

A photograph of two F-35 fighter jets in flight against a clear blue sky. The jet in the foreground is banking to the left, leaving a white smoke trail. The second jet is visible in the background to the right.

INSIGHTS

Force Majeure or Frustration: What This War Means For Your Contracts

Introduction

We have seen it happen before, from the crises of 2009 to COVID 2019, and now headlines across news channels: contracts become hard or impossible to perform, lawyers review contracts, and parties invoke “force majeure”.

But word on the so called (wall) street is that everyone is beginning to think they can now invoke force majeure to excuse either their own non-performance or those who are receiving notices of force majeure from their counter parties excusing non-performance, are befuddled and think they have already lost their right.

But like everything else in law and contract, it is never that simple. It is not hard. Because everything becomes simple when and if you understand it. If QatarEnergy has invoked force majeure, or anyone else you’ve heard of, they have invoked force majeure for their specific contracts — which you have not read.

So, here is the question: can you invoke force majeure and have the performance of your contractual obligations delayed, excused, or down right terminated?

Conversely, can you respond with a strong and brutal “no sir, you can’t” to the counterparty that tries to invoke force majeure against you?

What is force majeure?

We have written an article on what is force majeure. For its brevity, it has been rather disproportionately appreciated, widely circulated in academic circles, and cited in graduate papers.

But summarily speaking here is the key extracts:

A force-majeure event, when it occurs, excuses performance of the contract despite its express provisions obligating the parties to perform. It is one of the several other exceptions that excuse the parties from the performance of the contract.

If the force majeure clause specifically covers the relying event, then the parties have a better chance to excuse themselves of further obligations as they have explicitly agreed in the contract to this condition. A court would uphold the sanctity of the contract and the freedom of the parties to define the parameters of their obligations as they see fit. The court cannot go contrary to explicit clauses to make the contractual bargain fairer.



The Event of War

In the present situation, the “force majeure” event we are going to grapple in this article is the US-Israel war with the Islamic Republic of Iran. Hereinafter we will refer to this war as the “**Event of War**”.

In this article we will analyze whether this specific Event of War amounts to force majeure or otherwise permits the excuse of performance of contractual obligations, and to what extent and in what circumstances.

The timing of the Contract

Contracts entered before 28th February 2026 would be able to invoke the force majeure clause. Contracts made amid the war and the ensuing events cannot later rely on those same events to excuse performance. When a commercial party enters into an agreement, it is deemed to have accepted to perform its obligations in the circumstances and facts that exist at that time and should be in the knowledge of a reasonable commercial contracting party.

The wording of the Contract

Force-majeure is purely a creation of a contract, thereby entailing an application of the general principles of contractual interpretation.

Question 1: Is the impact of the ongoing war between Israel, USA against Iran covered by the force majeure clause in your agreement?

War is very often specifically defined as an event of force majeure in most contracts that contain a force majeure clause. Nearly every agreement which includes a force majeure clause has “war” as the second or third in the list of events and circumstances that qualify as an event of force majeure.

Question 2: is the current Event of War (capitalized as defined above) direct and relevant to your contract?

There is always a war going somewhere in the world these days. Could everyone in the world since the start of Ukraine war in 2022 have the right to excuse performance of their contractual obligations or accept refusal of performance by their counter parties if they invoked force majeure under the name of the Ukraine war?

No.

Invoking the Event of War as a force majeure event, would then require you to prove “causation”. Has the Event of War directly affected the performance of the obligation being excused?

Once again, the wording of the contract becomes relevant. For example, if your contract states:

“If a party is unable to perform any of the obligations under this contract as a result of force majeure”

The question of causation becomes more stringent, because it is important to show whether the war in question, “*direct cause*” which makes the contracting party “*unable to perform*” its contractual obligation. [emphasis added].

Being unable to perform requires a certain degree of impossibility, not just mere inconvenience or hardship in performing the obligation.

Alternatively, your agreement could read:

“If any of the events of force majeure occur, the contracting parties will be excused from the performance of their obligations under the contract”.

Technically, under this agreement’s wording, any war anywhere in the world can then excuse performance of your agreement. But that interpretation would be just oxymoron to the concept of entering into a contract.

Therefore, obligation could be excused by first proving a reasonable nexus between the Event of War and the obligation; and then showing that a reasonable level of negative impact of the Event of War and the performance of the obligation. In this case, total impossibility may not be required to prove.

Contracts without a force majeure clause

If your agreement is not extensively drafted or formally agreed in writing at all, performance can still be legally excused under two principles of contract laws.

If your contract does not have a force majeure clause that mentions war or even if mentioned, if the application of this specific Event Of War and its impact on your contract is disputed by the counter party, then depending on the governing of your contract either:

- the common law concept of frustration would apply; or
- the civil code application of force majeure under the specific civil codes of the country whose law governs the contract would apply.

The Civil Law: Impossibility of Performance

The civil law and the legal principle of 'impossibility of performance' found in most civil codes in civil law jurisdictions like that of France, UAE, Qatar, KSA and others.

UAE Civil Code

The UAE Civil Code requires impossibility:

Article 273 (1) In bilateral contracts, if a force majeure arises that makes the performance of the obligation impossible, the corresponding obligation shall, be extinguished and the contract ipso facto rescinded.

Article 273 (2) If the impossibility is partial, the consideration for the impossible part shall be extinguished. This shall also apply on the provisional impossibility in continuous contracts.

In practice, its application by Courts is akin to the French Civil Code which requires no less than three criteria to be satisfied before an event can be considered one of force majeure::

(a) Unpredictability: If the event could be foreseen at the time of entering into the contract, it should have been provided for in the contract, and the relying party is expected to have prepared for it or insert such event in the definition of force majeure under the contract. A party's failure to specify a foreseeable risk gives an assumption that the party intended to take such risk at the time of entering the contract.

(b) Externality: The event must not be attributable to the fault of the relying party, and the relying party must have had nothing to do with its occurrence.

(c) Irresistibility: The event must be insurmountable, and the relying party could not have done anything to mitigate it or avoid its occurrence. Financial difficulty or economic hardship does not excuse non-performance as contracting parties are expected to have reasonable business acumen and are expected to have calculated the economic risks of entering into contractual obligations.

The Common Law: Frustration of Contract

If your contract is governed by English law or the law of the country where common law's concept of frustration exists or even co-exists with the concept of impossibility of force majeure, the principle of Frustration of Contract would apply. Common law requires a precedent based analysis of facts and caselaw.

Key principle that emerges from the caselaw is that a supervening event, in our case, the Event Of War, shall frustrate a contract only if it renders "*performance impossible or fundamentally different*" from what was agreed, not merely more expensive, slower, or commercially disadvantageous. [emphasis added].

Shipping, Sale and Charterparty Agreements

Shipping, sale of goods, and charterparty obligations may remain enforceable despite massive cost increases.

A good parallel between the current situation arising from the current blockage of the Strait of Hormuz and the closure of the Suez Canal in 1956 (the Suez Crisis).

The Suez Crises and Leading Cases

The Suez Crisis resulted in significant litigation in English contract law regarding the doctrine of frustration, specifically concerning whether a contract is terminated when an alternative, albeit more expensive or longer, route is available. The courts generally held that increased cost or difficulty did not constitute frustration.

Verdict: The House of Lords held that the contract was not frustrated. Even though both parties likely contemplated the route via Suez, the agreement did not specifically and expressly mention that the shipment must take the Suez route. Therefore, the contractual obligation, being the delivery of goods, was not impossible to perform. The shipment could have been carried via the Cape of Good Hope; and the contractual obligation could be performed, even if its performance would become more expensive.

This principle has repeatedly been used in shipping disputes involving, canal closures, war zones, piracy routes and sanctions rerouting.



The Blockade of the Strait of Hormuz

In the current Event Of War, Iran has made it nearly impossible for ships to cross the Strait of Hormuz.

Hormuz is one of the world's most critical maritime chokepoints, especially for oil and LNG shipments. If it were blocked or severely restricted, the legal analysis in many contracts would resemble the reasoning in the Suez Canal example.

The courts will determine on a deeply specific case by case basis whether alternative routes remain available for delivery impossibility.

For example, in the case of Suez closure, the courts ruled that ships could sail around Africa. Similarly in the case of Hormuz closure, depending on the wording of the obligation agreed under the agreement, and whether tankers could theoretically load elsewhere, reroute pipelines, or use alternative export terminals will all become points of factual contention.

Distinguishing Factors in this Event of War

Modern contracts specifically address events such as this Event of War

Given the rise in global trade and global events such as wars and conflicts, nearly all modern contracts, especially those related to freight and cargo of goods, to nearly all oil and gas contracts, whether upstream or downstream, include specific clauses that expressly address wars, canal closures, blockades etc. accordingly reliance on the law (whether under civil law or common law) may not be necessary.

If such clauses allow termination or suspension upon closure of a chokepoint, the outcome differs from the case of the Suez Canal closure. Without them, the court may still require performance via any feasible route.

How the situation is impossible for Gulf Countries:

Unlike our Suez Canal Crises example where the question before the courts concerned the choice, convenience and cost of one shipping route over another, in this present Event of War some cargoes physically cannot exit the Gulf without that strait.

This is truer for oil and gas contracts than any other sector which is affected. Oil and LNG contracts depend on fixed infrastructure: pipelines, liquefaction facilities, export terminals, specific maritime chokepoints etc.

If any of these become unavailable, performance may become physically impossible, not merely more expensive.

If oil loaded in the Persian Gulf cannot reach open ocean at all, the situation could cross the Suez Canal case threshold and become true impossibility, potentially frustrating the contract.

So, what do we learn from it?

Whether force majeure or its English equivalent of Frustration applies to your case the outcome depends on a case-by-case basis.

In the case of Force Majeure, from the UAE Civil Code standpoint, it requires a high degree of burden of proof to show that the impact made the performance impossible, and it was neither foreseeable that it would happen nor resistible.

In the case of Frustration, the Event Of War must have rendered performance of your or your counter-party's obligation impossible or radically different from what was contracted, not just more onerous or expensive.

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