



# Force Majeure, Hardship, Frustration and Related Doctrines: Comparative Views from Europe, the Middle East and the Americas



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# FORCE MAJEURE – Legal provisions

## Continental European legal systems

### BELGIAN CIVIL CODE

**ARTICLE 1147.**- The defendant will be held liable to pay damages for non-performance of an obligation, unless damage is proven to be due to an outside cause.

**ARTICLE 1148.**- Damages are not due, when the defendant was prevented from performing an obligation by Act of God.

### FRENCH CIVIL CODE

**ARTICLE 1218.**- 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.

If the prevention is temporary, performance of the obligation is suspended unless the delay which results justifies termination of the contract. If the prevention is permanent, the contract is terminated by operation of law and the parties are discharged from their obligations under the conditions provided by articles 1351 and 1351-1.

**ARTICLE 1351.**- Impossibility of performing the act of performance discharges the debtor to the extent of that impossibility where it results from an event of force majeure and is definitive unless he had agreed to bear the risk of the event or had previously been given notice to perform.

**ARTICLE 1351-1.**- Where the impossibility of performance is a result of the loss of the thing that is owed, the debtor who has been given notice to perform is still discharged if he proves that the loss would equally have occurred if his obligation had been performed.

He must, however, assign to the creditor his rights and claims attached to the thing.

# FORCE MAJEURE – Legal provisions

## Continental European legal systems

### GERMAN CIVIL CODE

**ARTICLE 275.-** (1) A claim for performance is excluded to the extent that performance is impossible for the obligor or for any other person.

(2) The obligor may refuse performance to the extent that performance requires expense and effort which, taking into account the subject matter of the obligation and the requirements of good faith, is grossly disproportionate to the interest in performance of the obligee. When it is determined what efforts may reasonably be required of the obligor, it must also be taken into account whether he is responsible for the obstacle to performance.

(3) In addition, the obligor may refuse performance if he is to render the performance in person and, when the obstacle to the performance of the obligor is weighed against the interest of the obligee in performance, performance cannot be reasonably required of the obligor.

### SWISS CIVIL CODE

**ARTICLE 119 E.** Performance becomes impossible

1 An obligation is deemed extinguished where its performance is made impossible by circumstances not attributable to the obligor.

2 In a bilateral contract, the obligor thus released is liable for the consideration already received pursuant to the provisions on unjust enrichment and loses his counterclaim to the extent it has not yet been satisfied.

3 This does not apply to cases in which, by law or contractual agreement, the risk passes to the obligee prior to performance.

# FORCE MAJEURE - Legal provisions

## Latin America (Argentina)

### ARGENTINEAN CIVIL CODE

THIRD BOOK – PERSONAL RIGHTS - TITLE V - Other sources of obligations

CHAPTER 1 - Civil liability

SECTION 3° - Redress function

**ARTICLE 1730.-** An act of God or *force majeure* event is one that could not be foreseen or that, having been foreseen, it could not have been avoided. The act of God or *force majeure* event exempts from liability, unless otherwise provided.

This Code uses the terms “act of God” and “*force majeure*” as synonymous.

**ARTICLE 1731.-** Act of a third party. To exempt from liability, totally or partially, the fact of a third party for whom it is not necessary to respond must meet the characteristics of *force majeure*.

**ARTICLE 1732.-** Impossibility of performance. The debtor of an obligation is relieved from performance, and not held liable, if the obligation has been extinguished due to objective and absolute impossibility of performance that is not attributable to the obligor. The existence of this impossibility must be assessed taking into account the requirements of good faith and the prohibition of the abusive exercise of rights.

# FRUSTRATION - Legal provisions

## Latin America (Argentina)

### ARGENTINEAN CIVIL CODE

THIRD BOOK – PERSONAL RIGHTS - TITLE II - Contracts in general

CHAPTER 13

*Extinction, modification and adaptation of the contract*

**ARTICLE 1090.-** Frustration of the purpose. The definitive frustration of the purpose of the contract authorizes the affected party to declare its resolution, if it has its cause in an extraordinary alteration of the circumstances existing at the time of its conclusion, that are external to the parties and that exceed the risk assumed by the party that is affected. The resolution is operative upon this party's giving notice of termination to the other party. If the frustration of the purpose is temporary, [the affected party] is entitled to termination only where time is of the essence and the timely fulfillment of its obligation is prevented.

# FORCE MAJEURE IN THE MIDDLE EAST

- **Extraneous unforeseen event that could not be foreseen cause causing impossibility of performance**
- **Effect: discharge, in part or in full, of the obligation (cannot be transformed to compensation)**

## Sultanate of Oman

### **Article 172. of the Royal Decree No. 29 of 2013 Promulgating the Civil Code**

*(1) In contracts binding on both parties, if **force majeure** supervenes which makes the performance of the contract impossible, the corresponding obligation shall cease, and the contract shall be automatically terminated.*

*(2) In the case of partial impossibility, that part of the contract which is impossible shall be extinguished, and the same shall apply to temporary impossibility in continuing contracts, and in those two cases the creditor may terminate the contract provided that the debtor is notified.*

## Lebanon

### **Article 341 of the Code of Obligations and Contracts Issued on 09/03/1932**

*An obligation shall be extinguished if its subject became, after creation, impossible naturally or legally without making an action or mistake by an Obligor.*

### **Article 342 of the Code of Obligations and Contracts Issued on 09/03/1932**

*An Obligor shall provide evidence on force majeure and an Obligee shall also have the right to prove that the emergent event fallen upon an Obligor occurred due to a mistake of an Obligor such as defaulting on fulfilment resulting in delaying. In this case, an obligation shall remain in effect.*

### **Article 343. of the Code of Obligations and Contracts Issued on 09/03/1932**

*An Obligor shall be only discharged due to force majeure insofar as the fulfilment and thus an obligation shall lapse partially.*

*In all respects, even in case of lapse of an obligation as a whole, an Obligor shall assign to an Obligee all rights and lawsuits of compensation relevant to the previous obligation and shall deliver to him the remaining of the damaged thing, if any.*

# FORCE MAJEURE IN THE MIDDLE EAST

## Kingdom of Saudi Arabia

Several provisions, such as:

### Article 24 of the Commercial Court Law, (1350H) 1931G :

*The agent, trustee and packer shall guarantee delivery of the goods handed over within the period stated in the consignment list, and any damage resulting from his delay shall be guaranteed by him, unless due to **force majeure** that cannot be evaded.*

### Article 74(5) of the Saudi Labour Law, (1426H) 2005G

*An employment contract shall terminate in the following cases: {...}*

*(5) **Force majeure**;*

### Article 14 of the Saudi E-Commerce Law (1440 H) 2019G

*(1) Unless the Service Provider and the Consumer agree upon another period for delivery of the subject matter of the Contract or performance thereof, the Consumer may terminate the Contract in case that the Services Provider delays the delivery or performance of the contract for a period of more than (15) days as of the date of contract conclusion or the date agreed upon and recover any amounts paid under the contract in return for the product or service or any other costs incurred as a result of such delay unless the delay is due to a force majeure event.*

*(2) Without prejudice to the provisions of Paragraph (1) of this Article, the Service Provider shall be committed to inform the Consumer of any anticipated delay or difficulties he faces that have an essential impact on the delivery or the performance of the contract.*

## Kingdom of Bahrain

### Article 165. of the Decree-Law No. (19) of 2001 promulgating the Civil Code

*If a person proves that the injury resulted from a cause beyond his control, such as unforeseen circumstances, **force majeure**, the fault of the victim or of a third party, he shall not be liable to make reparation unless there is a provision to the contrary.*

## Egypt

### Article 373. of the Law No. (131) Of 1948 Promulgating the Civil Code

*The obligation shall be extinguished if the debtor proves that the performance of it has become impossible for him for **force majeure** in which he played no part.*

# FORCE MAJEURE IN THE MIDDLE EAST

## Jordan

### **Article 247. of the Law No. 43 of 1976 concerning the Civil Code**

*In contracts binding on both parties, if force majeure supervenes which makes the performance of the contract impossible, the corresponding obligation shall cease, and the contract shall be automatically terminated. In the case of partial impossibility, that part of the contract which is impossible shall be extinguished, and the same shall apply to temporary impossibility in continuing contracts, and in those two cases the creditor may terminate the contract provided that the debtor is notified.*

## Qatar

### **Article 256. of the Law No. 22 of 2004 on issuing the Civil Code**

*If the obligor fails to perform the obligation in kind or delays such performance, the obligor shall indemnify such damage suffered by the obligee, unless such non-performance or delay therein is due to a foreign cause beyond the control of the obligor.*

### **Article 258. of the Law No. 22 of 2004 on issuing the Civil Code**

*It may be agreed that the obligor shall bear liability for force majeure or unforeseen incident.*

### **Article 204. of the Law No. 22 of 2004 on issuing the Civil Code**

*If a person proves that damage has arisen from a foreign cause beyond the control of such person, such as force majeure, unforeseen incident or the error of the victim or a third party, such person shall not be liable to pay indemnity, unless there is a provision to the contrary*

# FORCE MAJEURE IN THE MIDDLE EAST

## United Arab Emirates (UAE)

### Article 273 of UAE Federal Law No. 5 of 1985 on Civil Transactions Law

(1) *In contracts binding on both parties, if **force majeure** supervenes which makes the performance of the contract impossible, the corresponding obligation shall cease, and the contract shall be automatically cancelled.*

(2) *In the case of partial impossibility, that part of the contract which is impossible shall be extinguished, and the same shall apply to temporary impossibility in continuing contracts, and in those two cases it shall be permissible for the obligor to cancel the contract provided that the obligee is so aware.*

### Article 287 of UAE Federal Law No. 5 of 1985 on Civil Transactions Law

*If a person proves that the loss arose out of an extraneous cause in which he played no part such as a natural disaster, unavoidable accident, **force majeure**, act of a third party, or act of the person suffering loss, he shall not be bound to make it good in the absence of a legal provision or agreement to the contrary.*

## Dubai International Financial Centre (DIFC) in the UAE

### Article 82(1) of DIFC Contract Law No. 6 of 2004

*Except with respect to a mere obligation to pay, non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.*

# FORCE MAJEURE - Legal provisions

## International law

### 1980 VIENNA CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

Chapter V. PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER  
Section IV. Exemptions

**ARTICLE 79.-** (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

# FORCE MAJEURE - Soft law

## UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (UPICC)

Chapter 7: NON-PERFORMANCE

Section 1: Non-performance in general

### ARTICLE 7.1.7.- (Force majeure)

- (1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
- (2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.
- (3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.
- (4) Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

# FORCE MAJEURE - Soft law

## PRINCIPLES OF EUROPEAN CONTRACT LAW (PECL)

Chapter 8: NON-PERFORMANCE AND REMEDIES IN GENERAL

### ARTICLE 8:108.- Excuse Due to an Impediment

- (1) A party's non-performance is excused if it proves that it is due to an impediment beyond its control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.
- (2) Where the impediment is only temporary the excuse provided by this article has effect for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the obligee may treat it as such.
- (3) The non-performing party must ensure that notice of the impediment and of its effect on its ability to perform is received by the other party within a reasonable time after the non-performing party knew or ought to have known of these circumstances. The other party is entitled to damages for any loss resulting from the non-receipt of such notice.

# FORCE MAJEURE - Soft law

## PRINCIPLES OF LATIN AMERICAN CONTRACT LAW

### CHAPTER 8. NON-PERFORMANCE OF THE CONTRACT

#### Section 1. Non-performance in general

#### **ARTICLE 89. *Force majeure* or act of God**

Force majeure or act of God is an event beyond the control of the obligor that temporarily or permanently prevents it from performing an obligation of which it has not assumed the risk and the occurrence and effects of which it could not have avoided.

#### **ARTICLE 90. Total or partial impossibility to perform**

(1) The total and final supervening impossibility to perform a contractual obligation due to an act of God extinguishes the obligation and releases the obligor. In this event, the obligee may choose to terminate the contract or require the assignment of the rights and actions to which, due to the impossibility, the obligor is entitled against a third party.

(2) When the impossibility is partial or temporary, the obligee may suspend performance or reduce it by an equal proportion, unless, as a result of the impossibility, it substantially deprives it of what it was entitled to expect according to that which was foreseeable at the time the contract was concluded. In the event of the latter, the option set forth in paragraph (1) shall apply.

# HARDSHIP - Legal provisions

## Continental European legal systems (France)

### FRENCH CIVIL CODE

**ARTICLE 1195.**- If a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. The first party must continue to perform his obligations during renegotiation. In the event of refusal or failure of renegotiations, the parties may agree to terminate the contract from the date and on the conditions which they determine, or, by mutual agreement, ask the court to adapt it. In the absence of an agreement within a reasonable time, the court may, upon the request of a party, revise the contract or put an end to it, from the date and subject to such conditions as it shall determine.

# HARDSHIP - Legal provisions

## Latin America (Argentina)

### ARGENTINEAN CIVIL CODE

THIRD BOOK – PERSONAL RIGHTS - TITLE II - Contracts in general

**ARTICLE 1091.-** Hardship. If in a commutative contract of deferred or continuous performance, the obligation of one of the parties becomes excessively onerous, due to an extraordinary alteration of the circumstances existing at the time of its conclusion, due to causes beyond the control of the parties and the risk assumed by the affected party, the latter has the right to request extrajudicially, or before a court, by action or exception, the total or partial resolution of the contract, or its adaptation. The same rule applies to the third party to whom rights have been conferred, or obligations, resulting from the contract; and to aleatory contracts if the obligation becomes excessively onerous for reasons beyond the risk that is typical to such contract.

# EXCEPTIONAL/OPPRESSIVE CIRCUMSTANCES IN THE MIDDLE EAST

## United Arab Emirates

### Article 249 of UAE Federal Law No. 5 of 1985 on Civil Transactions Law

*If **exceptional circumstances** of a public nature which could not have been foreseen occur as a result of which the performance of the contractual obligation, even if not impossible, becomes oppressive for the obligor so as to threaten him with grave loss, it shall be permissible for the judge, in accordance with the circumstances and after weighing up the interests of each party, to reduce the oppressive obligation to a reasonable level if justice so requires, and any agreement to the contrary shall be void.*

## Kingdom of Saudi Arabia

*Several provisions such as:*

### Article 74. (3) of the Government Tenders and Procurement Law (1440H) 2019G

*Extension of the contract or exemption from fine shall be in the following cases: (3) If the delay is because of the government entity or **emergency circumstances**.*

## Kingdom of Bahrain

### Article 130. of the Decree-Law No. 19 of 2001 promulgating the Civil Code

*When, however, as a result of **exceptional and unpredictable events** of a general character, the performance of the contractual obligation, without becoming impossible, becomes excessively onerous in such way as to threaten the debtor with exorbitant loss, the judge may, according to the circumstances, and after taking into consideration the interests of both parties, reduce to reasonable limits by lessening its extent or increasing its consideration, the obligation that has become excessive. Any agreement to the contrary is void.*

# EXCEPTIONAL/OPPRESSIVE CIRCUMSTANCES IN THE MIDDLE EAST

## Sultanate of Oman

### Article 159. of the Royal Decree No. 29 of 2013 Promulgating the Civil Code

If **exceptional circumstances** of a public nature which could not have been foreseen occur as a result of which the performance of the contractual obligation, even if not impossible, becomes oppressive for the debtor so as to threaten him with grave loss, the court may, in accordance with the circumstances and after weighing up the interests of each party, reduce the oppressive obligation to a reasonable level, and any agreement to the contrary shall be void.

## Qatar

### Article 171. of the Law No. 22 of 2004 on issuing the Civil Code

A contract is the law binding to its parties. Such contract may not be revoked or amended without mutual agreement by the parties or for such reasons as provided by law.

However, in the event of general **exceptional circumstances** that cannot be reasonably foreseen and, as a result of such occurrence, the performance of the contractual obligation, even though it has not become impossible to perform, becomes exhausting to the obligor, threatening to cause serious loss to such party, the court may, as applicable and upon comparison between the interests of the parties, decrease the exhausting obligation to a reasonable limit. Any agreement to the contrary shall be invalid.

# HARDSHIP - Soft law

## UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (UPICC)

Chapter 6: PERFORMANCE

Section 2: Hardship

### ARTICLE 6.2.2 (Definition of hardship)

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

- (a) the events occur or become known to the disadvantaged party after the conclusion of the contract ;
- (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract ;
- (c) the events are beyond the control of the disadvantaged party; and
- (d) the risk of the events was not assumed by the disadvantaged party.

# HARDSHIP - Soft law

## UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (UPICC)

Chapter 6: PERFORMANCE

Section 2: Hardship

### ARTICLE 6.2.3 (Effects of hardship)

- (1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.
- (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.
- (3) Upon failure to reach agreement within a reasonable time either party may resort to the court.
- (4) If the court finds hardship it may, if reasonable,
  - (a) terminate the contract at a date and on terms to be fixed, or
  - (b) adapt the contract with a view to restoring its equilibrium.

# HARDSHIP - Soft law

## PRINCIPLES OF EUROPEAN CONTRACT LAW (PECL)

Chapter 6: CONTENTS AND EFFECTS

### ARTICLE 6:111: Change of Circumstances

- (1) A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished.
- (2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that:
  - (a) the change of circumstances occurred after the time of conclusion of the contract,
  - (b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract, and
  - (c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear.
- (3) If the parties fail to reach agreement within a reasonable period, the court may:
  - (a) terminate the contract at a date and on terms to be determined by the court; or
  - (b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances.

# HARDSHIP – Soft law

## PRINCIPLES OF LATIN AMERICAN CONTRACT LAW

### CHAPTER 7. PERFORMANCE OF CONTRACT

#### **Article 84. Change of circumstances**

(1) If after its conclusion, performance of the contract becomes excessively onerous or the utility of the performance considerably decreases, due to a change of circumstances, provided the event or its magnitude could not have been reasonably foreseen, and if the risk of the change of circumstances has not been assumed by the affected party, the latter may request the renegotiation of the contract.

(2) Performance of the contract is not suspended during the renegotiation, unless such performance causes irreparable harm to the affected party.

(3) If, after a reasonable time, the parties have not adapted the contract, either party may request the court to adapt or terminate the contract. In adapting the contract, the court has to take into consideration the distribution of risk and the costs assumed by the parties.

**Article 85. Frustration of the cause of the contract** The definitive frustration of the contract's cause, due to a change of the circumstances existing at the time of its conclusion, unforeseen by the parties and that exceeds the risks assumed by the affected party, authorizes the latter to terminate the contract.

# FIDIC Model Clause

## Introduction and Context

- Force Majeure and COVID-19
- Companies are **making the assumption** that COVID-19 constitutes Force Majeure, or there must be a right to relief, but **those assumptions are not safe.**
- Any assessment of the impact of COVID-19 on a project, **must take account of the contractual and legal framework**, especially as common law and civil law systems treat these circumstances differently:
  - Common law: Starting point = contract terms
  - Civil law: An assessment of the impact must also look at the governing law which may readily step and imply doctrines into the contract
- Force Majeure and FIDIC
- The International Federation of Consulting Engineers
- 1999 1st edition FIDIC Contracts, 2017 2nd Edition FIDIC Contracts
- See recent 'Guidance Memorandum to Users of FIDIC Standard Forms of Works Contract' published in April 2020

Force majeure, hardship, frustration and related doctrines

FIDIC Red/MDB/Yellow/Silver Book (1999 edition)	FIDIC Red/Yellow/Silver Book (2017 edition) key changes
<p>Sub-Clause 19.1 [Definition of Force Majeure]</p> <ol style="list-style-type: none"> <li>1. An exceptional event or circumstance;</li> <li>2. Which is beyond a party's control;</li> <li>3. Which that party could not reasonably have provided against before entering into the contract;</li> <li>4. Which, having arisen, such party could not reasonably have avoided or overcome; and</li> <li>5. Which is not substantially attributable to the other party.</li> </ol> <p>Contains non-exhaustive list of potential events [4 man-made events ("war" etc.), 1 natural ("natural catastrophies")]</p>	<p>[SC 18.1] "Force Majeure" replaced by "Exceptional Events"</p> <p>Non-exhaustive list slightly reworded.</p>
<p>Sub-Clause 19.2 [Notice of Force Majeure]</p> <ul style="list-style-type: none"> <li>▪ If "a Party is or will be prevented from performing any of its obligations" it must give initial notice <u>14 days</u> after it became/should have become aware.</li> <li>▪ Excused from obligation for so long as prevented from performing.</li> <li>▪ Does not apply to obligations to make payments.</li> </ul>	<p>[SC 18.2] Precisions provided on (i) situation where notice is given after 14 days, (ii) and precision that excusal from performance applies to prevented obligations only.</p>
<p>Sub-Clause 19.3 [Duty to Minimise Delay]</p> <ul style="list-style-type: none"> <li>• Obligation for Parties to "use all reasonable endeavours to minimize any delay in performance"</li> <li>• Notice to be given when prevention ceases.</li> </ul>	<p>[SC 18.3] Additional ongoing notice formalities (to be provided every 28 days)</p>
<p>Sub-Clause 19.4 [Consequences of Force Majeure]</p> <ul style="list-style-type: none"> <li>• EoT available</li> <li>• Costs only available in cases of listed, man-made events.</li> </ul> <p>NB Notice of claim to be provided within 28 days, and a fully detailed claim within 42 days [SC 20.1]</p>	<p>[SC 20.2.4] 84 days to provide fully detailed claim, as opposed to 42.</p>
<p>Sub-Clause 19.5 [Force Majeure Affecting Sub-contractor]</p> <p>Broader terms in sub-contracts will not excuse the contractor's non performance</p>	<p>[removed]</p>
<p>Sub-Clause 19.6 [Optional Termination, Payment and Release]</p> <ul style="list-style-type: none"> <li>• Termination possible if prevention lasts 84 days continuously /140 days periodically).</li> </ul>	<p>[SC 18.5] No substantial changes</p>
<p>Sub-Clause 19.7 [Release from Performance under the Law]</p> <p>Discharge from performance and possible termination where any event or circumstances outside control of Parties arises which makes it impossible or unlawful to fulfil contractual obligations or entitles the Parties to be released under the governing law.</p>	<p>[SC 18.5] No substantial changes</p>

	Definition	Conditions/formalities	Relief
FIDIC	<ol style="list-style-type: none"> <li>1. An exceptional event or circumstance;</li> <li>2. Which is beyond a party's control;</li> <li>3. Which that party could not reasonably have provided against before entering into the contract;</li> <li>4. Which, having arisen, such party could not reasonably have avoided or overcome; and</li> <li>5. Which is not substantially attributable to the other party.</li> </ol>	<ol style="list-style-type: none"> <li>1. Duty to mitigate: <input checked="" type="checkbox"/></li> <li>2. Initial notice formalities: <input checked="" type="checkbox"/> (14 days after Party became/should have become aware)</li> <li>3. Ongoing notice formalities: <input checked="" type="checkbox"/> (2017 FIDIC suite only – every 28 days)</li> <li>4. Evidence: <input checked="" type="checkbox"/> (notice of claim within 28 days, fully detailed claim within 42 days [1999]/ 84 days [2017])</li> </ol>	<ol style="list-style-type: none"> <li>1. EoT: <input checked="" type="checkbox"/></li> <li>2. Costs: <input checked="" type="checkbox"/> Only in cases of listed, man-made events.</li> <li>3. Termination: <input checked="" type="checkbox"/> if prolonged (84 days continuously /140 days periodically).</li> </ol>
NEC 3	<ol style="list-style-type: none"> <li>1. An event preventing the contractor from completing the work or from completing it within the timeframe provided for by the contracting parties;</li> <li>2. An event that neither party could prevent, and</li> <li>3. An event that an experienced contractor would have judged at the contract date to have such a small chance of occurring that it would have been unreasonable to have allowed for it.</li> </ol>	<ol style="list-style-type: none"> <li>1. Duty to mitigate: <input checked="" type="checkbox"/></li> <li>2. Initial notice formalities: <input checked="" type="checkbox"/> (8 weeks days after becoming aware of the event)</li> <li>3. Ongoing notice formalities: <input checked="" type="checkbox"/></li> <li>4. Evidence: <input checked="" type="checkbox"/> (Contractor to submit quotation and detailed assessment for Compensation Event within 3 weeks)</li> </ol>	<ol style="list-style-type: none"> <li>1. EoT: <input checked="" type="checkbox"/> or changes to Completion Date if determined by the project manager to be a "Compensation Event" as provided for in Cl.60.1</li> <li>2. Costs: <input checked="" type="checkbox"/> if determined by the project manager to be a "Compensation Event" as provided for in Cl.60.1; or</li> <li>3. Termination: <input checked="" type="checkbox"/> if determined by project manager determines to be a termination event pursuant to Cl.91.7.</li> </ol>
AFNOR	<p>No definition. <i>Force majeure</i> as understood under French law [Article 1218 Civil Code], i.e.</p> <ol style="list-style-type: none"> <li>1. Event beyond the control of the debtor</li> <li>2. Unforeseeable at the time of the conclusion of the contract</li> <li>3. Effects not avoidable by appropriate measures</li> <li>4. Prevention of performance of his obligation by the debtor</li> </ol>	<ol style="list-style-type: none"> <li>1. Duty to mitigate: <input checked="" type="checkbox"/></li> <li>2. Initial notice formalities: <input checked="" type="checkbox"/> ("as soon as a party became aware")</li> <li>3. Ongoing notice formalities: <input checked="" type="checkbox"/> (2017 FIDIC suite only – every 28 days)</li> </ol>	<p>In accordance with French law [Article 1218 Civil Code]:</p> <ol style="list-style-type: none"> <li>1. Temporary suspension where effects are temporary</li> <li>2. Termination where prevention is permanent.</li> <li>3. Costs – see doctrine of Hardship re renegotiation of contract [Article 1195 of the civil code (entered into force on 1st October 2016)]</li> </ol>
ENAA International	<ol style="list-style-type: none"> <li>1. Event beyond the reasonable control of the affected party</li> <li>2. Even is unavoidable.</li> </ol>	<ol style="list-style-type: none"> <li>1. Duty to mitigate: <input checked="" type="checkbox"/></li> <li>2. Initial notice formalities: <input checked="" type="checkbox"/> Ongoing notice formalities: <input checked="" type="checkbox"/></li> </ol>	<ol style="list-style-type: none"> <li>1. EoT: <input checked="" type="checkbox"/></li> <li>2. Termination: <input checked="" type="checkbox"/> where substantial prevention (120 days).</li> <li>3. Costs: <input checked="" type="checkbox"/> Generally no costs - neither party will be liable in damages or for additional cost by reason of the delay or non-performance</li> </ol>

# Procedural and practical considerations

- Procedural considerations
  - Claims procedure to be carefully followed
  - Proving delay
  - Mitigation
- Practical considerations (current contracts)
  - Being prepared (before notifying...), challenging assumptions, thinking outside the box, not reinventing the wheel, putting the right team together.
- Practical considerations (drafting for future contracts)
  - FM Boilerplate clauses provide no real safety net against any future effects of the ongoing COVID-19 pandemic.
  - Necessary to draft balanced bespoke mechanisms to ensure the desired protection against risks.
  - Key considerations
    - Defining events caught by provision (e.g. labour availability)
    - Extent of relief available (costs, EoT);
    - Notice and time provisions;
    - Duty to mitigate;
    - Securities and insurance.

Force majeure, hardship, frustration and related doctrines

# List of authorities – French law

- **FORCE MAJEURE**
- 
- **Article 79 Contracts for the International Sale of Goods (CISG)**
- **Article 7.1.7 UNIDROIT Principles of International Commercial Contracts (UPICC)**
- **Article 8:108 Principles of European Contract Law (PECL)**
- 
- **Art. 1218 of French civil law** (English version) :
  - « 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. If the prevention is temporary, performance of the obligation is suspended unless the delay which results justifies termination of the contract. If the prevention is permanent, the contract is terminated by operation of law and the parties are discharged from their obligations under the conditions provided by articles 1351 and 1351-1”.
- 
- **Art. 1351 of French civil law:**
  - “Impossibility of performing the act of performance discharges the debtor to the extent of that impossibility where it results from an event of force majeure and is definitive unless he had agreed to bear the risk of the event or had previously been given notice to perform.
- **Art. 1351-1 of French civil law:** : “Where the impossibility of performance is a result of the loss of the thing that is owed, the debtor who has been given notice to perform is still discharged if he proves that the loss would equally have occurred if his obligation had been performed .He must, however, assign to the creditor his rights and claims attached to the thing ».

Force majeure, hardship, frustration and related doctrines

## List of authorities – French law

### ***Force majeure:***

- Paris Commercial Court, 20 May 2020, R.G. 20200 16407.
- Colmar Court of Appeal, 12 March 2020.
- Chikungunya epidemic: Started in January 2006, while the contract in question had been signed at a later date (Court of Appeal Saint Denis de la Réunion, 29 December 2009, N° RG 08/02114).
- Dengue epidemic: Considered as "a phenomenon which is a recurrent feature, particularly in the French West Indies" (Court of Appeal Nancy, 22 November 2010, N° RG 09/00003).
- H1N1: Event that has been considered as "widely announced and planned" (Court of Appeal Besançon, 8 January 2014, N° RG 12/02291).
- ICC Force Majeure and Hardship Model Clause 2020: <https://iccwbo.org/publication/icc-forcemajeure-and-hardship-clauses/>

# List of authorities – common law

## UK authorities

- *Krell v. Henry* [1903] 2 KB 740 (CA)
- *Davis Contractors Ltd. v. Fareham U.D.C* [1956] AC 696 [728]
- *Tenants (Lancashire) Ltd v CS Wilson & Co Ltd* [1917] AC 495
- *Mid Essex Hospital Services NHS Trust v Compass Group UK* [2013] EWCA Civ 200
- *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB)
- *Florida Power & Light Co. v. Westinghouse Electric Corp.* 826 F.2d 239 (1987)
- *Taqa Bratani Ltd and Others v. RockRose UKCS8 LLC* [2020] EWHC 58 (Comm)
- *Canary Wharf (BP4) T1 Ltd. v. European Medicines Agency* [2019] EWHC 335 (Ch)

## US authorities

- Uniform Commercial Code U.C.C. § 2-615 (Am Law Inst & Unif. Law Comm'n 2002)
- The Second Restatement of Contracts Section 261 (Am Law Inst 1981)
- *Louisiana Power & Light Co. v. Allegheny Ludlum Industries*, 517 F. Supp. 1319, 1324 (E.D. La. 1981)
- Emelianenko, 2011 WL 13176615
- *City of Vernon v. City of Los Angeles*, 45 Cal.2d 710, 720 (1955).

Force majeure, hardship, frustration and related doctrines

# List of authorities – Latin America

## Argentina :

- **Force majeure :**
- **C1ª Civ. y Com. La Plata, LA LEY, 79- 161** (expropriation of the real estate rendered promise to sell it impossible).
- **CN Civ, SALA J - 30/07/2020, Toledo, Victoria Andrea c. Línea de microómnibus 47 SACFEI y otros s/ daños y perjuicios (acc. trans. c/les. o muerte), Online citation: AR/JUR/28607/2020** (Covid-19 – debtor in default prior to pandemic may not invoke *force majeure*).
  
- **Frustration:**
- **CNCiv., Sala F, 25/04/1996, Online citation: AR/JUR/579/1996** (lease of a plot of land)
- **CN Civ, Sala H, “Carrefour Argentina c/Kids ando Co.”, LL, 1995-C, 18** (lease of premises at a shopping center)
- **CCiv. y Com., Azul, sala II, 15/11/2016, “Ferreira, Rodríguez Amelia c. Ferreira Marcos, y otra s/ desalojo”, LL del 17/3/2017, p. 5, LL 2017-B-109, RCCyC 2017 [abril], p. 180, AR/JUR/74096/2016** (lease of premises)
- **CNCiv., sala A, 24/8/2015, “M. V. T., B. y otro c. Julia Tours S. A. y otro s/daños y perjuicios”, RCCyC 2015 [noviembre], p. 138, RCyS 2015-XII-117, DJ del 2/3/2016, p. 68, RCyS 2017-IV-65, AR/JUR/28309/2015** (tourist trip)
  
- **Hardship :**
- **CNCom., Sala B, 30/06/2003, “Delistovich, Armando c. Transporte del Oeste”, LA LEY, 2003-F, 1047; Online citation: AR/JUR/1910/2003** (2002 economic crisis).

Force majeure, hardship, frustration and related doctrines

# List of authorities – Latin America

## Brazil :

### • **Hardship :**

Several judicial decisions on suspension / temporary reduction of price of commercial leases during the Covid-19 pandemic:

<https://www.insper.edu.br/conhecimento/direito/deciso-es-judiciais-relacionadas-a-covid-19-ja-somam-165-mil/>

## Colombia:

### • **Hardship:**

- **Tribunal Superior de Bogotá, Sala Civil. Sentencia del 16 de mayo de 2005, M.P.: Rodolfo Arciniegas Cuadros**
- **Corte Suprema de Justicia, Sala de Casación Civil. Sentencia del 21 de febrero de 2012, M.P.: William Namén Vargas**
- **Arbitral award dated 21 October 2004 - parties: Empresa de Energía de Boyacá S.A. esp vs. Compañía Eléctrica de Sochagota S.A. esp , arbitrators: María Cristina Morales de Barrios, Jorge Suescún Melo & Carlos Esteban Jaramillo Schloss**

## PRINCIPLES OF LATIN AMERICAN CONTRACT LAW

[https://boe.es/biblioteca\\_juridica/abrir\\_pdf.php?id=PUB-PR-2017-44](https://boe.es/biblioteca_juridica/abrir_pdf.php?id=PUB-PR-2017-44)

Force majeure, hardship, frustration and related doctrines



# Force Majeure, Hardship, Frustration and Related Doctrines: Comparative Views from Europe, the Middle East and the Americas



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