



ADVISORY ON *FORCE MAJEURE* IN COMMERCIAL CONTRACTS

1. *Force Majeure* is not an independent doctrine. It does not exist outside the contract. Therefore, it must be stipulated in your Contract, in order to invoke it.
2. If there is a *Force Majeure* Clause in your Contract, identify the event specified in the clause which has given rise to an impediment to perform the Contract.
3. Review your obligations and rights and liabilities under the Contract.
4. Assess whether your pending performance/obligation under the Contract has been substantially or significantly impacted by the identified event in the Clause ?



5. Check the degree of non-performance specified in the Clause whether the supervening event has 'prevented' you from performing the Contract or merely 'disrupted' or 'interrupted' the performance of the Contract. Has the performance become impractical or impossible ?
6. Seek advice from MKA for interpretation and timely invocation of *Force Majeure* clause under your Contract.
7. *Force Majeure* requires the party invoking the Clause to take reasonable steps to mitigate the effect through an alternate mode of performance, and duly document the same.



8. Check the consequences prescribed on invocation of the *Force Majeure* Clause. In practice most *Force Majeure* clauses do not excuse a party's non-performance entirely, but only suspends it for the duration of the Force majeure and accordingly the time for the performance stands suitably extended.
9. You may also review the terms of your existing insurance policies covering commercial risks and their applicability to the supervening event. This may require seeking assistance from your insurance broker or external consultants.
10. If you are faced with a claim for *Force Majeure* from a counter party, consider both, the precise terms and scope of the contractual clause (of force majeure) asserted and the reasons for non-performance of obligations (such as government orders imposing import/transportation restrictions). Thereafter, duly respond to the claim either with acceptance or rejection thereof after seeking counsel from MKA.



CAVEATS

1. There must be a valid and subsisting Contract between the parties.
2. There must be some part of the Contract yet to be performed.
3. The *Force Majeure* Clause in the Contract should be strictly and narrowly construed.
4. Circulars/notifications issued by the government departments/ bodies not to be considered as binding to categorize the outbreak of COVID-19 as a force majeure event for every and any contract.
5. The supervening event must be beyond the control of the parties.



6. In cases where *force majeure* is invoked, the notification should not be inadequate in providing details of the impact of the force majeure event (in this case, pandemic) and reasons for non-performance of obligations.
7. Invocation of *force majeure* must not be premature. Notice invoking *force majeure* should not be sent before undertaking a correct assessment of impact and reasons for non-performance of obligations.
8. Specific timelines under the contract should be strictly followed for triggering *force majeure*.
9. Non-performance of the obligations should not be existing prior to the occurrence of *force majeure* event.