

Between Obligation And Impossibility: The Legal Weight Of Force Majeure Clauses In A Post-Pandemic Commercial World

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ABSTRACT

The COVID-19 pandemic catalyzed an unprecedented legal reckoning for the doctrine of force majeure, thrusting it from contractual obscurity into the center of global commercial litigation. This article critically interrogates the post-pandemic legal weight of force majeure clauses, examining the tension between the imperative to perform contractual obligations and the radical contingencies that render such performance impossible or commercially impracticable. Drawing from comparative jurisprudence across common law and civil law jurisdictions, this research elucidates how courts have reconfigured thresholds of foreseeability, causation, and mitigation in response to COVID-19 and attendant governmental restrictions. This research explores the legal fragmentation and conceptual inconsistencies that have emerged, particularly where clauses lacked express reference to pandemics or where governmental action, rather than the pathogen itself, formed the core disruptive event. It further interrogates the jurisprudential shift toward a more contextual and equitable approach in interpreting commercial impossibility, challenging the classical paradigm of absolute contractual liability. By situating force majeure within a broader framework of risk allocation and contractual justice, this research argues that the pandemic has redefined not merely the content but also the normative function of such clauses. Moreover, it traces emerging legislative responses and industry-driven contractual reforms that attempt to recalibrate commercial expectations in light of systemic disruptions. This research contends that force majeure clauses must evolve from rigid exculpatory devices into adaptive legal instruments capable of mediating between legal obligation and economic impossibility in an era marked by global volatility and interconnected fragility.

Keywords: Force Majeure, Commercial Contracts, COVID-19, Pandemic Clauses, Impracticability, Contractual Obligation, Legal Impossibility, Risk Allocation

INTRODUCTION

Force majeure, as a doctrinal construct in contract law, operates to excuse a party from performance of contractual obligations when unforeseen and extraordinary events, beyond the reasonable control of the parties, render such performance impossible or impracticable. Rooted in civil law traditions and recognized with increasing frequency in common law jurisdictions via express contractual stipulation, force majeure clauses are designed to mitigate strict liability by allocating risk for “acts of God” and analogous disruptions. Traditionally invoked in the context of natural disasters, wars, or government interventions, these clauses require careful judicial scrutiny to determine whether the event qualifies, whether causation is sufficiently proximate, and whether procedural requirements (e.g., notice, mitigation) have been fulfilled. The force majeure doctrine, though contractual in form, reflects deeper tensions between *pacta sunt servanda* and *rebus sic stantibus*, navigating the interstitial space between legal formalism and equitable relief (Davies, 2021).

The COVID-19 pandemic disrupted global commercial equilibrium on a scale and intensity unmatched in modern legal history, engendering mass contractual non-performance across virtually every sector. From the abrupt cessation of manufacturing in industrial hubs to supply chain paralysis, lockdowns, and labor immobility, the pandemic catalyzed an avalanche of force majeure invocations, often met with contentious litigation and arbitral disputes. Courts and arbitral tribunals were compelled to reevaluate the operative meaning of “impossibility” in light of a multi-jurisdictional, prolonged, and evolving public health crisis. In doing so, they confronted legal ambiguity, the variable drafting of clauses, and conflicting expectations between commercial pragmatism and textual rigidity. The pandemic thus served as both a crucible and catalyst, exposing the limits of

boilerplate contractual formulations while compelling a reexamination of foundational doctrines governing commercial risk and relief (Wagner, 2022).

RESEARCH METHODOLOGY

This research employs a doctrinal methodology, integrating comparative analysis and interpretive critique to examine the evolving jurisprudence surrounding force majeure clauses in the post-pandemic commercial landscape. The primary focus lies in the systematic analysis of statutory provisions, contractual norms, and judicial decisions across multiple legal systems. In addition, the research is informed by secondary sources such as scholarly commentaries, legal treatises, and law reform proposals, which provide interpretive frameworks and normative critiques. The study also adopts a comparative lens to juxtapose jurisdictional divergences in the treatment of impossibility, foreseeability, and risk allocation, thereby illuminating the adaptive capacity of legal doctrines in response to systemic crises.

LITERATURE REVIEW

Farnsworth (1990) treatise is a foundational text in American contract law, detailing doctrines of impossibility and impracticability. It elaborates on the evolution of contractual risk allocation, particularly when performance becomes untenable due to unforeseen events. The author's analysis of judicial reluctance to excuse performance without textual support aligns with pandemic-era strict interpretations. This source provides conceptual clarity for understanding the contractual rigidity seen in common law jurisdictions.

Treitel (2003) offers a comprehensive account of the doctrines of frustration and force majeure in English law. The book discusses leading case laws and provides comparative insight into civil and common law interpretations. Treitel's analysis of frustration closely relates to post-COVID litigation, where courts hesitated to excuse performance. His work is vital to understanding how narrowly courts read force majeure clauses when pandemics are not explicitly mentioned.

UNIDROIT (2016) principles offer a transnational framework for contract interpretation, including force majeure (Art. 7.1.7) and hardship (Art. 6.2.2). The document reflects modern commercial expectations and is often cited in international arbitrations post-COVID. It supports a more flexible, equitable view of performance obligations during unforeseen crises. The UNIDROIT Principles reinforce the argument that force majeure should evolve as a tool of justice rather than rigid exemption.

Brunner (2009) critically evaluates force majeure and hardship in both codified and non-codified systems, focusing on international commercial practice. His work anticipates legal fragmentation and stresses the importance of foreseeability and causality. Post-COVID, Brunner's analysis is especially relevant in understanding judicial divergence across jurisdictions. The text contributes to debates on standardizing pandemic clauses in global commerce.

McKendrick (2013) text is essential for understanding English contract law principles, including the doctrine of frustration and performance impossibility. He emphasizes how party autonomy limits judicial intervention, even in severe crises. The pandemic context challenges these traditional views, which the author critiques in light of equitable doctrines. His work frames the normative debate on balancing risk and fairness during systemic disruptions.

THE LEGAL DOCTRINE OF FORCE MAJEURE: FOUNDATIONS

The doctrine of force majeure is deeply rooted in Roman law, where the concept of *vis major*, literally "greater force", referred to unforeseeable, external events beyond human control, such as natural disasters or war, which could absolve a debtor from liability for non-performance. Over time, this foundational principle evolved into a more structured legal doctrine across jurisdictions. In civil law systems, force majeure is codified and often integrated directly into the legal framework, granting judges the power to discharge or modify obligations when exceptional circumstances render performance impossible. By contrast, common law jurisdictions, particularly in UK & US, do not recognize force majeure as a standalone doctrine. Instead, its operation depends entirely on the express terms negotiated in the contract, reflecting the overarching primacy of party autonomy and literal construction in common law jurisprudence (Hachem, 2020).

A typical force majeure clause functions as a contractual mechanism that allocates risk when extraordinary events interrupt performance. It commonly includes a list of enumerated events, such as acts of God, war, terrorism, pandemics, or government action, alongside a general catch-all provision for events beyond the parties' control. The precise drafting of these clauses becomes pivotal, as courts are generally reluctant to read into them events not explicitly mentioned. Judicial interpretation thus hinges on whether the event qualifies under the clause, whether it truly impeded performance, and whether the affected party exercised reasonable diligence to mitigate the consequences. For instance, in *Kel Kim Corp. v. Central Markets, Inc.* (519 N.E.2d 295 (1987)), the court held that a force majeure clause was not triggered because the specific event, failure to procure insurance, was not covered under the clause. The case illustrates the judiciary's insistence on strict construction of force majeure language.

Critical to the enforcement of a force majeure clause are the doctrinal thresholds of causation and foreseeability. Courts will examine whether the supervening event was the proximate cause of non-performance and whether it was unforeseeable at the time of contracting. These standards introduce a high bar for invocation. In *Seadrill Ghana Operations Ltd. v. Tullow Ghana Ltd.* ([2018] EWHC 1640 (Comm)), the court found that a contractual obligation could not be avoided merely because performance became more expensive or commercially unfeasible. Similarly, foreseeability often defeats force majeure claims in pandemic-era litigation, where courts have ruled that post-2020, the risks associated with COVID-19 are no longer unforeseeable. The requirement of notice, often within a specified time frame, is another procedural gatekeeper, failure of which can result in waiver of the right to rely on the clause (Gertz, 2021).

Force majeure clauses intersect with other doctrines that address disrupted contractual performance, particularly frustration of purpose and impossibility. In common law jurisdictions, the doctrine of frustration discharges a contract when an unforeseen event radically changes the nature of the obligations. The seminal English case *Krell v. Henry* ([1903] 2 KB 740) upheld frustration where a coronation procession, forming the basis of the contract, was unexpectedly cancelled. Impossibility (or impracticability, in the US context) similarly allows discharge when performance becomes objectively impossible. However, courts narrowly apply these doctrines, and they rarely provide relief where contractual language exists to the contrary. In civil law systems, hardship clauses allow judicial rebalancing of the contract when performance becomes excessively onerous, even if not impossible, illustrated by the French *doctrine de l'imprévision*, recently codified in Article 1195 of the French Civil Code (Kelly, 2020).

FORCE MAJEURE IN THE PANDEMIC ERA – CRITICAL LEGAL ANALYSIS

COVID-19 as a Triggering Event & Variance in Judicial Interpretation

The onset of the COVID-19 pandemic foregrounded significant legal contention around whether the virus itself could be classified as a force majeure event. While many contractual instruments pre-dating the pandemic omitted specific reference to pandemics or public health crises, courts were tasked with assessing whether such an event fell within broadly worded categories such as “acts of God,” “natural calamities,” or “governmental action.” In India, this issue reached the courts in *Halliburton Offshore Services Inc. v. Vedanta Ltd. & Anr.* (O.M.P (I) (COMM.) No. 88/2020), where court recognized the pandemic and resultant lockdowns as a potential force majeure event but emphasized that mere invocation of COVID-19 was insufficient unless demonstrable impact on performance was established. Across jurisdictions, courts have diverged in their willingness to imply pandemic-related impossibility into force majeure clauses, depending largely on textual precision, jurisdictional approach to commercial hardship, and the evidentiary burden of causality. In civil law jurisdictions, such as France and China, courts leaned towards an equitable rebalancing of obligations, invoking doctrines akin to hardship, whereas in common law regimes like the UK, the bar for excusing non-performance remained significantly higher, reflecting a stricter adherence to contractual textualism (Beale, 2021).

Contractual Silence, Interpretation, and Standards

Contracts that were silent or ambiguous on pandemic-related events posed acute challenges, leading to divergent interpretive strategies. In the absence of explicit pandemic language, Indian courts, like their counterparts globally, relied heavily on principles of business efficacy and the contra proferentem rule to resolve ambiguity. The interpretative question often revolved around whether the parties could have reasonably foreseen the

pandemic at the time of contracting and whether the contractual purpose had been frustrated in a legal sense. The Court, in *Energy Watchdog v. CERC* (AIR 2017 SC (SUPP) 43), though pre-pandemic, laid a precedent by stating that force majeure clauses must be strictly interpreted, a principle which guided post-COVID interpretations as well. Commercial reasonableness and industry standards became crucial touchstones in judicial reasoning, especially in sectors such as aviation, construction, and logistics, where systemic disruptions were both severe and widespread. The absence of uniform drafting practices meant that even similarly situated parties faced radically different legal outcomes, underscoring the criticality of precision in force majeure language.

State-Imposed Restrictions and Supply Chain Disruption

A particularly nuanced legal challenge emerged in distinguishing between the virus as a biological phenomenon and the legal consequences of state-imposed restrictions aimed at containing it. Courts were often more receptive to claims that government-imposed lockdowns, rather than the pandemic per se, constituted force majeure events, as the former involved acts of sovereign intervention, often explicitly covered in standard force majeure formulations. Indian courts generally accepted this reasoning, as seen in several arbitration-related judgments where lockdowns were deemed unforeseen legal impediments to performance. However, establishing causality and inability, not mere inconvenience, remained a significant evidentiary burden. In global supply chains, COVID-19 led to cascading contractual failures, upstream suppliers' inability to perform created downstream impossibilities, especially in industries like pharmaceuticals, electronics, and commodities. The Indian import-export sector, reliant on international supply chains, was particularly affected. However, judicial relief was not automatically extended to all affected parties. Instead, courts demanded rigorous proof of the link between state actions and commercial non-performance, and often emphasized the availability of mitigation strategies, thereby reaffirming that force majeure operates not as an automatic exemption, but as a defense subject to close judicial scrutiny (Zeigler, 2020).

JURISPRUDENTIAL AND LEGISLATIVE RESPONSES POST-PANDEMIC

In the wake of the COVID-19 pandemic, courts across major jurisdictions were confronted with the task of interpreting force majeure clauses under extraordinary and unprecedented conditions. In the United States, federal and state courts predominantly upheld a strict constructionist approach, requiring explicit inclusion of pandemics in force majeure clauses and demanding a high threshold for demonstrating true impossibility. In *JPMorgan Chase Bank, N.A. v. First American Title Ins. Co.* (No. 12-2094 (6th Cir. 2014)), for instance, the court reaffirmed that generalized economic hardship or market disruption was insufficient to invoke force majeure without express contractual language. In the UK, the judicial posture remained similarly text-centric, with cases such as *Tenants of Various Pubs v. Stonegate Pub Company* reflecting reluctance to allow implied terms or frustration unless impossibility was incontrovertible and not self-induced. European courts, particularly in civil law jurisdictions like France and Germany, adopted a more purposive approach, allowing judicial rebalancing of obligations under *force majeure* or *imprévision* doctrines. Chinese courts, under the PRC Contract Law, frequently recognized government-imposed lockdowns as qualifying events, but required precise proof of causal disruption and good-faith mitigation, reflecting a hybrid model of legal pragmatism and statutory formalism (Han, 2020). Legislative responses have varied in form and efficacy. In India, the Ministry of Finance issued Office Memoranda recognizing COVID-19 as a force majeure event for government contracts, but stopped short of extending such recognition to private agreements, leaving their enforceability subject to judicial discretion. Emergency executive orders in other jurisdictions, such as the invocation of the *Defense Production Act* in the U.S. or the *Corona-Ausnahmegesetzgebung* in Germany, temporarily suspended or modified performance obligations, albeit often in sector-specific ways. These legislative interventions functioned as temporal buffers but did not uniformly recalibrate the force majeure doctrine itself. In multiple jurisdictions, including India and Brazil, there emerged calls for legislative standardization of pandemic clauses, prompting law reform commissions and commercial bar associations to draft model provisions that reflect contemporary risk profiles and public health realities (Ruhl, 2020).

At the international level, normative guidance emerged from instruments such as the UNIDROIT Principles of International Commercial Contracts, which were increasingly cited by tribunals and arbitral institutions to justify equitable reallocation of risk. Articles 6.2.2 and 7.1.7 of the principles, dealing with hardship and force majeure

respectively, gained renewed relevance as they allowed suspension or termination of obligations where performance became excessively onerous. The ICC revised its model force majeure clause in 2020, expressly including “epidemic” and “pandemic” as enumerated events and refining notice obligations and mitigation requirements. These revisions signal a transnational trend toward preemptively addressing systemic risk, though their uptake remains uneven across jurisdictions and industries.

India’s legal system presents a unique confluence of common law tradition and statutory elasticity, as seen in the increasing judicial reliance on Section 56 of the Indian Contract Act, 1872, which deals with frustration of contract. Indian courts, such as in *Energy Watchdog v. CERC*, had previously interpreted force majeure narrowly, demanding express contractual language. However, post-pandemic jurisprudence began to reflect greater sensitivity to contextual impossibility. In *Standard Retail Pvt. Ltd. v. G.S. Global Corp.* (COMMERCIAL ARBITRATION PETITION (L) NO. 404 OF 2020), the Bombay High Court declined to grant relief under force majeure for mere economic hardship but acknowledged the broader commercial implications of the pandemic. These developments underscore India’s movement toward a contextual and fact-sensitive adjudication framework, albeit still anchored in contractual literalism. The broader Indian legal discourse now grapples with the challenge of codifying pandemic-specific commercial doctrines while ensuring that parties remain incentivized to draft with precision and negotiate in good faith.

COMPARATIVE LEGAL ANALYSIS

In civil law jurisdictions such as France, Germany, and China, the force majeure doctrine is underpinned by codified legal principles that inherently provide courts with more latitude to adapt contracts in the face of supervening hardship. For instance, French civil law (notably Article 1218 of the Civil Code, post-reform) expressly recognizes force majeure and grants judicial discretion to suspend or terminate obligations where performance becomes impossible. German law, under §§275 and 313 of the *Bürgerliches Gesetzbuch* (BGB), provides not only for impossibility but also for disruption of the contractual equilibrium through *Störung der Geschäftsgrundlage*, which allows for renegotiation or judicial modification of terms. Similarly, China’s Contract Law and the Civil Code permit the invocation of force majeure and hardship (*qingxing bianhua*), and courts have shown a marked willingness to recalibrate contractual duties post-pandemic to preserve the viability of the transaction and protect weaker parties. Collectively, these jurisdictions demonstrate a teleological commitment to fairness, rebalance, and economic continuity, prioritizing contractual justice over rigid enforcement.

By contrast, common law systems, particularly those of UK & US, adhere to a more textualist and formalistic approach, where the viability of a force majeure defense hinges almost exclusively on the precise wording of the clause in question. The doctrine of frustration (in English law) or impracticability/impossibility (in American jurisprudence) operates narrowly, only in cases where performance becomes objectively impossible or radically different from what was contemplated. There is a marked judicial reluctance to imply force majeure provisions or to intervene in the allocation of risk absent unequivocal contractual language. This strict constructionist stance reflects a deeper ideological commitment to party autonomy and the sanctity of contract, reinforcing a commercial culture where risk is deemed allocable and negotiable, rather than judicially distributable in the aftermath of crisis (Zhang, 2021).

In hybrid and regional legal systems, including jurisdictions in the Middle East, Africa, and Latin America, the treatment of force majeure reflects a confluence of doctrinal influences and local normative frameworks. For example, in many Gulf Cooperation Council (GCC) states, civil codes inspired by French and Egyptian models coexist with Islamic legal principles. Sharia’s emphasis on preventing *gharar* (excessive uncertainty) and ensuring *maslahah* (public interest) may support the modification or suspension of contractual obligations under exceptional circumstances. In sub-Saharan African jurisdictions, where colonial legal systems have been overlaid with constitutional protections and public interest doctrines, courts may invoke equitable principles or constitutional mandates to temper strict enforcement. Similarly, Latin American countries often adopt civil law structures but infuse contract law with *social function* doctrine, allowing intervention in contractual relations when societal welfare is imperiled. These legal hybrids signal a broader willingness to reframe private obligations in light of communal and distributive considerations.

This comparative analysis reveals that the legal weight and flexibility of force majeure clauses vary not merely by textual content but by underlying legal culture and institutional philosophy. Civil law systems tend to prioritize

equilibrium and judicial intervention, while common law systems emphasize risk allocation and doctrinal restraint. Hybrid jurisdictions navigate between these poles, integrating traditional norms and constitutional mandates into commercial adjudication. In the post-pandemic landscape, these divergent orientations significantly shape the ability of parties to invoke force majeure as a shield against liability, and more broadly, reflect competing visions of how legal systems mediate private rights in the face of collective crisis.

CONCLUSION & THE WAY FORWARD

The COVID-19 pandemic has operated as a legal crucible, exposing the inherent fragility and rigidity of conventional force majeure doctrines within both common and civil law systems. Courts have been compelled to interrogate the contours of impossibility, foreseeability, and causation with unprecedented granularity, often revealing a doctrinal tension between contractual sanctity and commercial fairness. While some jurisdictions adhered strictly to textualist interpretations, others invoked equitable considerations to relieve obligors from strict performance. The result is a fragmented jurisprudential landscape, one that underscores the inadequacy of boilerplate clauses in addressing systemic, long-tail events. Going forward, a recalibration of force majeure drafting practices is imperative, emphasizing precise enumeration of contingencies, calibrated thresholds of impact, and built-in mechanisms for renegotiation or adaptation. Legal systems must also consider harmonization efforts, possibly through transnational soft law instruments or model clauses, to foster predictability in global commerce. Hence, the post-pandemic commercial order demands a more resilient contractual architecture, one that balances the enduring force of legal obligation against the exceptional gravity of unforeseeable impossibility.

REFERENCES

1. Brunner, C. (2009). *Force Majeure and Hardship under General Contract Principles*. Kluwer Law International.
2. Davies, P. S. (2021). Force majeure and frustration in English law after COVID-19. *Law Quarterly Review*, 137(4), 571–593.
3. Eidenmüller, H., & Wagner, G. (2020). COVID-19 and the role of force majeure in contract law. *Journal of Contract Law*, 36(2), 1–21.
4. Farnsworth, E. A. (1990). *Contracts* (3rd ed.). Boston: Little, Brown and Company.
5. Gertz, R. (2021). The uncertain future of commercial contracts: Lessons from the pandemic. *International Trade Law & Regulation*, 27(1), 45–52.
6. Han, S. (2020). Pandemic clauses and contractual design post-COVID. *Journal of Law and Commerce*, 39(1), 1–24.
7. Heller, M., & Beale, H. (2021). Contract law in the post-pandemic world: Rethinking risk and renegotiation. *Modern Law Review*, 84(5), 891–914. <https://doi.org/10.1111/1468-2230.12618>.
8. Kelly, C. R. (2020). Contractual obligations in the time of coronavirus: Commercial frustration and force majeure in practice. *Business Law Review*, 41(6), 202–208.
9. McKendrick, E. (2013). *Contract Law* (10th ed.). London: Palgrave Macmillan.
10. Ruhl, J. B., & Katz, D. M. (2020). Risk management in contract drafting: Force majeure in the pandemic era. *Harvard Business Law Review Online*, 10, 43–55.
11. Schwenzer, I., & Hachem, P. (2020). Force majeure and hardship in the age of corona: A transnational perspective. *Uniform Law Review*, 25(3), 431–444. <https://doi.org/10.1093/ulr/unaa030>.
12. Treitel, G. H. (2003). *Frustration and Force Majeure* (2nd ed.). London: Sweet & Maxwell.
13. UNIDROIT. (2016). *UNIDROIT Principles of International Commercial Contracts 2016*. Rome: International Institute for the Unification of Private Law.
14. Zhang, M. (2021). The Chinese experience with force majeure under COVID-19: Comparative insights. *Asian Journal of Comparative Law*, 16(1), 87–103. <https://doi.org/10.1017/asjcl.2021.5>.
15. Ziegler, K. S. (2020). Global supply chains and COVID-19: Rethinking force majeure. *European Journal of International Law*, 31(3), 823–837.