts strictly and literally.</p> <p>For the affected party to establish that a contract is impossible to perform, they must adhere to an objective standard, and additionally demonstrate that their default cannot be attributed to them (Article 415).</p> <p>As another alternative, to trigger the change of circumstance doctrine under the good faith principle in Article 1(2), the affected party would need to establish:</p> <ul style="list-style-type: none"> <li>• an objectively unforeseen change of circumstances;</li> <li>• that the change was not attributable to the parties; and</li> <li>• that the literal interpretation of a contract would result in an unfair outcome for the affected party.</li> </ul>	<p><b>Contractual Force Majeure</b></p> <p>Effect will vary depending on how the relevant clause is drafted. This may include:</p> <ul style="list-style-type: none"> <li>• discretion for the affected party to request or accept a temporary modification of contractual obligations to reflect the effect of the force majeure event;</li> <li>• postponing or wholly/partially excusing the affected party's contractual obligations for a specified/unspecified period; or</li> <li>• extinguishing all contractual obligations as a whole.</li> </ul> <p><b>Japanese Civil Code provisions</b></p> <p>The effects of the courts being satisfied that a contract is impossible to perform will be that:</p> <ul style="list-style-type: none"> <li>• the obligor will not be liable for the default (Article 415);</li> <li>• the obligee may immediately terminate a part or the whole of the contract without needing to give notice to the obligor (Article 542); and</li> <li>• the obligor will bear the risk of the force majeure event because the obligee does not have to perform its obligations under the contract (Article 536).</li> </ul> <p>However, if the obligation affected is a money-payment obligation, the debtor will bear the risk of its debt obligation in any event (Article 419).</p> <p>If the court finds that the doctrine of change of circumstances is satisfied, the affected party would have a right to either terminate the contract or adjust the terms of the contract. However, it is not common for the court to apply this doctrine.</p>

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<b>Russia</b>	<p>Yes.</p> <p>Force majeure, or a "circumstance of insuperable force", is generally defined by:</p> <ul style="list-style-type: none"> <li>• unavailability (it being objectively impossible for any market participant to avoid such a circumstance or its consequences); and</li> <li>• extraordinariness (the exceptionality of the event in question, which occurrence is not usual in the relevant circumstances).</li> </ul> <p>In determining if force majeure has occurred in the particular circumstances, the courts will look, among other things, at whether the event was beyond the control of the party claiming force majeure.</p> <p>Parties to commercial contracts may provide in the contract which circumstances constitute force majeure thereby expanding or narrowing the statutory definition.</p>	<p>The onus is on the party seeking to rely on force majeure to prove it applies, which generally involves establishing:</p> <ul style="list-style-type: none"> <li>• the facts relating to the occurrence of the force majeure event itself;</li> <li>• that the circumstances which the party in breach claims to constitute a force majeure event meet the relevant criteria under law or contract;</li> <li>• causation between these circumstances and the inability to perform (which includes the defaulting party having also taken all necessary measures to properly perform its obligations under the contract and there being an absence of any evidence which would indicate the defaulting party's bad faith in taking such measures).</li> </ul> <p>Any contractual clauses indicating this will be considered, such as notices or how to deal in such events.</p>	<p>The remedies which may be available to the party in breach of contract due to force majeure include:</p> <ul style="list-style-type: none"> <li>• release from liability for breach of contract;</li> <li>• termination of an obligation due to the impossibility (legal or actual) of its performance.</li> </ul> <p>The innocent party may have a right to terminate the contract if the other party is in breach due to force majeure or to unilaterally change the terms of the contract (provided that there is an express provision in the contract allowing this).</p> <p>Both parties may apply to court to vary or terminate the contract due to a material change in circumstances.</p>
<b>Saudi Arabia</b>	<p>There is not a standard definition of force majeure, as per "Shari'ah". It is also called "Ja'eha/ جعها" which are general, external and unavoidable damage causing circumstances over which the parties have no control upon.</p> <p>Application and scope will depend on how the particular force majeure clause, if any, is drafted such as: (i) force majeure; (ii) changes of laws; and (iii) material changes. However, depending on the case scenario, this will be subject to the sole discretion of the judge in the event of disputes, and the draft of the contract, should be applied as long as the relevant clauses does not contravene with "Shari'ah" principles.</p>	<p>The party seeking to rely on a force majeure/"Ja'eha/ جعها" event must prove it applies, which generally involves establishing that:</p> <ul style="list-style-type: none"> <li>• the circumstance that has occurred is within the scope of the force majeure clause and outside the party's control;</li> <li>• the circumstance that has occurred is general and caused a public effect, and not only related to one of the contractual parties;</li> <li>• the circumstance that has occurred is not avoidable, and cannot be mitigated.</li> </ul> <p>Any contractual clauses indicating this will be considered, such as notices or how to deal in such events.</p>	<p>Varies depending on the case scenario, regardless if any clause drafted, and may include:</p> <ul style="list-style-type: none"> <li>• extending time for performance;</li> <li>• excusing failure to perform;</li> <li>• allowing suspension or termination of the contract; and/or</li> <li>• restoring the financial balance of the contractual parties.</li> </ul> <p>Most force majeure clauses will also provide a right to terminate the contract on notice or automatically, this will apply in case the force majeure event continues beyond a specified period of time.</p>

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<b>Singapore</b>	<p>No.</p> <p>Application and scope of force majeure clause will depend on how it is drafted.</p>	<p>Whether a party is entitled to invoke a force majeure clause depends on how force majeure is defined in the particular clause. Typically, force majeure will be defined as:</p> <ul style="list-style-type: none"> <li>• an event that was not reasonably foreseeable;</li> <li>• it was beyond the reasonable control of the invoking party that performance of its obligation was affected (typical clauses will require the event to “prevent”, “obstruct”, “hinder”, “delay” performance); and</li> <li>• it could not reasonably have been avoided.</li> </ul> <p>The precise wording used in the clause matters when determining the extent to which contractual performance is affected. The words “hinder” / “disrupt” have been held to impose a lower threshold than “prevent”. Generally, performance is hindered or disrupted when it is commercially impractical to continue, even if not impossible.</p> <p>The invoking party will also need to comply with the notice requirements under the contract.</p>	<p>The effect of a force majeure clause will depend on how it is drafted. Typically, it may:</p> <ul style="list-style-type: none"> <li>• excuse failure to perform;</li> <li>• extend time for performance; and/or</li> <li>• entitle a party to terminate the contract if force majeure conditions persist for a period of time.</li> </ul> <p><b>Please note:</b> Singapore recently enacted legislation in response to COVID-19 which provides temporary relief for those unable to perform contractual obligations.</p> <ul style="list-style-type: none"> <li>• This legislation applies to certain contracts only, including event, tourism-related construction, supply, and loan contracts.</li> <li>• Contracts (save for pre-existing contracts which are automatically renewed) must have been entered into before 25 March 2020.</li> <li>• Performance of the contractual obligation in question must have been due on or after 1 February 2020.</li> <li>• Qualifying parties can issue a relief notification, which will impose a six-month moratorium on certain types of legal proceedings.</li> <li>• In addition, for construction and supply contracts, notifying parties can raise a defence to breach of contract and liquidated damages for the same six-month period.</li> </ul> <p>More details can be found <a href="#">here</a>.</p>

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<b>South Africa</b>	<p>No.</p> <p>Force majeure is a contractual mechanism agreed by the parties.</p> <p>Common law relief can be found in the doctrine of supervening impossibility of performance.</p>	<p>Force majeure only applies in accordance with the terms agreed between the parties. Usually, the parties agree on either a closed or open list of instances which would constitute a force majeure event.</p> <p>Insofar as force majeure has been regulated by a contract, the courts will be slow to grant relief in terms of the common law (in accordance with the doctrine of supervening impossibility of performance).</p> <p>The common law remedy of supervening impossibility of performance requires that the performance of certain obligations is rendered objectively impossible due to either an act of God (<i>vis maior</i>) or accident (<i>casus fortuitous</i>).</p> <p>Blame for the cause of impossibility does not affect the extinguishing of obligations but it might affect a claim for damages in due course.</p> <p>In order to rely on supervening impossibility of performance, the party seeking the relief will need to demonstrate that the performance has been rendered objectively impossible.</p>	<p>This will depend on the terms of the clause in question.</p> <p>Usually, such clauses provide for the suspension of obligations for a period of time, followed by an election to cancel the contract should the event persist. The courts generally enforce force majeure clauses to the exclusion of common law remedies.</p> <p>In common law, performance under a contract is suspended during any temporary period of impossibility or alternatively is entirely extinguished in circumstances of objective impossibility of performance.</p> <p>Partial impossibility of performance under common law does not extinguish the obligation but, if the counterparty cannot reasonably be expected to accept partial performance, the creditor is entitled to terminate the obligation. Acceptance of partial performance relieves the counterparty from performing corresponding obligations relevant to the performance which has been excused.</p> <p>Insofar as performance is extinguished, performance of the counter-party's corresponding obligations is also extinguished. Any prior performance can be claimed back through the mechanism of unjustified enrichment. The contract, however, will not automatically be terminated.</p> <p>Usually, no claim for damages will exist if the party seeking the relief is not responsible for the cause of the impossibility.</p>



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<b>Spain</b>	<p>Yes.</p> <p>Article 1105 of the Spanish Civil Code:</p> <p>“Apart from the cases expressly mentioned in the law, and those cases in which the obligation so declares, no one shall be responsible for those events which could not have been foreseen, or which, if foreseen, were inevitable.”</p>	<p>The party seeking to rely on force majeure should allege the contractual provisions (if any) on force majeure.</p> <p>From a general perspective, circumstances should qualify as a force majeure event if they are extraordinary and are unleashed from the outside, are unpredictable and it would not have been possible to foresee nor to avoid them even by displaying the greatest diligence.</p> <p>In any case, the following must be taken into account:</p> <ul style="list-style-type: none"> <li>• the contractual provisions (if any) governing special situations leading to a force majeure event and the consequences of that event;</li> <li>• the concurrent circumstances in each case;</li> <li>• the means available to the party which is required to perform; and</li> <li>• its ability to react to the unforeseen event.</li> </ul> <p>Based on the above, force majeure events must be analysed by the parties (and ultimately the court) carefully on a case-by-case basis as (aside from Article 1105 of the Civil Code) there are no regulations that detail the cases or situations that constitute force majeure.</p>	<p>All obligations remain in place for all parties to the contract but if any obligations become impossible to fulfil as a result of the force majeure event, then the non-defaulting party is not liable for not complying with those impossible obligations. None of the parties can demand that the other party (or parties) delivers performance of the impossible obligations nor is the non-defaulting party entitled to claim damages or termination of the agreement.</p>
<b>Thailand</b>	<p>Yes.</p> <p>Article 8 of the Civil and Commercial Code of Thailand defines the term "force majeure" to mean any event the happening or pernicious results of which could not be prevented even though a person against whom it happened or threatened to happen were to take such appropriate care as might be expected.</p>	<p>The onus is on the party seeking to rely on a force majeure clause under Thai laws to prove that the event falls within the specific terms of the clause.</p> <p>If a party wishes to invoke a force majeure clause on the basis of the COVID-19 outbreak, he or she must prove that the event which occurred qualifies as a force majeure event under the contract and that the event has prevented or hindered performance of the contract.</p> <p>It is important that the claiming party is able to demonstrate the causal connection between the force majeure event and the non-performance.</p>	<p>A force majeure clause relieves the affected parties from liability to perform contractual obligations when performance is prevented by a force majeure event or circumstance. However, force majeure clauses do not excuse liability where the effects of the force majeure event could reasonably have been anticipated and/or avoided.</p>

\* **Thailand:** See page 13 for a description of how we provide legal services in Thailand.

Jurisdiction	Common law doctrine and/or statutory/standard definition	Relevant tests	Effect
<b>United States: California</b>	<p>Yes.</p> <p>Californian Civil Code, section 1511(2), provides that "The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate ... 2. When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary."</p> <p>Californian Civil Code, section 3526, provides that "No man is responsible for that which no man can control."</p>	<p>The party seeking to rely on force majeure must prove it applies, which generally involves establishing that:</p> <ul style="list-style-type: none"> <li>the force majeure event is encompassed by the force majeure clause or, if the contract does not contain a force majeure clause, that contractual performance was prevented or delayed by intervening unforeseeable events;</li> <li>the force majeure event is preventing the party's performance in the degree required by the contract (eg depending on the wording of the contract, it may be delay, hindrance, preventing etc.);</li> <li>the party has made reasonable efforts to perform under the contract despite the occurrence of the force majeure event;</li> <li>notice has been provided in accordance with any contractual requirements.</li> </ul>	<p>Varies depending on the specific facts, as well as the wording of the relevant provision. These may include:</p> <ul style="list-style-type: none"> <li>extending time for performance;</li> <li>excusing failure to perform;</li> <li>allowing suspension or termination of the contract.</li> </ul> <p>Most force majeure clauses will also provide a right to terminate the contract, on notice or automatically, if the force majeure event continues beyond a specified period of time.</p>
<b>United States: New York &amp; Texas</b>	<p>No.</p> <p>Application, scope and effect will depend on the wording of the particular force majeure clause (if any).</p>	<p>The party seeking to rely on the force majeure clause must prove it applies, which generally involves establishing that:</p> <ul style="list-style-type: none"> <li>the force majeure event is unforeseeable and encompassed by the force majeure clause;</li> <li>the force majeure event is preventing the party's performance in the degree required by the contract (eg depending on the wording of the contract, it may be delay, hindrance, preventing etc.);</li> <li>the party has made efforts to perform under the contract despite the occurrence of the force majeure event (mere impracticability or unanticipated difficulty are generally not enough to excuse performance);</li> <li>notice has been provided in accordance with any contractual requirements.</li> </ul>	<p>Varies depending on the wording of the relevant provision. These may include:</p> <ul style="list-style-type: none"> <li>extending time for performance;</li> <li>excusing failure to perform;</li> <li>allowing suspension or termination of the contract.</li> </ul> <p>Most force majeure clauses will also provide a right to terminate the contract, on notice or automatically, the contract if the force majeure event continues beyond a specified period of time.</p>

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