

# De Jure

July 9, 2012

The importance of force majeure clauses in contracts



---

# Force majeure – a superior clause in its true sense

**" operates to discharge a contracting party when event is beyond the control of either party "**

Force Majeure is a legal concept that originated in civil law systems and has migrated through the contract matrix into agreements governed by common law. Force majeure is a clause commonly found in commercial agreements. The importance of this clause is often over-looked and dismissed as 'boilerplate' or 'standard wording' clause near the end of the contract.

## Force majeure

Force majeure is not a mere French version of the Latin expression "*vis major*" and strikes, breakdown of machinery and such thing which though normally not included in "*vis major*" are included in force majeure. The expression force majeure is taken from the Code Napoleon and has a more extensive meaning than "Act of God" or "*vis major*", though it may be doubtful whether it includes all "causes you cannot prevent and for which you are not responsible".

The doctrine of force majeure usually distinguishes between events of force majeure produced by natural causes and those caused by human behaviour. Under civil law, those events that are the result of natural causes are referred to as "Acts of God" while force majeure events caused by humans through the exercise of governmental

power are known as 'Acts of the State'.

An act of God or force majeure clause generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond the control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill.

## Purpose of force majeure clause

Where reference is made to "force majeure" the intention is to save the performing party from the consequences of anything of the nature stated above or over which the performing party has no control.

However, force majeure is not intended to excuse negligence or other malfeasance of a party, as where non-performance is caused by the usual and natural consequences of external forces, or where the intervening circumstances are specifically contemplated.

The elements of force majeure are that (a) it must proceed from a cause not brought about by the defaulting party's default; (b) the cause must be inevitable and unforeseeable; and (c) the cause must make execution of the contract wholly impossible.

---

If you would like to know more about the subject covered in this publication or our services, please contact us at [shisham@rajaniassociates.net](mailto:shisham@rajaniassociates.net).

---

## Doctrine of frustration

A common misconception is that the parties to a contract will be automatically relieved from performing their obligations if some kind of disaster occurs. However, the doctrine of 'frustration' under the Indian Contract Act, 1872 only provides the parties with limited remedies and applies where performance is rendered impossible.

Impossibility can be either initial impossibility or subsequent impossibility. In either case the contract becomes void. The doctrine of frustration comes into play when the performance is physically cut off, or when the object of contract has failed. If the inability to perform the contract is due to the fault of one of the parties, the party cannot plead frustration. There is also no frustration where performance of the contract remains physically and legally possible though commercially unprofitable. The law is well settled that mere commercial impossibility will not excuse a party from performing the contract.

## Force majeure and frustration

Force majeure clauses and the doctrine of frustration are similar in that they deal with occurrences beyond the control of parties to an agreement.

Frustration requires that the entire subject matter or underlying rationale for the contract be destroyed. It normally operates to permanently relieve parties from all of their contractual obligations, including those to perform and to pay. Force majeure clauses, on the other hand, permit a much greater degree of flexibility. The occurrence, giving rise to relief can be defined with greater certainty and the entire

rationale or subject matter of the contract need not be destroyed in order for force majeure to operate.

Force majeure may also be temporary, allowing the parties to maintain their contractual arrangements once the event passes or is remedied. As a term negotiated between parties, a force majeure clause can respond to occurrences that cannot be prevented while still maintaining certain contractual obligations, such as those relating to payment, and temporarily suspending certain others, such as the delivery of product.

Force majeure clauses can also prescribe differing consequences depending on the nature or type of force majeure event. Whereas the doctrine of frustration is a blunt instrument that permanently ends all contractual obligations, a carefully crafted force majeure clause is capable of responding to the same events in a more predictable and equitable manner, while maintaining the contractual relationship between the parties.

## Drafting of force majeure clause

Force majeure clauses envisage eventualities beyond the control of contracting parties. Such clauses are of two types: open and close ended. Close-ended clauses specify the exact events that constitute force majeure. The heart of the clause is a "laundry list" of potential occurrences that are considered to be force majeure. However, in an open-ended clause, the parties simply narrate what generally constitute force majeure situations and add "*and such other acts or events that are beyond the control of parties*".

-Shisham Priyadarshini, Ritika Modee

**"Doctrine of Frustration provides limited remedies"**

---

---

## Our View

We conclude that due to the risks involved in relying on the law of frustration, it is essential to ensure a strong force majeure clause in the agreement. Since the concept of force majeure is not embedded as a principle of law, the clause for force majeure must be clearly set out in the agreement. This means that the power of a force majeure clause is found in the drafted words.

---

---

### AREAS OF PRACTICE

| Capital Markets | Private Equity | Mergers and Acquisitions | Corporate Litigation & Arbitration | Projects |  
| Real Estate & Trust | Corporate & Commercial | Banking & Finance | Structuring |

---

### DISCLAIMER

*This update only contains a summary/ limited description of the topic dealt with hereinabove for general information purposes and should not be construed as a legal opinion or be relied upon in absence of specific legal advice. For further information or legal advice please feel free to contact us at the addresses set out herein.  
For Private Circulation Only*

---

## CONTACT US

**Address:** 204-207 Krishna Chambers  
59 New Marine Lines  
Churchgate Mumbai 400020  
Maharashtra, India

**Telephone:** (+91-22)-40961000

**Facsimile:** (+91-22)- 40961010

**Email:** [dejure@rajaniassociates.net](mailto:dejure@rajaniassociates.net)

---