

FORCE MAJEURE CLAUSES IN COMMERCIAL CONTRACTS

General considerations

- > In contractual relations, the rule is that parties must respect the contract and perform their contractual obligations. However, there are cases where a party is prevented from performing by events beyond its control, as in the case of Force Majeure events.
- > Commercial contracts often include a Force Majeure clause setting out requirements for establishing the existence of a Force Majeure (FM) event—an event or circumstance that prevents or impedes a party’s performance of its contractual duties.
- > FM clauses will vary from contract to contract, and it is important to check the specifics of your clause.
- > In the absence of an FM provision in a contract, the law applicable to the contract will be relevant and parties would be well advised to seek legal assistance for guidance. The concept of FM is not universally recognized, and different legal systems provide different solutions where an impediment prevents performance of a commercial contract.
- > FM clauses generally share some fundamental characteristics. (See, for example, the ICC Model Force Majeure Clause 2020 (<https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/>), which is a balanced model that can be a useful reference for drafting future contracts and offers users a choice of a short or long form.)
- > The underlying test for many FM clauses requires the party invoking the clause to prove that
 - the impediment is beyond the party’s control;
 - the impediment could not reasonably have been foreseen when the contract was concluded; and
 - the effects of the impediment could not have been avoided or overcome by the party.
- > If a party to a commercial contract successfully invokes—or ‘calls’— an FM clause after giving timely notice of the FM event, that party is typically relieved of
 - its duty to perform its impeded contractual obligations, and
 - liability for damages for breach of contract,during the period that the FM event prevents contractual performance. The other party to the contract may also be permitted to suspend contractual performance once it has received timely notice of the FM event from the party invoking the clause.
- > The ICC Model Force Majeure Clause 2020 (<https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/>) provides that plague and epidemic are examples of presumed impediments that trigger the use of the clause; regarding such a presumed impediment, the party invoking the clause need prove only that it could not have been avoided or overcome. The ICC Model Force Majeure Clause of 2003 took a similar approach.
- > ICC’s model contracts generally either refer to the ICC model FM clause itself or, as in the case of the ICC Model International Sale Contract, contain FM clauses based on the ICC model clause.