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**COVID-19**  
Coronavirus

A&L Goodbody

# International Definitions of Force Majeure Amid Covid-19

April 2020



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Felicity Saxon | Corrs Chambers Westgarth

Does your country have a legal definition of force majeure, and if so, what is it?

In Australia there is no standard force majeure definition or clause so each contract will turn on its specific drafting.

Does the legal definition include epidemics and/or pandemics?

A typical Australian force majeure clause will relieve a party from any delay or non-performance that is directly caused by unforeseen events outside of that party's control, and it is not uncommon for contracts to identify epidemics or pandemics as examples of a force majeure event.

How is force majeure proven? Do authorities issue official force majeure certificates?

Relief under such terms is often conditioned on the non-performing party having taken reasonable steps to mitigate or overcome the effects of the force majeure event (for example, by maintaining and implementing a disaster recovery plan).

Is the spread of COVID-19 considered force majeure?

Whether or not the direct or indirect effects of COVID-19 provide relief to a non-performing party will depend on the wording of the force majeure clause in the contract being considered.



### Does your country have a legal definition of force majeure, and if so, what is it?

Bolivian jurisprudence provides that an event must have the following characteristics to be considered *force majeure* or *caso fortuito* and excuse a party's performance:

- External, meaning out of the obligated party's control;
- Makes compliance with contractual terms impossible;
- Unforeseeable, meaning it could not have been reasonably predicted at the time the contract was signed;
- Inevitable;
- Current; and
- Its consequences were not aggravated or worsened by the acts or omissions of the nonperforming party.

Bolivian doctrine provides that examples of force majeure events include the following:

- Natural disasters (earthquakes, floods, fires, droughts, lightning, sleet, etc.)
- Acts or war or other third-party disturbances (theft, civil disturbance, labor strikes, shipwrecks, transit accidents, etc.)
- Orders by public authorities, usually the executive (expropriation, seizures, prohibition or limitation on trade, withdrawal from commerce of certain goods or currencies, etc.)



# BOLIVIA (contd.)



Lindsay Sykes | Ferrere Abogados

Does the legal definition include epidemics and/or pandemics?

It does not and these definitions are usually not included in contractual definitions.

How is force majeure proven? Do authorities issue official force majeure certificates?

The party alleging force majeure must demonstrate that:

- a) the event prevented performance and was outside the party's control;
- b) the event was unpredictable and inevitable;
- c) it is now impossible to fulfill its obligations, or, at least, to fulfill them completely; and
- d) that the consequences of the event have not been increased or aggravated by its actions or nonactions.

Is the spread of COVID-19 considered force majeure?

Eventually judicial and arbitral tribunals will have to decide the question of whether the circumstances caused by COVID-19 constitute force majeure. Although current government prohibitions on transit and border closures will certainly be a strong factor in favor of a finding of force majeure, all circumstances must still be considered, including when the nonperformance occurred, when the governmental orders took effect, and what measures the nonperforming party took to mitigate losses.

In other words, nonperformance during the public health emergency caused by COVID-19 will not automatically be considered excused by force majeure. The situation therefore requires monitoring and analysis of the relevant factors at regular intervals as well as upon changes to the situation.



Amina Đugum | In cooperation with Karanović & Partners

## Does your country have a legal definition of force majeure, and if so, what is it?

Bosnian law does not provide a legal definition of “force majeure”.

However, the following legal concepts should be taken into account:

impossibility of performance – if for the party affected by COVID-19 pandemic and related administrative measures (“Pandemic Implications”), performance of a contractual obligation is impossible, such obligation of the affected party as well as the other party to the contract terminates. The affected party is obliged to return what it received from the other party for the performance of the contract. No damage compensation would be owed by any party involved.

It is important to emphasize that the contracting party affected by COVID-19 must prove that the subsequent inability to fulfil its contractual obligations was due to these circumstances. In practice, a distinction is made between a strictly individualized obligation (the sale of a specific item) and an obligation that is to surrender generic items (things determined by gender).

In the first case, with the appearance of COVID-19, the obligation of the debtor ceases, while that is not the case in the second situation. exoneration of liability for failure to perform a contract – if the party affected by Pandemic Implications was unable to perform its contractual obligation or was unable to perform it in a timely manner for reasons arising after the contract was signed, that party could not have anticipated, prevented or overcome, such party is not liable for damages that the other party suffered as a result of such non-performance.

However, in case the debtor is late with the fulfilment of its obligations prior to the occurrence of the COVID-19 pandemic, then a debtor will be held responsible for non-performance.

In addition, the debtor has the burden of proof, meaning a debtor is the one that needs to prove that occurrence of COVID-19 caused late fulfilment of its obligations.



# BOSNIA & HERZEGOVINA (contd.)



Amina Đugum | In cooperation with Karanović & Partners

**Does the legal definition include epidemics and/or pandemics?**

Force majeure provisions may be introduced through different contractual clauses.

There is no centralized approach when it comes to determining COVID-19 as force majeure, it will depend on the terms of the contract in each case.

However, in case a contract provides for a specific force majeure definition it is likely that the epidemic and/or pandemic would be included.

**How is force majeure proven? Do authorities issue official force majeure certificates?**

Foreign Trade Chamber of Bosnia and Herzegovina is issuing a force majeure certificates which party can use to prove the occurrence of force majeure.

The force majeure certificate is a document for relieving of responsibility for failure to perform one's obligations. This certificate is issued by the competent authority and it enables the contracting party to prove to its business partners that it was unable to comply with the contractual obligations for objective reasons - that is, for the reasons that it could not influence and could not foresee.

In order for the Foreign Trade Chamber to issue such a force majeure certificate, it is necessary to submit a written request stating specific data on the service/product that could not be realized due to force majeure, number of contracts related to inability to fulfill obligations, the delivery time and the area/location where the force majeure occurred.

# BOSNIA & HERZEGOVINA (contd.)



Amina Đugum | In cooperation with Karanović & Partners

## Is the spread of COVID-19 considered force majeure?

Whether COVID-19 situation is to be qualified as force majeure is to be determined on case by case basis. The party invoking force majeure clause needs to demonstrate that the specific events which were beyond that party's control caused that party's inability to perform an obligation under a contract (irrespective whether the emergency situation has been declared or not).

Note that the Bosnia and Herzegovina (BH) is complex country, consisted of Federation of Bosnia and Herzegovina (FBH), Republic of Srpska (RS) and Brčko District (BD).

Additionally:

- a) BH declared the state of natural or other disaster on 17 March 2020;
- b) FBH declared the state of disaster on 16 March 2020;
- c) RS declared the state of emergency situation on 16 March 2020;

Furthermore, competent authorities are taking certain repressive measures, with the primary objective of protecting public health. However, such measures are also impacting business sector in a way that many companies are reducing their business capacities, which is consequently leading to many of them not being able to duly and timely fulfil their obligations arising from contractual obligations.

In order to consider declaration of a state of emergency/natural or other disaster as a force majeure event there has to be a causal connection between the state of emergency/natural or other disaster and the failure to perform contractual obligations.

In other words, the party needs be unable to fulfil its duties under the contract due to the precautionary measures taken within the scope of state of emergency/natural or other disaster.





Luciana Tornovsky | Demarest

Does your country have a legal definition of force majeure, and if so, what is it?

In Brazil, we have a legal definition of force majeure. This is provided by the article 393 of the Brazilian Civil Code, as follows:

“Art. 393. The debtor is not liable for damages resulting from unforeseeable circumstances or force majeure, if expressly not responsible for them.

Single paragraph. The act of God or force majeure occurs in the necessary fact, the effects of which it was not possible to avoid or prevent.”

Does the legal definition include epidemics and/or pandemics?

No, the legal definition of force majeure in Brazil does not expressly include the epidemics and/or pandemics as an act of God or force majeure event.

However, these events are usually included as examples of acts of God or force majeure events in contractual force majeure clauses and definitions. This may help in the definition of the boundaries of force majeure clauses and definitions.

How is force majeure proven? Do authorities issue official force majeure certificates?

In accordance with the Brazilian Laws, all kinds of evidences may be used to prove the occurrence of an act of God or force majeure event. However, in order to enforce a force majeure clause, it is necessary also to observe the conditions contractually imposed.

If the contract requires a specific evidence to be presented, the party invoking the force majeure clause will be obliged to present such specific evidence.



## Is the spread of COVID-19 considered force majeure?

Such question cannot be answered in general. It must be verified in a case by case basis. It will depend on the wording of the force majeure clause. If the parties have made an express exclusion of such event (or even of epidemics and pandemics generically), it will not be possible to invoke the spread of COVID-19 as a force majeure event.

According to the Brazilian law, the force majeure event, at least:

- a) must be supervenient to the agreement;
- b) must have a cause-consequence relation with the damage or non-performance of the agreement or contractual obligation; and
- c) the effects of such event could not and cannot be avoided or prevented. In thesis, and considering no exception has been made, it would be possible to consider the spread of COVID-19 as force majeure event, provided that the requisites above mentioned are all fulfilled.



Mealy Khieu | SokSiphana & Associates (a member of ZICOLaw)

### Does your country have a legal definition of force majeure, and if so, what is it?

In Cambodia, the Civil Code does not provide a clear definition of what constitute force majeure.

Most definitions of force majeure are mainly be found in each individual contract a party has entered. Some contracting parties who engaged lawyers with Common Law background tend to have more detailed definition of force majeure or frustration of purpose clause in their contracts, which is generally not the case for contract drafted by civil law trained lawyers.

Moreover, if relying on force majeure as an implied term under the default provisions of the Civil Code: (1) it can be made only in limited types of contracts (i.e. lease, perpetual lease); and (2) even so, the Civil Code does not offer adequate solution (i.e. perpetual lessee shall be entitled to terminate the contract after 3 consecutive years of force majeure).



# CAMBODIA (contd.)



Mealy Khieu | SokSiphana & Associates (a member of ZICOLaw)

Does the legal definition include epidemics and/or pandemics?

Epidemics and pandemics are covered under the force majeure clause of some contracts, but it is not clearly defined what it is.

How is force majeure proven? Do authorities issue official force majeure certificates?

In Cambodia, there is no authority, nor governmental institutions will issue such force majeure certificates, except the competent courts are entrusted to decide the case submitted by infected parties.

Hence the judges are empowered to use their vague discretionary power to decide the cases.

Is the spread of COVID-19 considered force majeure?

The Covid-19 has tremendous impact on the whole country's economy. There are about 90 factories are allowed to suspend its operations with more than 60,000 workers are partially paid. Other sectors such as tourism, transport, aviation is also affected which cause the interruption of its contractual performance.

Since there is no vivid no detailed definition in our Civil Code, each party will rely completely on its own term stipulated in each individual contract.

In case its contract is silence, the affected party shall be responsible to find the evidence proving such case and submitted to the court for decision.

There is no one formula for all. Since Cambodia follows Civil Law system, there is no jurist prudence thus judges could decide each case differently.



Audrey Z. Chen | Jun He

**Does your country have a legal definition of force majeure, and if so, what is it?**

There is definition under the General Rules of the Civil Law of the People's Republic of China. Force majeure means unforeseeable, unavoidable and unconquerable objective situations.

Article 180 No Civil Liability is borne in case of failure to perform civil duties due to force majeure, unless otherwise provided by law.

**Does the legal definition include epidemics and/or pandemics?**

Epidemics and pandemics can be covered by the definition of force majeure.

Whether a specific epidemic or pandemic would be regarded as a force majeure event is a case by case matter, depending on the severity and other key factors.

**How is force majeure proven? Do authorities issue official force majeure certificates?**

In China, the China Council for the Promotion of International Trade (CCPIT) is the recognized authority to issue official force majeure certificates.

# CHINA (contd.)



Audrey Z. Chen | Jun He

## Is the spread of COVID-19 considered force majeure?

The COVID-19 has caused serious consequences in China, e.g., lock down of Wuhan and nationwide shutdown. It should be regarded as a force majeure event. We have seen a number of reports saying that CCPIT has issued certificates for many Chinese enterprises proving COVID-19 as a force majeure event in China.

As for declaration of official emergency situation, there are views that it is a proof of the severity of the COVID-19 (or other epidemics), but may not be necessary to decide the existence of a force majeure event.

Even if COVID-19 has been recognized by a force majeure event in China, it may not necessarily impede the performance of all obligations of every contract in China. E.g., the payment obligation under a contract shall not be impeded by COVID-19. In other words, COVID-19 shall not be a force majeure event for payment obligation under a contract.





### Does your country have a legal definition of force majeure, and if so, what is it?

Legislation in Costa Rica does not give a legal definition but instead refers to “force majeure” as a waiver of liability.

The Costa Rican Civil Code refers to force majeure in article 702 as follows: Article 702: The debtor who fails to fulfill his obligation, either in substance or in the manner, will be responsible for himself for the damages and losses caused to his creditor, unless the default arises from an act of Force majeure or unforeseeable circumstances.

The Labor Code in article 74, on the temporary suspension of employment contracts, contemplates force majeure, as follows:

*“Article 74. They are causes of temporary suspension of employment contracts, without liability for the employer or for the workers ... b) Force majeure ..., when it brings as a necessary, immediate and direct consequence the suspension of work”.*

In this case, the Executive Power may dictate emergency measures that, without damaging the interests of the employers result in the alleviation of the economic situation of the workers.

The doctrine has defined force majeure as an event that although could be foreseen, it is inevitable. The force majeure would be due to a fact of nature. The force majeure as exemptions from liability require the following characters: External and objective nature of the event, unpredictability or inevitability. Force Majeure, means the occurrence of an event or circumstance (“Force Majeure Event”) that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that the party affected by the impediment (the Affected Party “AP”) proves:

- a) that such impediment is beyond its reasonable control;
- b) that it could not reasonably have been foreseen at the time of the conclusion of the contract; and
- c) that the effects of the impediment could not reasonably have been avoided or overcome by the AP.



# COSTA RICA (contd.)



Tatiana Rojas | Aguilar Castillo Love

Does the legal definition include epidemics and/or pandemics?

There is no legal definition given by the Costa Rican Legislation. However Epidemics and/or Pandemics as a force majeure is an external and objective event of nature as it is unpredictable and unavoidable.

How is force majeure proven? Do authorities issue official force majeure certificates?

The Government does not issue a force majeure certificate, however, it has issued Executive Decree No. 42227, by which COVID-19 was declared a national emergency. Through this decree the event of COVID-19 as a national emergency, had conferred the status of an event of force majeure.

# COSTA RICA (contd.)



Tatiana Rojas | Aguilar Castillo Love

## Is the spread of COVID-19 considered force majeure?

A pandemic is defined as the "global spread" of a new disease; and as a pandemic, COVID-19 was inevitable. As a result of this, it had health, social and economic repercussions. We are in presence of a force majeure.

In a contractual relationship, it is the obligor who bears the burden of proof, that is, he must demonstrate that the breach was due to the impossibility of executing the contract due to force majeure.

Regarding COVID-19 status as Force Majeure, the International Chamber of Commerce in the "ICC Force Majeure Clause" from March, 2020 establishes that the Presumed Force Majeure Events commonly qualify as Force Majeure.

It is therefore presumed that in the presence of one or more of these events, the conditions of Force Majeure are fulfilled, and the Affected Party (AP) does not need not prove these conditions:

- a) war (whether declared or not), hostilities, invasion, act of foreign enemies, extensive military mobilisation;
- b) civil war, riot, rebellion and revolution, military or usurped power, insurrection, act of terrorism, sabotage or piracy;
- c) currency and trade restriction, embargo, sanction;
- d) act of authority whether lawful or unlawful, compliance with any law or governmental order, expropriation, seizure of works, requisition, nationalisation;
- e) plague, epidemic, natural disaster or extreme natural event;

As result all of the above and the Costa Rican legislation, we can confirm that the spread of COVID-19 constitutes Force Majeure.





Franka Baica | Ilej & Partners (in cooperation with Karanović & Partners)

## Does your country have a legal definition of force majeure, and if so, what is it?

There is no straightforward legal definition of “force majeure” under Croatian law. However, the definition may be extracted from the legal concepts which may be applied to events which are commonly referred to as force majeure. Such event should be *“external, extraordinary and unpredictable, should occur after the conclusion of the contract and could not be prevented, remedied or avoided”*.

The legal concepts connected with the force majeure include:

- a) impossibility of performance – where due to the COVID-19 situation performance of a contractual obligation is impossible, such obligation of the affected party terminates. In turn, the obligation of the other party also terminates. The affected party is obliged to return what it received from the other party for the performance of the contract. No damage compensation would be owed by any party involved;
- b) exoneration of liability for failure to perform a contract – if the party affected by COVID-19 situation was unable to perform its contractual obligation or was unable to perform it in a timely manner due to COVID-19 situation, such party is not liable for damages the other party suffered as a result of such non-performance.

Franka Baica | Ilej & Partners (in cooperation with Karanović & Partners)

Does the legal definition include epidemics and/or pandemics?

There is no legal definition that explicitly includes epidemics and/or pandemics.

The contractual practice varies, but where a contract provides for a specific force majeure clause, it is likely that the epidemic and/or pandemic would be included either explicitly or in the wording of the definition of the force majeure event

How is force majeure proven? Do authorities issue official force majeure certificates?

There is no specific method of establishing the occurrence of force majeure. The affected contractual party should prove the force majeure occurrence and the effect of such occurrence on its ability to perform the contract.

In the past, certain institutions were issuing force majeure certificates to affected entrepreneurs (e.g. during the gas crisis in 2009) which could enable them to prove the occurrence of force majeure more easily. Although the Croatian Employer's Association and a number of Croatian entrepreneurs already requested the overall declaration of force majeure due to COVID-19 outbreak, there are still no public reactions to such a proposal from the competent authorities

Is the spread of COVID-19 considered force majeure?

The question of whether COVID-19 is considered as force majeure or not and whether it impacts the party's ability to meet its obligations does not have a straightforward answer and should be assessed on case to case basis. Irrespective of whether the emergency situation has been declared or not, a party would have to be able to demonstrate that the specific events which were beyond the control of the party invoking force majeure caused that party's inability to perform an obligation under a contract.

Although certain countries in the region introduced nationwide state of emergency due to COVID-19 situation, the Croatian Government did not adopt such decision yet.



**Does your country have a legal definition of force majeure, and if so, what is it?**

There is no separate definition of force majeure in the Cyprus law.  
Whether a party can claim FM will depend on the nature and wording of the contract in question.

**Does the legal definition include epidemics and/or pandemics?**

It will depend on the specific wording of the contract.

**How is force majeure proven? Do authorities issue official force majeure certificates?**

The courts will examine the intention of the parties at the time of entering into the contract to prove whether force majeure can be invoked or not. They may also have regard to section 56 of Cyprus contract law Cap 149 which contains the doctrine of “frustration” which applies in cases of a supervening event causing a contract to become impossible to perform.

Arguably, COVID, which has both a natural disaster element because of the virus and also a human supervening element such as the travel bans or quarantines, may be interpreted as an event to which the doctrine of “frustration” may apply.

**Is the spread of COVID-19 considered force majeure?**

It is as yet not known whether the spread of COVID 19 will be interpreted as force majeure in general terms but in Cyprus law the determination will be specific to the facts in question and to whether a pandemic can be construed as an included term in the events provided for in a contract.





# CZECH REPUBLIC



Glatzová Vladimíra | Glatzová & Co.

## Does your country have a legal definition of force majeure, and if so, what is it?

There is no explicit definition of force majeure in Czech law, however, the force majeure is generally interpreted as an extraordinary, unforeseeable and insurmountable accident/obstacle created independently of party's will, which prevents it from fulfilling its contractual duty or exercising its right.

The occurrence of force majeure is significant in connection with the regulation of the compensation for damage, as it relieves the affected party from the duty to provide compensation for damage resulting from breach of a contractual duty. However, an obstacle arising from the party's personal circumstances or arising when the party was in default of performing its contractual duty, or an obstacle which the party was contractually required to overcome shall not release it from the duty to provide compensation.

Unless otherwise agreed in the contract, i.e. unless the parties agree a force majeure clause for such cases, force majeure does not relieve the affected party of the obligation to perform and does not give the affected party the right to unilaterally terminate the contract.

## Does the legal definition include epidemics and/or pandemics?

In Czech law there is no legal definition of force majeure that expressly includes a reference to epidemics or pandemics, however, epidemics and pandemics may fall under the above definition.

A contractual definition is usually used in a wording similar to the legal one, together with a nonexclusive list of examples of cases of force majeure being included for the avoidance of doubt. The most common examples include strikes or lockouts of employees, blackouts of electricity or other energies, street riots, rebellions, wars, floods, fires, earthquakes or similar natural or social calamities. It is not usual for epidemics/pandemics to be explicitly mentioned, but it may occur.

On the other hand, expressly excluding epidemics/pandemics from a force majeure definition would be highly uncommon.

# CZECH REPUBLIC (contd.)



Glatzová Vladimíra | Glatzová & Co.

**How is force majeure proven? Do authorities issue official force majeure certificates?**

In the Czech Republic, force majeure certificates are issued by the Czech Chamber of Commerce.

In case of dispute between the parties, the affected party can use any other suitable means in order to prove the occurrence of the force majeure event to the other party / court (including available documents from other governmental authorities, such as historical data from the Czech Hydrometeorological Institute etc.).

The occurrence of the force majeure could also fall under generally known facts, which do not need to be proved to the court, but it would still be necessary to prove that it formed an obstacle to the fulfilment of the contractual obligation.

**Is the spread of COVID-19 considered force majeure?**

Declaration of an official emergency situation is not a necessary condition for the qualification of COVID-19 as a force majeure, as the spread of COVID-19 itself could possibly constitute a separate force majeure event if the above definition is met.

A threshold could be considered in determining whether the spread of COVID-19 itself prevented a party from fulfilling its contractual obligation. In such a case, it is conceivable that the affected party could effectively invoke COVID-19 as a force majeure, either as grounds for delay in performance of contractual obligations (if a corresponding force majeure clause was agreed in the contract) or as statutory grounds for liberation from compensation for damage.

As for official emergency situation and official crisis measures, the above applies *mutatis mutandis*, i.e. if it prevented a party from fulfilling its contractual obligation, it should be considered force majeure.



Lise Lotte Hjerrild, Iben Schaumburg | Horten

## Does your country have a legal definition of force majeure, and if so, what is it?

Since Danish law has no actual provision that defines force majeure in general, the legal principle of force majeure is developed through case law which defines the scope of extraordinary and unforeseen circumstances.

Under Danish law, the concept of force majeure is generally defined as a condition in which the fulfilment of an obligation is hindered by external events of such a nature that not even reasonable precautions could have ensured. It is the concept of an extraordinary and unforeseen event preventing a party from fulfilling its obligations under the contract.

Thus, to invoke force majeure it must 1) be impossible to fulfil the contractual obligation and 2) the event and the consequences thereof must be unforeseen.

Whether or not an event causing non-performance may constitute force majeure will depend on an individual assessment of the event based on the specific contractual provisions governing the obligation. Thus, what may constitute force majeure in one situation may not enjoy that conclusion for other companies with other contracts. If no precise provisions have been agreed, force majeure may be applied in its basic conceptual form.



# DENMARK (contd.)



Lise Lotte Hjerrild, Iben Schaumburg | Horten

## Does the legal definition include epidemics and/or pandemics?

Typical examples of extraordinary and unforeseen events include natural disasters such as earthquakes, volcanic eruptions, blockade, public seizure, import bans and acts of war which make it physically and in practice impossible for the contracting party to perform the obligations.

No court rulings in Denmark have definitively decided whether epidemics or pandemics per se may constitute force majeure or not. If a force majeure clause would specifically include epidemics or pandemics as a force majeure event, Danish courts of law would respect that when ruling on the matter. However, such clauses seem to be very rare. Most often, force majeure clauses are limited to the following groups of events: accidents, circumstances regarding national security, unforeseen national restrictions, public order, unforeseen economic development, unwarranted collective labour disputes and natural disasters. So, a pandemic as such will not from a theoretical and general point of view qualify as a force majeure event. But the measures that governmental and other competent authorities take with mandatory and binding effect on the performing party in a contract may constitute force majeure if it will render performance impossible.

Following recent changes of the Danish Epidemic Act, governmental agencies have now the power to issue bans or restrictions against certain activities such as gatherings, travel and transport, shop or work place openings. The inherent reason for those measures is the epidemic or pandemic, but it will be the scope, applicability and validity of the regulatory instruments that will cause force majeure. These restrictions will constitute force majeure even with no contract clause defining the scope of force majeure, provided they will make performance objectively impossible and were unpredictable at the time of the party assuming the particular obligation. In the first period of COVID-19 in Denmark, the government made several 'recommendations' (that events such as concerts and theatre shows were cancelled; that restaurants closed; that various activities were dropped). This was a serious problem because the 'recommendation' did not qualify as an insurmountable obstacle such as a binding order. Cancellations were a consequence not a result of force majeure.



## How is force majeure proven? Do authorities issue official force majeure certificates?

Proving force majeure is difficult. The party claiming force majeure will have to prove that non-performance is due to impossibility (inability to perform contractual obligations) as a result of an unforeseen qualified event. The absolutely first requirement is that the obstacle is notified, and that accurate circumstances are invoked immediately after having ascertained the predicament. There is no room for delay.

As an example, fulfilment of the contract will not be considered impossible in the event of supplier failure if it is possible to fulfil the contract obligation by contracting with a different subcontractor. It is not enough that the contract obligation has become more burdensome or unprofitable. The level of documentation depends on a concrete assessment of the specific case and contract. It also has to be proved that the event causing inability to perform in accordance with the contract was unforeseen. For example, it will be difficult to prove that this condition is fulfilled regarding COVID-19 for contracts signed after the outbreak of COVID-19.

Due to COVID-19, the Danish government is currently rushing through legislation to be able to implement bans, restrictive measures and lock-down. The impact of these measures is still unknown but will probably serve as documentation or as part of documentation of a force majeure claim. Always, however, a regulatory restriction may only serve as a justified force majeure condition in relation to the precise obligation which it makes impossible to perform. All other undertakings remain intact and enforceable under the contract. Danish authorities do not interfere in the regulation of contracts by 'defining' force majeure or issuing certificates or statements to that effect.



## Is the spread of COVID-19 considered force majeure?

To determine whether the outbreak of COVID-19 constitutes force majeure, the specific contract has to be assessed in consideration of all relevant circumstances, including the contractual obligations, the force majeure clause if such exists and the impossibility derived from the COVID-19 outbreak.

It is difficult to define a specific threshold as to when a virus constitutes force majeure according to Danish law. As stated above, the virus is in itself and by definition not an obstacle to any contractual performance.

The threshold as to when a virus would constitute force majeure depends on the specific circumstances and the wording of the contract, the applicable law (including current restrictions and bans), the reason for inability to perform and whether the obligations could be performed in another way, or if the loss derived from the potential force majeure event could be mitigated in any way.

As the question of force majeure is tied to a party's inability to perform in accordance with its contractual obligations, Danish law does not necessarily require an official state of emergency for a virus to constitute force majeure. Hence, it will depend on a full assessment on a case-by-case basis as described above.



Does your country have a legal definition of force majeure, and if so, what is it?

The Ecuadorian Civil Code defines force majeure or fortuitous event as an unforeseen event that cannot be resisted. As it can be seen, the two elements that will define what is force majeure are:

- a) unpredictability; and
- b) irresistibility.

In this definition events such as natural disasters and acts of authority are included; therefore, the sanitary emergency declaration made by President Lenin Moreno would comply with the two elements in order to be qualified as force majeure.

Does the legal definition include epidemics and/or pandemics?

Our law does not expressly include epidemics or pandemics as part of the definition of force majeure, and neither do contracts in general; however, an epidemic or pandemic would constitute an unforeseen and irresistible event and thus can be qualified as force majeure.

How is force majeure proven? Do authorities issue official force majeure certificates?

Relief under such terms is often conditioned on the non-performing party having taken reasonable steps to mitigate or overcome the effects of the force majeure event (for example, by maintaining and implementing a disaster recovery plan).

Is the spread of COVID-19 considered force majeure?

Whether or not the direct or indirect effects of COVID-19 provide relief to a non-performing party will depend on the wording of the force majeure clause in the contract being considered.



# ECUADOR (contd.)



Paola Gachet | Ferrere

How is force majeure proven? Do authorities issue official force majeure certificates?

According to the Civil Code, a fortuitous event must be proved by the person that alleges it. This prove may be made by any means necessary or available to that person. In a judicial procedure, there are several means of prove such as documents, testimony, expert reports, among others. In general terms, force majeure does not require any kind of certificate of declaration by any authority in order to be qualified as such.

Exceptionally force majeure must be qualified as such within the context of administrative contracts. Most of public contract provide that when there is a fortuitous event or force majeure, such event has to be notified to the Contracting Entity so that it can be analyzed whether such event constitutes an obstacle for the fulfilment of the Contractor's obligations under a contract.

The Ecuadorian National Procurement law includes force majeure within the context of "emergency situations" and determines that it must be concrete, imminent, unforeseen, proved and objective.

Is the spread of COVID-19 considered force majeure?

As it has been explained, COVID-19 would fulfill the two elements in order to constitute a force majeure event (unpredictability and irresistibility). Therefore, according to our legislation there is no requirement for COVID-19 to be declared as an official emergency in order to be alleged as force majeure in general.

However, it is vital to point out that a force majeure event may be alleged only if this event prevents a party to fulfill an obligation.

Our case law has not developed a specific threshold for considering a virus as force majeure; however, it is our opinion that such threshold should be established around the possibility or impossibility of a party to fulfil a specific obligation and not around the mere fact that such event exists.



**Does your country have a legal definition of force majeure, and if so, what is it?**

Force majeure are circumstances which are beyond the control of the obligor and which, at the time the contract was entered into or the noncontractual obligation arose, the obligor could not reasonably have been expected to take into account, avoid or overcome the impediment or the consequences thereof which the obligor could not reasonably have been expected to overcome.

**Does the legal definition include epidemics and/or pandemics?**

The legal definition does not include epidemics or pandemics and in practice force majeure had been, until now, considered mostly reserved for natural catastrophes. Domestic contracts usually include an open-ended definition of force majeure, similarly to the legal definition. International contracts are more likely to include a definition including epidemics and/or pandemics.

**How is force majeure proven? Do authorities issue official force majeure certificates?**

Force majeure can be proven by providing evidence of circumstances influencing contract performance – government acts that restrict business operations, such as temporary shut-downs of businesses, restrictions on travel and international transit; notices of non-performance from key suppliers or contributors; proof of sick leave given to a large number of employees etc. Government authorities do not issue official force majeure certificates.

**Is the spread of COVID-19 considered force majeure?**

The pandemic itself was not considered force majeure before the official emergency situation was declared. However, the emergency situation was declared rather early so if the situation had developed more it is possible that it could have become force majeure on its own. The official emergency situation at the moment qualifies as force majeure given a causal link between restrictions and non-performance exists.



Ami Paanajärvi

Does your country have a legal definition of force majeure, and if so, what is it?

Even though force majeure is a term used in Finnish legislation there is no absolute definition for "force majeure" under Finnish law. Generally it means "an event not foreseeable".

What constitutes force majeure will be determined by the Courts on a case-by-case basis and will also depend on how the force majeure clause in question is worded (note however that not having a force majeure clause does not necessarily mean inability to plead force majeure).

Does the legal definition include epidemics and/or pandemics?

There is no legal definition.

How is force majeure proven? Do authorities issue official force majeure certificates?

Force majeure needs to be shown by the party arguing it. Finnish authorities are not in the practice of issuing force majeure certificates or anything similar.

Is the spread of COVID-19 considered force majeure?

This depends on how the force majeure clause is worded (if there is one). The specific contract, its clauses and their interpretation, are key. A force majeure clause may be worded broadly, in which case it needs to be assessed whether the COVID-19 pandemic in the particular circumstances can constitute an event that is "not reasonably foreseeable". However, if the force majeure clause is more specific and mentions "epidemic" or "pandemic" as particular examples of force majeure events, it is important to note that it would still need to be established that the underlying cause of the disruption to the relevant performance is in fact the COVID-19 pandemic.

### Does your country have a legal definition of force majeure, and if so, what is it?

Force Majeure is defined for contractual matters in Article 1218 of the French Civil Code :

“In contractual matters, there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor.

Several conditions must therefore be satisfied:

- a) the event must be beyond the control of the debtor ;
- b) the event could not reasonably have been foreseen at the time of execution of the contract ;
- c) the effects of such event could not be avoided by the debtor, i.e. meaning that the debtor is supposed to have used reasonable efforts to limit the effects of the event;
- d) such event must prevent performance of the specific obligation of the debtor.

It should be noted that the definition of force majeure under the Civil Code does not fall under the public order provisions and may be amended by agreement between the parties. Contracts could therefore include a larger or more restrictive definition of force majeure, include examples (disease, strike), etc.



# FRANCE (contd.)



Axelle Toulemonde | Gide Loyrette Nouel

## Does the legal definition include epidemics and/or pandemics?

The definition of force majeure event under the Civil Code is broad and does not specifically relate to epidemics and diseases. However, such events could clearly be qualified as force majeure if the conditions indicated above are met.

Definitions of force majeure included in contracts usually did not refer in the past in our experience to epidemics and/or pandemics. We can however anticipate that practice will evolve under the current circumstances and we already see specific requests from clients to address consequences of the current COVID-19 pandemic in the contracts.

## How is force majeure proven? Do authorities issue official force majeure certificates?

The proof of existence of force majeure has to be made by the debtor who cannot fulfill its obligations.

There is no official force majeure certificate in France but COVID-19 pandemic has been officially acknowledged by France on 29 February 2020, which can help qualify the force majeure (subject always to the other conditions being met).

## Is the spread of COVID-19 considered force majeure?

Force majeure is appreciated by judges on a case by case basis.

The spread of COVID-19 can therefore be considered as force majeure if the conditions are met with respect specifically to the debtor and its obligations, at the time of execution of the agreement. There is consequently no specific threshold for a virus nor requirement to refer to an official emergency situation. The unforeseeable character of the force majeure event can however be questioned if, at the time of execution of the contract, COVID-19 and its consequences were already foreseeable. COVID-19 has been qualified by the World Health Organization on 30 January 2020 as a « Public Health Emergency of International Concern » and the COVID-19 has been officially acknowledged by France on 29 February 2020.

For contracts executed before these dates, the pandemic can therefore be considered as force majeure if the other conditions are met. The unforeseeable character could however be questioned for contracts or agreements executed after such official recognition. We also note that the last condition (the event prevents the debtor from performing its obligations) could be difficult to meet or to prove in practice depending on the type of obligations. Case law indeed usually considers that the force majeure event must prevent (objectively and totally) the debtor from performing its obligations. The fact that such event makes performance of the debtor's obligations more difficult or more costly should therefore not enable the debtor to be released from its obligations. Again, on this type of criteria, a case by case analysis needs to be carried out depending on the type of obligations. Payments for instance are not made impossible by the current COVID-19 situation. Same for closing of an M&A transaction, which is more complicated in the current situation but not impossible, although the analysis could evolve in view of stricter containment rules. For other obligations, the containment decided by the French President on 16 March 2020 could render performance of certain obligations impossible.



Does your country have a legal definition of force majeure, and if so, what is it?

German statutory civil law does not provide for a definition of force majeure. Established case law, however, defines force majeure as “a event, which, from the perspective of an objective spectator (and not of a party involved), does not have its cause within the business undertaking of a party to a contract, but which was caused by elementary forces of nature or by third person’s action, which could not have been foreseen as per human understanding and experience, which could not be prevented, or made ineffective in its consequences, by reasonable economic measures even applying utmost reasonable care, and which is not to be accepted by the owner of a business undertaking because of its frequent occurrence.” So there are in principle three cumulative elements that define force majeure:

- a) unpredictability
- b) inevitability
- c) exceptionality

Due to the absence of a definition of force majeure in statutory law, it is key to analyze the contractual agreements with respect to force majeure clauses. If these clauses exist, they will govern the legal consequences of the force majeure event, provided that they are valid and effective.

Does the legal definition include epidemics and/or pandemics?

The case law definition in the field of travel law includes epidemics/pandemics, provided that the disease is actually at least an epidemic disease, whose progress can be severe, i.e. it is not harmless. Moreover, the risk of a person to get an infection must be high and the resulting danger must be severe. The independent assessment of the situation by a governmental body can be a strong argument to qualify a infectious disease as force majeure.

Beyond the field of travel law, in case law it has not yet been fully clarified whether or not epidemic or pandemic infectious diseases constitute an event of force majeure.

# GERMANY (contd.)



Dr. Cornelia Topf | Gleiss Lutz

How is force majeure proven? Do authorities issue official force majeure certificates?

No, governmental bodies do not issue force majeure certificates.

The burden of proving force majeure lies with the party who wishes to infer advantageous legal consequences from the occurrence of an event of force majeure. This party can prove the prerequisites of force majeure by documentary evidence of any sort, witness testimonies or expert testimonies. Official statements of governmental bodies may be very helpful to convince a court that an event of force majeure actually happened.

However, these statements as well as the other means of evidence are not binding for a judge. Instead, the judge is completely free in considering whether these evidential means are compelling and convincing for proving force majeure



# GERMANY (contd.)



Dr. Cornelia Topf | Gleiss Lutz

## Is the spread of COVID-19 considered force majeure?

There is good reason to argue that the spread of COVID-19 is to be considered force majeure. The criterion “unpredictability” is most likely met because the rapid change and the escalation of the situation in Europe is without precedence. This was even highlighted in a speech of the German chancellor on 16 March 2020. Also, the spread has not been caused by the business operations of a party and it was caused by elementary forces of nature. The additional criterion of inevitability is likely also met because governmental measures and the risk that employees get infected severely affect the normal business operations.

However, each contractual relationship and the specific consequences of COVID-19 for the specific business operations under the contractual relationship must be examined diligently and very carefully. It is by no means possible to invoke force majeure by simply referring to COVID-19 without demonstrating in a substantiated manner the specific consequences for the contractual situation and the business operations to be performed under the respective contract.

Even so, invoking force majeure is only a measure of last resort. Before contractual relationships are suspended or changed because of force majeure, companies must take all reasonable measures to mitigate the consequences of the COVID-19 pandemic. So a specific assessment of the specific business situation, which takes into account all relevant circumstances, is necessary.



Does your country have a legal definition of force majeure, and if so, what is it?

Under Hong Kong law, force majeure is a contractual creation and has no standard or official definition. It normally refers to a specified event or events beyond the parties' control, where one or both parties would be entitled to:

- a) cancel the contract;
- b) be excused from the performance of the contract;
- c) suspend performance of the contract; or
- d) claim an extension of time for performance of the contract.

Does the legal definition include epidemics and/or pandemics?

Force majeure clauses come in different forms and have different wordings, but typically, they define a force majeure event as an event beyond the reasonable control of a party, and it is not uncommon for such clauses to set out a non-exhaustive list of examples of events covered by the clause.

It is up to the parties to agree what are the Force majeure events in respect of a contract. It is not uncommon that epidemics and/or pandemics are covered.



## How is force majeure proven? Do authorities issue official force majeure certificates?

Under Hong Kong law, the principle of force majeure is a contractual creation. There is no doctrine of force majeure under Hong Kong legislation and Hong Kong authorities do not issue official force majeure certificates.

The party invoking the force majeure clause will generally have to prove that:

- a) the event is covered by the force majeure clause as drafted – some clauses make it reasonably clear if they specifically identify “disease”, “epidemic” or “quarantine” as force majeure events, whilst other clauses may include more general events such as “Acts of God” or “circumstances beyond the parties’ control”;
- b) the defaulting party has been prevented, hindered or delayed from performing the contract by reason of that event;
- c) the defaulting party’s non-performance was due to circumstances beyond its reasonable control; and
- d) there were no reasonable steps that the defaulting party could have taken to avoid or mitigate the event or its consequences.



## Is the spread of COVID-19 considered force majeure?

Whether the spread of COVID-19 is considered force majeure and the threshold therefor depend on the construction of the clause in question. In such case, parties should review the relevant contract and consider:

- a) whether the definition of force majeure expressly includes epidemics and/or pandemics, and if not, whether it includes all events or circumstances beyond parties' reasonable control; and
- b) what kinds of failure of performance the clause covers: whether it provides for non-performance only or covers hindrance/delay of performance as well.

Depending on the language, the spread of COVID-19 (and possibly its effects such as travel restrictions and other governmental actions) may fall within the ambit of the clause. There is not an objection standard of threshold and the parties may agree on this in the contract.

The courts typically interpret force majeure clauses strictly with the result that it can be difficult to claim for relief. It is often insufficient if an event merely causes performance to become more onerous or expensive. However, if the force majeure clause only requires the event to merely "hinder" performance, as opposed to "prevent", the threshold may be lower.



Does your country have a legal definition of force majeure, and if so, what is it?

Hungarian law does not explicitly regulate force majeure situations, its legal framework is mainly determined by judicial practice, according to which, force majeure can be defined as an irresistible force of natural or human origin, that is absolute in nature and that cannot be suppressed by means available to humans.

Does the legal definition include epidemics and/or pandemics?

Epidemics and / or pandemics may be included in the definition of force majeure; however neither the COVID-19 nor the measures taken by the Government to defeat the pandemic in themselves justify the non-fulfilment of a contractual obligation. In order to be exempt from the consequences of breach of contract by revoking force majeure, the party shall prove that the extraordinary circumstances created by the COVID-19 pandemic have a direct effect on its business and permanently or temporarily exclude the performance of its obligations.

In Hungarian legal practice, sometimes, one can find force majeure clauses in contracts; however, these clauses are usually applied only when one of the contracting parties or the governing law originates from the common law system or when Anglo-Saxon type documentation is applied. If a force majeure clause is included in a contract, then it shall be adjudicated on the basis of its actual wording; there is no usual or typical wording of force majeure clauses in Hungary.

# HUNGARY (contd.)



Zsófia Füzi | Forgó, Damjanovic & Partners

## How is force majeure proven? Do authorities issue official force majeure certificates?

Given the fact that there is no specific regulation on force majeure in Hungarian law, in order for one to avoid the result of the breach of contract, two legal institutions can be invoked depending on the purpose of the parties and the nature of the contractual obligations:

- a) When the party's obligation is adversely affected by the event beyond its control but does not render it completely impossible, such as late or partial performance and the contracting party has no intention to terminate the contract, it is practical to refer to exculpation.
- b) On the contrary, the doctrine of impossibility shall be applied when the party intends to deviate from the contract since it is fundamentally impossible to perform due to legal, physical or economic impediments. It is an interesting Hungarian phenomenon that the Hungarian Chamber of Commerce issues force majeure certificates upon the request of a party. We do not see the legal basis for this and note that contracting parties shall be careful when relying on these certificates in a judicial proceeding as the evidentiary value attributed to them is questionable.

## Is the spread of COVID-19 considered force majeure?

The spread of COVID-19 may be considered force majeure in certain cases, however, it shall be assessed by the acting court in every case individually, with specific regard to the nature of the contract, the existing circumstances and the casual connection between them and COVID-19, as well as its actual effect on (non-) compliance.

Based on the Hungarian legal framework, there is no exact threshold for considering a virus force majeure, and a reference to force majeure situation may also be regarded justified by the courts without the declaration of an official emergency situation.

### Does your country have a legal definition of force majeure, and if so, what is it?

Force Majeure (“FM”) is not defined under any statute in India. However, Section 56 of the Indian Contract Act, 1872, gives a legal recognition to the Doctrine of Frustration. This section sets out that that in a contract, any act set out to be performed therein becomes unlawful or impossible to perform after the contract is made and such impossibility could not be prevented by the promisor, then such an, contract will become void when such act becomes impossible or unlawful.

This recognises non-performance of contracts due to impossibility of performance. In certain cases, the courts have also construed impracticability of performance to fall within the purview of this section. It is pertinent to note a well settled position of law that in the event a contract is declared to be void under Section 56, any party who has gained any benefit out of such contract is bound to restore such benefit to the party from whom he received it. Therefore, the parties should carefully analyse the situation and the terms of the contract before opting for application of doctrine of frustration to such contracts.

Section 32 of the of the Indian Contract Act, 1872 recognises FM clauses. This section provides for the discharge of contractual obligations during a contingency event. Therefore, if the contract contains a clause which sets out that performance of the contract is contingent on the occurrence of an event, the impossibility of such an event shall render the contract void.

FM clauses are included in contracts and their scope is limited to the wording of the clauses set out in such contracts.



## Does the legal definition include epidemics and/or pandemics?

There is no legal definition and hence the scope of an FM clause in an agreement is determined by all types of FM events that have been negotiated and agreed between the parties.

In the case of *Energy Watchdog v. Central Electricity Regulatory* (Civil Appeal Nos.5399-5400 of 2016), the Supreme Court of India while analysing FM clauses in a Power Purchase Agreement (“PPA”) agreed to the argument taken by the respondents in the matter that a FM clause is not an exhaustive clause under the PPA and therefore would cover unforeseen events occurring outside the events listed in the natural and non-natural force majeure events set out in the PPA.

However, this was stated upon careful analysis of the wordings of FM clause in the PPA. The court also stated that FM is governed by the Indian Contract Act, 1872, in so far as it is relatable to an express or implied clause in a contract, such as the PPAs before the court, it is governed by Chapter III, Section 32 dealing with the contingent contracts. In so far as a force majeure event occurs de hors the contract, it is dealt with by a rule of positive law under Section 56 of the Contract.

Therefore, the courts would analyse the clauses in agreement and the wordings thereof to determine whether such clause would extend to epidemics and/or pandemics.





How is force majeure proven? Do authorities issue official force majeure certificates?

A FM event can be proved by showing evidence of impossibility of performance and also proof taken by performing parties to set out steps taken to prevent such non-performance.

The authorities in India do not issue FM certificates.

Is the spread of COVID-19 considered force majeure?

Various government office memorandum such as below have set out COVID-19 to be an FM event:

Office Memorandum No. 18/4/2020-PPD dated 19 February 2020 issued by Ministry of Finance, Department of Expenditure, Procurement policy division have referred to the FM clause under the Manual for Procurement of Goods, 2017 and have set out COVID-19 to be a natural calamity and stated that FMC may be invoked, wherever considered appropriate.

Following the above, Office Memorandum No. 283/18/2020-GRID SOLAR dated 20 March 2020 issued by Ministry of New & Renewable Energy (MNRE), Grid Solar Power Division have directed their agencies to treat delay on account of disruption of the supply chains due to spread of coronavirus in China or any other country, as Force Majeure subject to applications procedure along with evidence as set out therein.

Parties can place reliance up such Office Memorandum while arguing FM clauses in relation to COVID-19 in court of law. However, the ambit would depend upon FM clauses contained in the agreements and evidence submitted by the parties.



**Does your country have a legal definition of force majeure, and if so, what is it?**

There is no legal definition of force majeure under Irish law. A force majeure event is generally understood to be an event which is outside the control of a party and which prevents that party from performing its obligations under a contract.

There is no implied doctrine of force majeure under Irish common law. Parties must include a specific clause in their contracts if they wish to rely on the concept. Where incorporated into a contract, a force majeure clause generally excuses one or both parties from performing its obligations following the occurrence of particular events. Its premise is that on the occurrence of particular events outside of a party's control, that party is entitled to (depending on the wording of the particular clause):

- a) suspend performance of its contractual obligations (all or in part), or
- b) may even be excused entirely from those obligations. As a result, that party will not be liable for failure to perform its contractual obligations.

If contracts do not include a force majeure clause, or if the clause arguably doesn't cover COVID-19, parties seeking protection may be able to rely on the doctrine of frustration at common law. Frustration occurs when an unforeseen event, which is outside the control of both the parties, renders it impossible to perform the obligations required under the contract. The intervening event must not have been foreseeable at the time the contract was entered into. When a contract is frustrated, both parties are discharged from their future obligations and neither can sue for breach of contract. The doctrine of frustration is a narrow one and requires a very high threshold to be met before it can be established.



## Does the legal definition include epidemics and/or pandemics?

Force majeure clauses are often drafted in an open-ended manner in Ireland, and typically include a short non-exclusive list of events. It is not unusual to see epidemics and/or pandemics included in such a list of potential force majeure events. Other types of events that may be specified as force majeure events include natural disasters, severe weather, government actions, war, terrorism, riots and strikes.

Force Majeure clauses often require that performance be impossible, (i.e. not more difficult or burdensome); however, some force majeure clauses may also provide relief where performance is either hindered or delayed.

## How is force majeure proven? Do authorities issue official force majeure certificates?

Proving a force majeure event and successfully invoking a force majeure clause will depend on a number of factors. Generally speaking, a party seeking to rely on a force majeure clause will need to: (i) show that a force majeure event (as provided for in the force majeure clause) has caused that party's failure to perform a contractual obligation, (ii) prove that it has taken steps to avoid the force majeure event and/or mitigated its effects, and (iii) followed the procedures set out in the force majeure clause (eg implemented a business continuity plan, issued notice in writing, etc).

Irish authorities do not issue official force majeure certificates. It is up to the parties to a contract to provide for and define the circumstances which will be beyond the control of the parties and to pre-agree terms on an orderly course to either perform the contract in a limited or different manner or exit the contract.



## Is the spread of COVID-19 considered force majeure?

Whether COVID-19 constitutes a force majeure event is contract specific and will vary depending on the wording of each individual force majeure clause. As the World Health Organization (WHO) has categorised COVID-19 a "pandemic", it is likely that a force majeure clause which includes pandemics can be relied upon by a party to release it from its contractual obligations.

However, if the force majeure clause simply refers to unforeseen events, Irish courts would likely look at the date of the contract and consider whether or not COVID-19 or something of a similar nature was foreseen or unforeseen at that time. In the event of a contractual dispute, it is important to remember that business contracts will be interpreted narrowly by the courts and the courts will be unwilling to include circumstances that were not expressly included by the parties.

There is no set threshold for determining whether a virus will constitute a pandemic/epidemic for the purposes of a force majeure clause. This is fact-specific and will depend on the circumstances. Parties should consider advice from organisations such as the WHO and government bodies when making their assessment.

Going forward, parties should continue to monitor advice from the WHO and government bodies. It is possible that the changing circumstances will affect whether a force majeure event exists or not.



## Tamar Krongrad, Dr. Ira Ryk-Lakhman | Tadmor Levy &amp; Co

Does your country have a legal definition of force majeure, and if so, what is it?

There is no definition of “force majeure” under Israel law, each force majeure provision must be considered separately, on its precise terms, and against its particular context.

Does the legal definition include epidemics and/or pandemics?

Typically, contracts that include a definition of force majeure refer to it using a “catch-all” language, such as an “act of god” or an event that is “outside the reasonable control of the party affected” followed by a non-exhaustive list of illustrative force majeure events and events that do not constitute force majeure. Usually such provisions comprise “war, armed conflict, flood, and plague or pandemic”.

If the provision makes a specific reference to a “pandemic”, “epidemic”, “plague”, or “disease”, then it will be potentially easier to bring a force majeure claim in the context of the outbreak of the Coronavirus, but the other elements of force majeure still need to be satisfied. If, however, the provision does not enumerate such language (i.e., “pandemic”) then it will be necessary to consider whether it may be said that the outbreak of Coronavirus comes within the scope of the “catch-all” language (i.e., an “outside the control of the party” or an “act of God”).



Tamar Krongrad, Dr. Ira Ryk-Lakhman | Tadmor Levy & Co

How is force majeure proven? Do authorities issue official force majeure certificates?

There are some commonalities to most force majeure provisions that allow to infer the main (cumulative) elements of a force majeure claim:

- a) The Event: Under the terms of the provision, the event that occurred may, principally, constitute force majeure;
- b) Impracticability: This event is beyond the reasonable control of the affected party;
- c) Forcibility: Some contracts require that the event could not have been anticipated, foreseeable, or expected, and unavoidable;
- d) Causation: As a result of the event, the affected party is not able to perform its contractual obligations;
- e) Mitigation: The affected party has taken all commercially reasonable steps to avoid, mitigate, or minimize the event and its consequences.

Is the spread of COVID-19 considered force majeure?

Whether or not the implications of the outbreak of the Coronavirus allow parties to rely on frustration depends on the nature of the contractual obligation and the particular circumstances. For instance, because the requirement of unenforceability is assessed relative to the time when the parties entered into contract, it will be harder to invoke frustration in the context of contracts that were concluded after the outbreak of Coronavirus.

Does your country have a legal definition of force majeure, and if so, what is it?

Under Italian law, force majeure is a not codified principle and is considered any event that makes compliance of the contractual obligations impossible.

In such context, the Italian system provides for some remedies to the (definite, partial or temporary) supervening impossibility to perform a contractual obligation. As a general principle, in order to exclude the liability, the impossibility must be objective, unforeseeable, absolute and insurmountable (to this end, orders or measures adopted by an administrative authority after the obligation was originally undertaken and which renders its performance impossible may be considered as force majeure and fall into the definition of *factum principis*).

Article 1256 of the Italian Civil Code (hereinafter “ICC”), which regulates the impossibility of performance (due to reasons not attributable to the debtor), distinguishes between definitive and temporary impossibility: in the first case the debtor is discharged from performing the obligation; in the second case the debtor is excused for the delay in the performance (which could turn into the discharge of the obligation if the impossibility becomes definitive, or the creditor has no interest in the performance anymore).

According to Article 1463 ICC, the party excused from its obligation due to definitive impossibility (provided by art. 1256 ICC) cannot seek performance by the other party and must return what has received; on the other side, Article 1464 ICC, in case of partial impossibility provides...

(contd.)

# ITALY (contd.)



Giulia Battaglia, Vania De Feo | Chiomenti

Does your country have a legal definition of force majeure, and if so, what is it? (contd.)

...that, when the performance of one of the parties has become only partially impossible, the other party is entitled to a reduction of the performance due (or the right of withdrawal, if it has lost interest in such performance).

The unforeseeable event may also lead (not to the impossibility of performance, but) to the excessive onerousness of the contract. In this event, Article 1467 ICC provides that, if extraordinary and unpredictable events make the performance of one of the parties excessively onerous, the party who owes such performance may claim for the termination of the contract. Such remedy is applied only to contracts with continuous or periodical performance, or deferred performance; the excessive onerousness must consist of a significant alteration of the contractual mutual obligations, which requires one of the parties to bear a much greater economic sacrifice than the expected risk of the contract.

Does the legal definition include epidemics and/or pandemics?

Under Italian law there is no legal definition of force majeure that expressly includes a reference to epidemics/ pandemics; however in principle such circumstances may fall under the general principle of force majeure.

From a contractual point of view, force majeure clauses usually provide for a broad definition of force majeure, containing an indicative list of circumstances deemed to be force majeure. Epidemics, natural catastrophic events, wars, insurrections and compelling acts of public authorities (e.g. embargo) are generally indicated in international contracts as causes of force majeure. On the other hand, difficulties in supplies from suppliers, crisis of raw materials and strikes are generally excluded.





## How is force majeure proven? Do authorities issue official force majeure certificates?

In order to establish force majeure, parties should prove that

- (i) the force majeure event is not within the reasonable control of the parties,
- (ii) it is not reasonably foreseeable,
- (iii) its effects cannot be avoided through reasonable efforts or due diligence, and
- (iv) it has materially affected the ability to perform contractual obligations.

Pursuant to the Decree adopted by the Government to fight the emergency (which provides for strict measures, including the suspension of non-essential production for a certain period of time) the compliance with the measures adopted has to be taken into account in establishing exemption from liability of the obliged party, including as regards the application of any forfeiture or penalties related to late or non-performance. Recently, the Chambers of Commerce have been authorized to issue declarations assessing circumstances related to the outbreak of Covid-19 pandemic. Basically, the declaration states that, in relation to the restrictions imposed and the state of emergency in progress, the company was unable to fulfil the contractual obligations previously assumed due to unpredictable reasons independent of the company's will and ability.

## Is the spread of COVID-19 considered force majeure?

In principle, the proliferation of Covid-19 in Italy, and the subsequent adoption by the Government of restrictive measures aimed at facing this emergency (such as the suspension of non-essential production) may be relevant in terms of force majeure.

The decision whether the liability of a party is excluded due to Covid-19 (and, in general, any assessment on the consequences of the pandemic on the contracts) should be made on a case by case basis, taking into consideration inter alia both the nature of the obligation possibly affected by the supervening impossibility, and the nature of the specific consequences of Covid-19.



Does your country have a legal definition of force majeure, and if so, what is it?

There is a legal definition of force majeure. According to the Article 6.253(2) and Article 6.212(1) of the Civil Code of the Republic of Lithuania ("CC"), a party shall be released from the liability for failure to perform the contract if it proves that the contract was not performed due to circumstances beyond its reasonable control, and it could not reasonably foresee the occurrence of such circumstances at the time of the conclusion of the contract, and that it could not prevent the occurrence of such circumstances or their consequences.

The absence of the goods in the market required to fulfil the obligation, the lack of the adequate financial resources or the default of the debtor's contractors shall not be considered as the force majeure circumstances.

Does the legal definition include epidemics and/or pandemics?

The legal definition does not specifically mention epidemics and/or pandemics. There is no case law addressing the issue yet. We believe that epidemics and/or pandemics might be considered force majeure if it corresponds to the following four conditions:

- a) the circumstances must not be present at the time the conclusion of the contract,
- b) the circumstances render the contract objectively impossible to perform (including temporary impossibility),
- c) the party in breach of the contract due to force majeure circumstances could not control or prevent them,
- d) the party did not assume the risk of such circumstances.

# LITHUANIA (contd.)



Dovile Burgiene | Welless

How is force majeure proven? Do authorities issue official force majeure certificates?

Force majeure shall be proved in each situation by the party relying on it. Regional Chambers of Commerce, Industry and Crafts issue official force majeure certificates.

However, the certificates are not obligatory. In any case the courts evaluate the circumstances themselves and make conclusions whether the circumstances amount to force majeure.

Is the spread of COVID-19 considered force majeure?

The spread of COVID-19 shall be considered force majeure if it corresponds to the four above mentioned conditions, the most important in this situation being whether the spread of the virus render the contract objectively impossible to perform (including temporary impossibility). It might be that some contracts have not been affected by the spread of COVID-19 or at least not to a large extent.

That being the case, the spread of COVID-19 in these particular legal relations is not force majeure. In those cases, whether the spread of the virus render the contract objectively impossible to perform (also temporarily), it shall be considered force majeure.



Maria Mulvaney | Mamo TVC Advocates

Does your country have a legal definition of force majeure, and if so, what is it?

Article 1134 of the Maltese Civil Code (Chapter 16 of the Laws of Malta) stipulates that 'the debtor shall not be liable for damages if he was prevented from giving or doing the thing he undertook to give or to do, or if he did the thing he was forbidden to do, in consequence of an irresistible force or a fortuitous event'. Although the law contemplates force majeure as a defence for the non-performance of an obligation, it however, falls short of providing a statutory definition of 'force majeure', 'irresistible force' or 'fortuitous event'. Maltese Courts have had ample opportunity to delve into the meaning of 'force majeure', mostly in the course of judicial proceedings where 'force majeure' is invoked by a defendant to justify non-adherence to an obligation. In a nutshell, our Courts have established the principles that:

- a) the defence of force majeure can only succeed if the event in question was irresistible;
- b) a fortuitous event can only arise if the event in question was unpredictable and
- c) it is not sufficient to prove that the event in question was unusual and disproportionate; rather, it must be proven that the event was inevitable.

Does the legal definition include epidemics and/or pandemics?

As aforesaid, Maltese law does not provide a statutory definition of the concept. Contractual force majeure definitions are typically catered for in the contract establishing the contractual relationship between the parties. In this regard, some contracts will define or give examples of what would amount to 'force majeure' (such as, for example, strikes, lock-outs, industrial action, fire, explosion, storm, pandemic, restrictions of any government etc.) whereas others cater for the notion of force majeure in a more generic through the inclusion of clauses which might even provide for the right to terminate the contractual relationship.





# MALTA (contd.)



Maria Mulvaney | Mamo TVC Advocates

How is force majeure proven? Do authorities issue official force majeure certificates?

Authorities in Malta do not issue force majeure certificates which could serve as proof of the existence of a force majeure event. Proof of force majeure therefore depends on any specific contractual clause in the contract governing the relationship between the parties and, ultimately, the interpretation adopted by the Courts.

Is the spread of COVID-19 considered force majeure?

There is no official threshold. We believe that for many situations, the outbreak will be deemed to constitute a force majeure event; however, it remains to be seen how our Courts will, should the need arise, eventually interpret the concept taking into account different scenarios and different types of contracts/contractual relationships.



Milica Savić, Maja Jovančević Šetka | In cooperation with Karanović & Partners

## Does your country have a legal definition of force majeure, and if so, what is it?

Similarly to other ex-Yugoslavia countries, which share more or less the same civil law heritage, Montenegrin legislation does not provide for legal definition of “force majeure”.

However, several legal concepts developed both in practice and theory may be applied to situations which are commonly referred to as “force majeure”, which are the following:

impossibility of performance – in case due to the COVID-19 situation performance of a contractual obligation is impossible, such obligation of the affected party ceases. In turn, the obligation of the other party also ceases. The affected party is obliged to return all what was received from the other party for the performance of the contract. In addition, no damage compensation would be owed by any involved party;

exoneration of liability for failure to perform a contract – in case the party affected by COVID-19 situation was unable to perform its contractual obligation or was unable to perform it in a timely manner for reasons arising after the contract was signed, that party could not have anticipated, prevented or overcome, such party is not liable for damages the other party suffered as a result of such non-performance. Although the Montenegrin case law is not abundant on this issue, the other party would most likely have the right to rescind the agreement or prolong the term for performing of the obligation of the affected party, depending on the circumstances of each particular case.

# MONTENEGRO (contd.)



Milica Savić, Maja Jovančević Šetka | In cooperation with Karanović & Partners

**Does the legal definition include epidemics and/or pandemics?**

As stated above, there is no legal definition of the force majeure.

Due to this, force majeure provisions are usually introduced through different contractual clauses. Where a contract provides for a specific force majeure definition it is likely that the epidemic and/or pandemic would be included either explicitly, or that the general wording of the contractual force majeure clause would encompass situations of pandemic and epidemic.

**How is force majeure proven? Do authorities issue official force majeure certificates?**

There is no “official” method of establishing the force majeure occurrence in Montenegro. Therefore, the force majeure occurrence and the effect of such occurrence on the party’s ability to perform the contract are to be proven by a party to the contract invoking the force majeure clause.

At this stage, Montenegrin authorities do not issue official force majeure certificates due to COVID-19.

**Is the spread of COVID-19 considered force majeure?**

Whether the COVID-19 situation qualifies as force majeure, and whether it impacts the party’s ability to perform its contractual obligations, should be assessed casuistically. Generally, in order to avail itself of the force majeure protection, a party would have to be able to demonstrate that the specific events which were beyond that party’s control caused that party’s inability to perform an obligation under a contract (irrespective whether the emergency situation has been declared or not).

Note that the authorities in Montenegro introduced the COVID-19 epidemic on 26 March 2020, which does not constitute force majeure per se, while no emergency state was introduced yet. There is no specific threshold for considering a virus force majeure.

## Does your country have a legal definition of force majeure, and if so, what is it?

The concept of force majeure is recognised under Dutch law and is included in the Dutch Civil Code. However, there is no definition as such. Statutory force majeure may apply if:

- a) it is impossible for the non-performing party to fulfil its contractual obligations, also taking into account possible alternatives to fulfil the relevant performance obligations. This may be the case if performance of these obligations is (or will be) – whether temporarily or not – factually impossible or only partially possible, or performance of the agreement is actually still possible, but it takes such a major effort or sacrifice that it must be considered practically impossible; and
- b) this is not due to the non-performing party's fault or for its account pursuant to the law, a legal act or generally accepted principles.

The analysis of whether these conditions have been met will differ from case to case and must be made taking into account all relevant facts and circumstances.

Parties are also free to contract a force majeure clause expanding, or limiting the scope of the statutory force majeure. What constitutes force majeure will then primarily depend on what parties have agreed. It is possible that relying on force majeure situations is expressly excluded in the contract.



# NETHERLANDS (contd.)



Kirsten Berger | Houthoff

**Does the legal definition include epidemics and/or pandemics?**

Epidemics, pandemics and the measures taken in this respect may constitute statutory force majeure, depending on whether the conditions for statutory force majeure have been met. This must be assessed on a case by case basis within the Dutch legal framework, taking into account the relevant facts and circumstances.

In respect of a contractual force majeure clause, the contract will need to be reviewed to see whether it provides for epidemics / pandemics – perhaps in more general terms – and if so, what the rights and obligations of the parties are. The provisions of the contract may not always be clear. In any event, the contract needs to be construed.

Generally speaking, for negotiated contracts, the wording chosen by the parties in a commercial agreement does in certain circumstances have great significance. However, the decisive factor for interpretation remains the meaning that the parties could have reasonably given to the provisions in the given circumstances and what they could reasonably expect from each other in that respect.

**How is force majeure proven? Do authorities issue official force majeure certificates?**

The Dutch authorities do not issue official force majeure certificates.

The party invoking force majeure will need to prove that – depending on the situation and contractual arrangements made by the parties – the conditions for contractual force majeure, or statutory force majeure have been met.

**Is the spread of COVID-19 considered force majeure?**

Whether COVID-19 constitutes a force majeure event may vary depending on the relevant facts and circumstances in each specific case, as these will determine whether the conditions for force majeure have been met (whether statutory or contractual).

As such there is no general answer to this question.



Ljupka Noveska | In cooperation with Karanović & Partners

Does your country have a legal definition of force majeure, and if so, what is it?

Under the local Law on Obligations (2001), there are two definitions for force majeure which are provided for the following legal institutes:

a) Impossibility of performance, where force majeure represents an exceptional event which:

- occurred after the entering into the agreement, but before the maturity of the obligation;
- could not be anticipated at the time of entering into the agreement;
- could not be prevented, avoided or eliminated by the affected party; and
- did not occur due to a fault of any of the contracting parties.

b) Exoneration of liability for damages due to failure to perform a contract, where force majeure is an exceptional event which:

- occurred after the entering into the agreement; and
- could not be prevented, avoided or eliminated by the defaulting party.



# NORTH MACEDONIA (contd.)



Ljupka Noveska | In cooperation with Karanović & Partners

## Does the legal definition include epidemics and/or pandemics?

As can be seen above, the legal definitions use general language without providing any explicit exhaustive or non-exhaustive list of events. Hence, there is no explicit referral to epidemic and/or pandemics as force majeure events.

In practice, contracting parties use general wording for the contractual force majeure clause, which in some cases is a simple reference to the Law on Obligations, and also specific force majeure clauses, in which case it is likely that epidemics and/or pandemics are included as force majeure event.

## How is force majeure proven? Do authorities issue official force majeure certificates?

There are no instruments which are provided from the authorities in order to confirm the occurrence of a force majeure. The burden of proof is on the debtor (i.e. the affected/defaulting party) who should demonstrate the existence of the circumstances which exclude its liability to:

- a) perform the obligation and/or
- b) compensate the damages.



# NORTH MACEDONIA (contd.)



Ljupka Noveska | In cooperation with Karanović & Partners

## Is the spread of COVID-19 considered force majeure?

Whether the spread of COVID-19 qualifies as a force majeure should be evaluated on the facts of each particular case since exceptional events such as natural events (e.g. epidemic/pandemics; earthquakes, etc.) and human acts (e.g. ban on import and export of goods; destruction of object or thefts by third parties; etc.) do not represent force majeure per se. Generally, under the Law on Obligations, parties can invoke force majeure if these events result in impossibility of performance of a contract or damages and include the elements of the abovementioned definition of force majeure.

The fact that there is or there is not a declared state of emergency does not impact the potential existence of a force majeure due to the spread of COVID-19. More specifically, one party may not be able to perform the contractual obligations even if there is no declared state of emergency. Opposite to this, not all contracts are affected by the declared state of emergency.

Nevertheless, note that the President of the Republic of North Macedonia declared state of emergency for protection and dealing with the consequences from the spread of COVID-19 on 18 March 2020.





Marianne Sahl Sveen | Arntzen de Besche

Does your country have a legal definition of force majeure, and if so, what is it?

Norwegian law does not operate with an universal legal definition of force majeure. In general, force majeure is understood as a term used to describe situations where, due to unforeseen or extraordinary circumstances beyond the parties' control, it is impossible or unreasonably burdensome, to fulfill their contractual obligations. Each individual contract may hence comprise its own definition of force majeure, and it is therefore important that contracting parties now review their contracts to assess whether the force majeure definition included (if any) includes a pandemic such as COVID-19.

Does the legal definition include epidemics and/or pandemics?

Whether force majeure includes epidemics/pandemics will depend on an interpretation of the relevant clause in the contract. Force majeure is typically broadly described, and will usually include situations such as strike, war, or natural disasters such as earthquakes and hurricanes, but may also include epidemics/pandemics.

# NORWAY (contd.)



Marianne Sahl Sveen | Arntzen de Besche

## How is force majeure proven? Do authorities issue official force majeure certificates?

The Norwegian authorities do not use official force majeure certificates. Whether, and on which terms, a party may claim force majeure, is regulated in most contracts, and a company's ability to plead force majeure must be assessed on the basis of an interpretation thereof. In lack of a force majeure clause in the contract, there are applicable rules on force majeure under Norwegian contract law. For instance, section 27 and/or section 40 in the sale of goods act or principles of non-statutory law. A prerequisite for pleading force majeure is usually that:

- a) the affected party's performance is hindered by the event
- b) the event is beyond the party's reasonable control
- c) the party could not have foreseen the hindrance when the contract was entered into, and
- d) the party could not reasonably have avoided or overcome the consequences of the hindrance. Note that commercial contracts between professional parties will often have set aside all regulations which are not mandatory pursuant to relevant back-ground law, and this may also include force majeure regulations.

## Is the spread of COVID-19 considered force majeure?

The COVID-19 outbreak, and the measures taken by the authorities may in principle and in practice be regarded as a force majeure event.

As previously mentioned, this must however be assessed on the basis of an interpretation of the force majeure clause in each individual contract. COVID-19 will not, as a general rule, be deemed a force majeure event solely on the basis of a declaration by the regulators. Whether there is a force majeure situation, must be based on an assessment on the contract clause and/or applicable contract law.

In this regard, please note that for contracts being entered into at this point onwards, the COVID-19 crises will not be considered as a hindrance a party could not have foreseen, thus force majeure cannot be claimed for such contracts on the basis of the COVID-19 outbreak.



Does your country have a legal definition of force majeure, and if so, what is it?

The term force majeure is not defined but it can be found in several provisions of the Polish Civil Code.

Does the legal definition include epidemics and/or pandemics?

Despite the lack of a statutory definition, force majeure is assumed to be an accidental or natural external event, and therefore unforeseen or unforeseeable, the effects of which cannot be prevented. When analysing a specific case, it is necessary to answer the question whether, given the experience of an average representative of a given industry, such event could have been reasonably expected to occur, and if yes, whether – within the limits of the capacity of the party affected by the force majeure event – there was a reasonable possibility of protection against this event.

Epidemics are considered to be force majeure events. Some contracts include a so-called force majeure clause. In some cases, contractual parties define on their own the term force majeure applicable to the contractual relationship between them. Quite often, there are no direct references to epidemics in such definitions or clauses, though it must be noted that the examples of events, stipulated in them, generally do not constitute an exhaustive list.

As a rule, a force majeure clause is included in the contract so that in the event of non-performance or improper performance of the contract by one of the parties due to force majeure it could be possible to release it from liability towards the other party for the resultant damage. Some contracts require the party affected by the force majeure event to take certain steps (e.g. submit a relevant notification) in order to secure legal protection.

# POLAND (contd.)



Anna Masiota | Masiota

How is force majeure proven? Do authorities issue official force majeure certificates?

Authorities do not issue any official force majeure certificates.

In the current situation of the pandemic two legal acts, confirming the existing situation, were adopted, namely: Regulation of the Minister of Health of 13 March 2020 declaring the state of epidemic threat in the territory of the Republic of Poland and Regulation of the Minister of Health of 20 March 2020 declaring the state of epidemic in the territory of the Republic of Poland.

Is the spread of COVID-19 considered force majeure?

The spread of the COVID-19 virus may be considered a force majeure event.

The official declaration of a state of epidemic threat or epidemic is not a necessary condition for it to be considered as such.





### Does your country have a legal definition of force majeure, and if so, what is it?

Provisions of Russian law related to force majeure can be found in Arts. 401 and 417 of the Russian Civil Code [hereinafter RCC]. Article 401(3) is devoted to the issue of liability for violation of contractual obligations and establishes: Unless otherwise stipulated by law or contract, a person acting in a commercial setting, who failed to perform an obligation or performed it in an improper way . . . shall be liable unless he can prove that due performance was impossible because of irresistible force, i.e. extraordinary circumstances, which were impossible to avert under the given conditions.

The Russian Supreme Court mentioned criteria for such irresistible force (force majeure) mentioned in Article 401(3): 1) it should be extraordinary (i.e. exceptional circumstances which are unusual for the particular case); 2) unavoidable (i.e. any other contractor could not avoid these circumstances and/or their consequences); and 3) external in relation to the contractor (i.e. are beyond his/her will). (Paragraph 8 of Resolution of the Plenum of the Supreme Court of the Russian Federation No.7 dated 24 March 2016).

Additionally, the Russian Supreme Commercial Court clarified that the exceptional nature of irresistible force (force majeure) entails something 'going beyond the "normal" and ordinary course, extraordinary for a particular life situation . . . which can never be taken into account (Ruling of the Presidium of the Supreme Commercial 'Arbitrazhny' Court of the Russian Federation dated June 2012. Case No. A40-25926/2011-13-230).

# RUSSIA (contd.)



Anna Zabrotskaya | Borenienius

Does the legal definition include epidemics and/or pandemics?

Russian law considers those circumstances to be force majeure that are both extraordinary (that is, not reasonably foreseeable at the time of the conclusion of the contract) and unavoidable. Epidemics and/or pandemics can meet these conditions and are usually included in contractual force majeure definitions.

How is force majeure proven? Do authorities issue official force majeure certificates?

Article 417(1) of the RCC deals with the termination of obligations and provides for such termination in full or in part if, due to an act of a state body or municipal authority, performance under the contract has become impossible in full or in part.



## Is the spread of COVID-19 considered force majeure?

Some authorities and parts of the business community have already recognized the coronavirus epidemic as force majeure:

- a) Decree No. 20-UM of the Mayor of Moscow dated 14 March 2020 classifies the spread of the coronavirus infection as a force majeure event in Moscow;
- b) The Ministry of Industry and Trade, the Ministry of Justice and the Ministry of Finance of Russia are developing an act recognizing the epidemic as a force majeure circumstance in public procurement;
- c) The Chamber of Commerce and Industry of Russia is issuing certificates of force majeure to companies that have disrupted export supplies due to the epidemic.

The Russian Supreme Court clarified that the considering COVID-19 as a force majeure is not a rule of thumb for all categories of contractors and it very much depends on their type of activity, the region where the business is conducted and etc. This should be considered on case by case basis by also taking an account contractual terms, the nature of the outstanding obligation, whether the contractor acted in good faith and etc. (Review of the judicial issues related to the law enforcement and to counteracts the spread of COVID-19 in Russia prepared by the Presidium of the Supreme Court of the Russian Federation No.1 dated 21.04.2020)

(contd.)



## Is the spread of COVID-19 considered force majeure?

The final decision on whether the epidemic has the nature of force majeure for each specific contract falls within the exclusive competence of the court. All of the above acts will have only persuasive as opposed to binding force for the court. When resolving such disputes, the court will assess a number of circumstances, taking into account the specifics of a particular contract, including:

- a) The date of the conclusion of the contract. Thus, if a contract for delivery to a quarantined zone has been concluded after the announcement of the epidemic, the virus will not be recognized as an extraordinary circumstance – when deciding on delivery, the parties knew or should have known of its existence.
- b) The outbreak of the epidemic in a specific market segment. The party must prove that it was not able to overcome obstacles to the performance of the contract by making all reasonable efforts.

Terms and conditions of the agreement regarding force majeure. Most commercial contracts contain force majeure clauses. These clauses may:

- a) establish what circumstances the parties recognize as force majeure (for example, epidemics entailing the introduction of quarantine measures);
- b) determine the necessary evidence of force majeure (for example, a certificate from the chamber of commerce and industry);
- c) clarify the consequences of force majeure (suspension of the contract, its termination, etc.)



## Jelena Vučković, Maja Jovančević Šetka | In cooperation with Karanović & Partners

Does your country have a legal definition of force majeure, and if so, what is it?

There is no legal definition of “force majeure” under Serbian law. However, several legal concepts may be applied to situations which are commonly referred to as “force majeure”, as follows:

- a) impossibility of performance – where due to the COVID-19 situation performance of a contractual obligation is impossible, such obligation of the affected party terminates. In turn, the obligation of the other party also terminates. The affected party is obliged to return what it received from the other party for the performance of the contract. No damage compensation would be owed by any party involved;
- b) exoneration of liability for failure to perform a contract – if the party affected by COVID-19 situation was unable to perform its contractual obligation or was unable to perform it in a timely manner for reasons arising after the contract was signed, that party could not have anticipated, prevented or overcome, such party is not liable for damages the other party suffered as a result of such non-performance. Although the Serbian court practice is not abundant on this issue, the other party would most likely have the right to rescind the agreement or prolong the term for performing of the obligation of the affected party.

Does the legal definition include epidemics and/or pandemics?

As stated above, there is no legal definition of the force majeure.

The contractual practice varies, and where a contract provides for a specific force majeure definition it is likely that the epidemic and/or pandemic would be included either explicitly, or that the general wording of the contractual force majeure clause would encompass situations of pandemic and epidemic.



Jelena Vučković, Maja Jovančević Šetka | In cooperation with Karanović & Partners

How is force majeure proven? Do authorities issue official force majeure certificates?

There is no “official” method of establishing the force majeure occurrence. The force majeure occurrence and the effect of such occurrence on the party’s ability to perform the contract are to be proven by a party to the contract invoking the force majeure clause.

Is the spread of COVID-19 considered force majeure?

The qualification of the COVID-19 situation as force majeure, and whether it impacts the party’s ability to perform its contractual obligations, should be assessed on case to case basis.

Generally, in order to avail itself of the force majeure protection, a party would have to be able to demonstrate that the specific events which were beyond that party’s control caused that party’s inability to perform an obligation under a contract (irrespective whether the emergency situation has been declared or not).

Note that the Government of the Republic of Serbia has introduced state of emergency due to COVID-19 situation on 15 March 2020.



Felicia Tan and Uma Sharma | TSMP Law Corporation

Does your country have a legal definition of force majeure, and if so, what is it?

At its core, force majeure clauses are a contractual allocation of risks. Force majeure has been defined in Singapore jurisprudence as really no more than a convenient way of referring to contractual terms that the parties have agreed upon to deal with situations that might arise, over which the parties have little or no control, that might impede or obstruct the performance of the contract. There can therefore be no general rule as to what constitutes a situation of force majeure. Whether such a (force majeure) situation arises, and, where it does arise, the rights and obligations that follow, would all depend on what the parties, in their contract, have provided for.

It bears noting that in construing a force majeure clause, courts will tend to apply the presumption that the expression force majeure is likely to be restricted to supervening events which arise without the fault of either party and for which neither of them has undertaken responsibility.

Ultimately, the scope of a force majeure clause turns on the precise language of the clause in the contract/agreement itself.

Does the legal definition include epidemics and/or pandemics?

Under Singapore law, there isn't one singular definition of force majeure. Even where we consider the general case law, there is no particular definition or construction that includes epidemics or pandemics. What tends to be included are situations that are beyond parties' control which hinder the performance of the contract.

Nonetheless, given how force majeure contractual clauses are often phrased, the consequent result of epidemics and/or pandemics could fall under the wider definition of force majeure under certain contracts. This would ultimately turn on the precise phraseology of the force majeure clauses.



## How is force majeure proven? Do authorities issue official force majeure certificates?

Currently, there is no known practice in Singapore of authorities issuing official force majeure certificates as might have been the case in China. A party who relies on the force majeure clause bears the burden of proving (a) that it has brought itself within the clause and (b) that it has taken all reasonable steps to avoid its operation or mitigate its results.

That said, the Covid-19 (Temporary Measures) Act 2020 enacted on 7 April 2020 provides temporary relief from legal action in relation to certain types of contracts (such as construction contracts) set out in the schedule to the Act, where the contract was entered into before 25 March 2020 with contractual obligations to be performed on or after 1 February 2020.

Contracting parties are restrained from commencing court or insolvency proceedings, or enforcing security over certain types of property, in relation to the specified types of contracts. While this is not framed as a force majeure legislation, it no doubt goes some distance towards addressing possible force majeure type issues.

Any dispute over whether the performance of the contract was to a material extent caused by a COVID-19 event shall be referred to an “assessor” appointed by the Minister for Law.



# SINGAPORE (contd.)



Felicia Tan and Uma Sharma | TSMP Law Corporation

## Is the spread of COVID-19 considered force majeure?

Under Singapore law, there isn't one singular definition of force majeure. Even where we consider the general case law, there is no particular definition or construction that includes epidemics or pandemics. What tends to be included are situations that are beyond parties' control which hinder the performance of the contract.

Nonetheless, given how force majeure contractual clauses are often phrased, the consequent result of epidemics and/or pandemics could fall under the wider definition of force majeure under certain contracts. This would ultimately turn on the precise phraseology of the force majeure clauses.

## Ermina Delić Kamenčič | In cooperation with Karanović &amp; Partners

**Does your country have a legal definition of force majeure, and if so, what is it?**

There is no legal definition of “force majeure” in Slovenian law. However, Slovenian legal theory and court jurisprudence interpret “force majeure” as an event, the occurrence of which was outside the control of the affected party, was not foreseeable, could not be mitigated, avoided or prevented and that prevents the performance of contractual obligations. “Force majeure” must prevent, and not only hinder the performance of contractual obligations or render the performance of contractual obligations more financially burdensome or more expensive. Therefore, the affected party would have to prove that the performance of its obligation was not merely more expensive or burdensome but it was prevented by COVID-19 or governmental restrictive measures and that there exists a causal link between affected party’s non-performance and COVID-19 or governmental restrictive measures. If the affected party’s performance was made more difficult, and not in fact impossible by the “force majeure”, the affected party may request termination of the agreement due to changed circumstances, while the other party to the contract may request amendments to the contract.

Several legal concepts may be applied to situations with “force majeure”:

- a) impossibility of performance – Party affected with COVID-19 and related governmental restrictive measures can claim inability to perform contractual obligations. Impossibility of performance due to the reasons for which neither party is responsible causes that contractual obligations of the affected party as well as the other party to the contract terminate. The affected party is obliged to return what it received from the other party for the performance of the contract. In the event of partial inability, other party to the contract may withdraw from the other party to the contract has the right to request a proportional reduction of its contractual obligations. In accordance with majority...

(contd.)

# SLOVENIA (contd.)



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- a) (contd.)...position of case law and legal theory, affected party can claim impossibility of ...performance of a strictly individualized obligation (e.g. the sale of a specific item) and cannot claim impossibility of performance of a strictly generic obligation (e.g. payment of certain amount of money).
- b) exoneration of liability for failure to perform a contract – if the party affected by COVID-19 and governmental restrictive measures was unable to perform its contractual obligation or was unable to perform it in a timely manner for reasons arising after the contract was signed, that party could not have anticipated, prevented or overcome, such affected party is not liable for damages the other party suffered as a result of such non-performance. The affected party has the burden of proof, meaning a debtor is the one that needs to prove that occurrence of COVID-19 and governmental restrictive measures caused late fulfilment of its obligations.

Does the legal definition include epidemics and/or pandemics?

As stated above, there is no legal definition of “force majeure” in Slovenian legislation.

Force majeure clauses are not standardized. Force majeure clauses could be limited only to exhaustive list of exceptional events, which are explicitly listed in the contract and can refer explicitly to “epidemic”, “pandemic” or “governmental measures”.

On the other hand, force majeure clauses may refer to non-exhaustive list of exceptional events or are more general referring only to exceptional events beyond the party’s control. In this case, the general wording of the contractual force majeure clause would encompass situations of pandemic and epidemic and governmental restrictive measures.

# SLOVENIA (contd.)



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## How is force majeure proven? Do authorities issue official force majeure certificates?

The Slovenian government declared COVID-19 an epidemic. However, there is no “official” force majeure certificate issued by Slovenian authorities.

Under Slovenian legislation, the affected party invoking force majeure would have to prove that the event, which prevented the performance of its obligation, was out of its sphere of control, that is was not foreseeable, could not be mitigated, avoided or prevented and that there exists a causal link between party's non-performance and the force majeure event.

## Is the spread of COVID-19 considered force majeure?

The qualification of the COVID-19 and governmental restrictive measures as force majeure should be assessed on a case by case basis.

The affected party invoking force majeure would have to prove that the event, which prevented the performance of its obligation, was out of its sphere of control, that is was not foreseeable, could not be mitigated, avoided or prevented and that there exists a causal link between party's non-performance and the force majeure event.

Note that the Government of the Republic of Slovenia has declared COVID-19 as epidemic on 12 March 2020.





Anna Edström | Advokatfirman Vinge KB

Does your country have a legal definition of force majeure, and if so, what is it?

Swedish law does not contain any definition of force majeure as such. It is, however, relatively common to include force majeure clauses in commercial agreements governed by Swedish law.

Such clauses may be of a general nature, referring to circumstances beyond the relevant party's control (without providing any examples or enumerations of such events) or they can be more detailed and include references to specific events, such as war, strikes, natural disasters, lock-outs, blockades or other similar circumstances over which such party generally had no control. In this context, it is also necessary to bear in mind that force majeure clauses in agreements are normally interpreted quite narrowly.

Does the legal definition include epidemics and/or pandemics?

We would say that, occasionally, force majeure clauses include an explicit reference to epidemics or pandemics although we, currently, find it being less common.

It does, however, exist for example in certain Swedish standard construction contracts. For example, under AB04 and ABT06 a contractor could be entitled to an extension of a contract period should there be an impediment for completing the contract work due to an epidemic or an authority order following an epidemic (although said contracts do not explicitly refer to such situations as "force majeure" situations).



## How is force majeure proven? Do authorities issue official force majeure certificates?

Currently, no Swedish authorities issue any official force majeure certificates.

When it comes to the question of how force majeure is to be proved, the assessment of whether a party should be entitled to damages in case of e.g. delays, need to show that several requirements are fulfilled:

- (i) there has to be an impediment
- (ii) the impediment has to be out of the party's control
- (iii) the party must show that it was not able to foresee the impediment, and
- (iv) the party must show that it is not able to overcome or avoid the impediment or otherwise mitigate the effects of the relevant event.

Under Swedish private law, as a general rule (although not consistently applied) the party making an allegation (e.g. that such party should be excused from performing its obligations under a contract due to force majeure) bears the burden of proof for such allegation.

If such party is successful, the counter party will have to prove that the circumstance is not at hand.



## Is the spread of COVID-19 considered force majeure?

Whether a specific event (such as the outbreak and spread of the Covid-19) constitutes force majeure under a specific contract, needs to be assessed taking all relevant circumstances at hand into consideration. There is not as such a specific threshold.

For example, it will be relevant to assess the wording of the actual force majeure clause, applicable law, the reason for the inability to perform, whether there is an actual inability (increased costs and difficulties in performing is generally not per se sufficient) and whether any alternative solutions or measures could be applied in order to mitigate the negative effects. In the event that the specific contract does not contain a force majeure clause, an assessment needs to be made whether any general legal principle or non-mandatory legal provisions (please refer to item 1 above) potentially could become relevant, which in turn may depend on the content and subject matter of the relevant contract and the standing of the parties. If so, the assessment of whether the specific event constitutes force majeure will have to be made in light of such principles and/or [non-mandatory] provisions. It should be noted that notwithstanding an absence of a force majeure clause, the obligation to mitigate the effects of one's damage is a strong legal principle within Swedish contract law.

It has been argued that in respect of agreements concluded after the SARS outbreak in 2003 epidemics such as the Covid-19 outbreak are foreseeable in light of such SARS outbreak. The argument is then that it is foreseeable that a similar virus outbreak could occur again and, hence, the Covid-19 outbreak would not give right to invoke force majeure in order to obtain relief.



## Does your country have a legal definition of force majeure, and if so, what is it?

The Civil Code of Ukraine stipulates that a person who has breached a contractual obligation shall be released from liability for such breach if that person proves that this violation occurred as a result of an incident or irresistible force. The Civil Code, however, does not go further and does not provide the definition of events of irresistible force and does not provide any exemplary list of such events. Considering this, the spread of coronavirus under the certain circumstances can be recognized as an event of irresistible force.

The Law of Ukraine “On Chambers of Commerce and Industry in Ukraine”, in turn, treats force majeure and irresistible force as one legal concept, defining them as an extraordinary and inevitable circumstances that objectively make it impossible to fulfill the obligations under the contract or other obligations stipulated by legislative and other normative acts.



# UKRAINE (contd.)



Aminat Suleymanova | Avellum

## Does the legal definition include epidemics and/or pandemics?

Law of Ukraine “On Chambers of Commerce and Industry in Ukraine” provides non-exhaustive list of circumstances which can be recognized as force majeure.

In fact, this list just serves as an indicator for the Ukrainian Chamber of Commerce and Industry and regional chambers which issue the official certificates recognizing certain event as force majeure. It should be noted that this list has contained epidemics long before the outburst of coronavirus all over the world.

However, on 17 March 2020, the above list was supplemented with such circumstance as a quarantine, which was introduced by the Ukrainian government (Cabinet of Ministers of Ukraine) in response to the pandemics of COVID-19.

Given that this non-exhaustive list of circumstances (including epidemics) serves as a guidance for parties concluding various contracts, epidemics are quite often included in contractual force majeure definitions.

# UKRAINE (contd.)



Aminat Suleymanova | Avellum

**How is force majeure proven? Do authorities issue official force majeure certificates?**

Ukrainian law provides that Ukrainian Chamber of Commerce and Industry and regional chambers of commerce and industry (empowered by the former) certify force-majeure events and issue official certificates recognizing certain event as force majeure. Such certificates serve as an authoritative evidence proving existence of force majeure.

At the same time, the freedom of contract principle, firmly established in Ukrainian law, allows the parties to envisage different procedures for certifying force majeure events.

**Is the spread of COVID-19 considered force majeure?**

Ukrainian law specifically provides that both epidemics and quarantine measures aimed at prevention of spread of various diseases, including COVID-19, can be recognized as force majeure in Ukraine.

However, in order to invoke force majeure in the stated circumstances, the interesting party has to prove that the relevant circumstance (including spread of COVID-19) was:

- a) unpredictable
- b) unavoidable and
- c) extraordinary or beyond the control of the party.

Apart from that:

- d) there must be a causal link between such circumstance and the inability of the party to fulfill its obligations. That is to say, a party wishing to invoke pandemic of COVID-19 as force majeure should have no alternative ways to fulfill its obligation.



**How is force majeure proven? Do authorities issue official force majeure certificates?**

The authorities in Uruguay do not issue these certificates.

It must be proved by any kind of proof regularly admitted, including witness testimonies.

**Is the spread of COVID-19 considered force majeure?**

It is not possible to respond to this query in general terms, as it depends on a case by case analysis. For instance, whether the parties specifically have a force majeure clause, what type of obligations are the ones that are breached, when the contract was entered into in relation to the date of the virus, etc.

Certainly the fact that an official emergency situation has been declared in Uruguay and the lockdown imposed by the government in certain cases are elements that must be taken into account in this analysis.

In addition, if the government declared a mandatory quarantine for the population it is more likely that the COVID-19 could be considered by a Judge a force majeure event in case the debtor is not allowed to fulfill its obligations due to the mandatory quarantine.

## Does your country have a legal definition of force majeure, and if so, what is it?

The Uruguayan Civil Code and Commercial Code do not provide a definition of force majeure. They set forth that damages are not owed if the debtor is not able to comply with its duty due to a force majeure event (except for some specific situations specifically determined, such as when the parties provide for a different solution in their contract).

Under Uruguayan law, an event of force majeure has been defined by the treatises and case law as an external, permanent, extraordinary, unpredictable and irresistible event, which prevents the party from complying with its duty.

The event must not have been reasonably foreseeable and must be imposed with a force that cannot be resisted. It is an objective event as the impossibility must be the same for anyone in that same position and conditions. Further, the impossibility that results must be absolute in the sense that the debtor must have exhausted all available means to comply with its duty (it cannot impose a mere difficulty).

## Does the legal definition include epidemics and/or pandemics?

This depends on what the parties have determined, in case their contract includes a force majeure clause which defines the term and provides examples. If the parties agreed that a pandemic or epidemic is a force majeure event, the Courts will uphold this agreement.

In case the parties did not provide a definition, then we believe that in general epidemics and pandemics are force majeure events, as they usually have the characteristics mentioned above.

However, whether the force majeure event can be used as a defense in the contract to justify a breach of the contract and exempt the party from all liability, must be analyzed on a case by case basis.