

INVOKING OR RESPONDING TO FORCE MAJEURE

March 2026

Recent geopolitical instability, including conflict across the Middle East and the effective closure of the Strait of Hormuz, has brought uncertainty and a heightened risk of supply chain disruption. In times of crisis, force majeure comes to the fore.

QatarEnergy and Bapco Energies have recently declared force majeure on deliveries, and it is reported that several major energy traders have, in turn, invoked force majeure in their downstream supply contracts. While force majeure clauses may offer contracting parties relief in response to an unexpected turn of events, it is crucial that parties carefully consider the terms of their contracts when invoking or responding to force majeure.

DEFINING FORCE MAJEURE

Force majeure is related to, but distinct from, the common law doctrine of frustration, which provides that a contract may be discharged when events following its formation make performance of the contract physically or commercially impossible or radically transform the obligation to perform. Suffice it to say, the doctrine of frustration is narrowly construed and rarely applies in practice. Where parties expressly allocate risk, it is likely that the contract (rather than the common law doctrine) will determine the consequences of an unexpected event.

There is no doctrine of force majeure in English law; instead, “force majeure” describes a clause setting out contractual rights and remedies arising in certain circumstances. The scope, triggers and consequences of invoking a force majeure clause depend on its drafting.

Force majeure events are often defined by reference to events or circumstances that are beyond the parties’ control and could not have been foreseen when entering into the contract. Definitions may, however, be limited to (or otherwise expressly include or exclude) particular events or circumstances. Even if a particular event (such as war) is expressly identified, it may need to satisfy other criteria to constitute force majeure.

THE IMPACT OF FORCE MAJEURE

Force majeure clauses typically require a causal connection between the force majeure event and the effect on a contracting party’s performance. The words used to identify the relevant impact are crucial: a clause that applies only where force majeure has *prevented* a party from performing sets a considerably higher bar for relief than a clause that applies where performance has been *hindered* or *delayed*.

If a clause excuses non-performance only where performance has been prevented by force majeure, it may be construed such that it applies only where it has become physically or legally impossible (rather than substantially more difficult) for the affected party to perform its obligations.

OVERCOMING FORCE MAJEURE

Force majeure clauses commonly contain a proviso requiring the affected party to exercise reasonable endeavours to avoid or overcome force majeure. In other words, a party may be unable to invoke force majeure where it could have avoided or overcome its impact by taking reasonable steps.

As our previous [client briefing](#) notes, the UK Supreme Court recently held that the requirement on a party to use reasonable endeavours to overcome a force majeure event does not require that party to accept an offer of non-contractual performance (that is, to accept performance otherwise than in accordance with the contract).

CONSEQUENCES OF FORCE MAJEURE

The consequences of force majeure depend on the clause's drafting. Although a force majeure clause may give rise to a contractual termination right (usually after a specified period), it is common for force majeure to suspend or vary the contract while the force majeure event continues, and the contract may provide for extensions of time. The obligations do not generally fall away and are, instead, reactivated once the force majeure event ceases.

Parties should, however, carefully consider how any force majeure clause interacts with other provisions of the contract. As well as termination rights, parties should consider any sole and exclusive remedies, price adjustment, cost allocation or cumulative rights provisions, for example.

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Parties seeking to rely on force majeure, or in receipt of a force majeure notice, should carefully consider the requirements of their contract.

Notice provisions may operate as a condition precedent to relief. If, as is often the case, the contract requires force majeure events to be causative of a party's default for it to be entitled to relief, that party will need to prove that it was able and willing to perform its contractual obligations but for the claimed event of force majeure. It may also need to evidence the steps it took to avoid or overcome the impact of that force majeure event.

KEY CONTACTS

If you would like to discuss any of the above in more detail, please speak to your usual Slaughter and May contact.



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