The Legal 500 Country Comparative Guides

Cyprus: Force Majeure

This country-specific Q&A provides an overview of force majeure laws and regulations applicable in Cyprus.

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1. **Is there a legal definition of force majeure in your jurisdiction?**

   No. There is no statutory definition of "*Force Majeure*" in Cyprus. Cyprus is a common law jurisdiction and the term has not been universally recognised or defined in common law jurisdictions.

2. **If there is not, give a brief overview of this concept.**

   Although Force Majeure has not been defined in law, some guidance as to its definition can be found in the case law of the Courts of Cyprus which follow common law principles on the issue of Force Majeure. Force Majeure comes into play when an unforeseeable event, outside the control of parties to a contract, prevents one or both parties from fulfilling their contractual obligations. Force Majeure operates either through the doctrine of Frustration or by specific provisions within the contract of the parties themselves, the Force Majeure Clauses.

   Force Majeure clauses allocate risk between parties to a contract when performance of contractual obligations becomes impossible due to the occurrence of such an event. In practice, it excuses one or both parties from non-performance of contractual obligations, but it does not necessarily imply the immediate termination of the contract. Due to the fact that Force Majeure may only be invoked if explicitly covered in the contract, the consequences of such event occurring will be set out in the contract itself. Hence, the Courts are tasked with examining the wording of the agreement to ensure that facts of a specific case fall within the ambit of a Force Majeure clause and to assess the intentions of the parties when contracting. A Force Majeure clause commonly provides for the obligations of one, or both parties, to be suspended and/or for the time within which they should be performed extended and/or delayed and/or even be altogether excused.

   In the first instance case of ***Demetris Gerolemou a.o v. Giovani Developers Limited a.o. Action No. 801/2012, 08/01/2018,*** the Court defined "Force Majeure" by relying on the English case ***Greenock Corp. v Caledonian Ry (1917) A.C.556***, as a "random and unpredictable event that falls outside the human factor and could not be reasonably predicted".

   If an appropriate force majeure clause has not been inserted in a contract, a party would be unable to rely on an event of Force majeure, save where such an event leads to a frustration of the contract. The doctrine of frustration is a common law principle which has been transplanted and codified into Cyprus Law under section 56 of the Cyprus Contract Law (Cap. 149) and states that a contract will be deemed automatically discharged where it becomes illegal or otherwise impossible to perform (by an event unforeseeable at the time of contract). However, if performing the contract would be merely financially undesirable, a party will not be able to argue that the contract is frustrated and therefore terminated immediately.

3. **Does force majeure allow a party to suspend its obligations? If yes, for how long?**

   A party to a contract will be allowed to suspend his obligations depending on the wording of the Force Majeure clause. Most often, Force Majeure clauses specify whether contractual obligations are to be suspended and if so for how long. Usually, it will be for as long as Force Majeure lasts and hinders the parties' ability to perform their contractual obligations.

   In practice, most Force Majeure clauses are of a suspensory nature and the contract is taken to resume once the Force Majeure incident comes to an end, unless the parties agree otherwise.

   On the other hand, if the event causing the inability to perform amounts to frustration of the contract then the contract is automatically discharged and both parties excused from performing.

4. **Does force majeure allow a party to totally or partially avoid liability for failure or delay in performing its obligations?**

   Liability of a party to a contract will depend on the content of the Force Majeure clause and what is provided under the clause and the contract between the parties in general. In most instances, it is common that such Force Majeure clauses are specifically inserted in a contract with the intention of avoiding liability for such pre-defined Force Majeure events that may occur and will allow the party relying on them to either suspend performance or be excused all together.

   An event amounting to frustration will allow a party to completely avoid liability.

5. **Does force majeure give a party the potential right to terminate the contract?**

   This will again depend on the wording of a Force Majeure clause and the circumstances surrounding the termination. A careful examination of the contract will be necessary because such "Force Majeure clauses", depending on the nature of the agreement, may be included under broader headings (for example under a termination clause).

   Nonetheless, in practice, Force Majeure clauses usually provide for the suspension of contractual obligations and/or extension of performance periods and can rarely be relied upon to terminate altogether an agreement unless this is explicitly provided for in the contract. In common law systems, including Cyprus, the doctrine of frustration, also defined under Cyprus Contract Law, is more frequently relied on as a basis for the termination of a contract as if applicable will automatically terminate the contract.

6. **Is the concept of force majeure enshrined in legislation?**

Not as such. There is no provision in Contracts Law, Cap.149 referring to the principle of Force Majeure. It is worth mentioning that other principles similar to force majeure have been codified into Cypriot legislation. For example, the doctrine of frustration is covered in **section 56(2) of Cap. 149:**

"a contract to do an act which, after the contract is made, becomes impossible, or by reason of some event, which the promisor could not prevent, becomes unlawful, shall be considered to be void when the act becomes impossible or unlawful".

7. **Would the courts be willing to imply force majeure terms into contracts?**

No. Common law does not automatically apply the principles of Force Majeure to contracts. In order for Force Majeure to be invoked it needs to be covered in a clause of the contract. Many commercial contracts include "Force Majeure clauses" either as a separate clause itself or equal wording is included within other clauses (i.e. termination clause).

8. **How do courts approach the exercise of interpretation in relation to force majeure clauses?**

The approach taken by Cyprus courts, which follows the English Court approach, is to apply a narrow scope for the interpretation of Force Majeure clauses. A party which relies on Force Majeure clause to avoid the performance of contractual obligations due to an increase in costs or difficulty tends to be discouraged by the Courts. This is also due to the fact that Force Majeure belongs in the category of exclusion or limitation clauses; hence it should be narrowly construed, as per relevant caselaw (*National Bank of Kazakhstan and another v The Bank of New York Mellon SA/NV*, London Branch [2018] EWCA Civ 1390).

Indeed, most Force Majeure clauses will specifically describe what shall constitute a Force Majeure event in the context of the specific contract and what it shall cover. Often, an exhaustive list of specific events amounting to Force Majeure is included to ensure that the clause is descriptive enough to reveal the intentions of the parties. It is not uncommon however to have a Force Majeure clause that is broader and/or non-exhaustive. Nonetheless, it is not clear whether or not the Courts will be willing to apply interpretation principles in trying to assess whether or not an incident amounts to Force Majeure under a contract.

Guided by Cypriot caselaw, in ***Cyprus Cinema & Theatre Co. Ltd v. Christodoulos Karmiotis (1967) 1 CLR 42*** the Court refused to interpret facts as falling within the term of "Force Majeure" because the relevant clause of the contract did not refer to such circumstances.

In order to avoid liability and ensure that risk is properly allocated during the occurrence of such events, it is advisable to include precise and specific Force Majeure clauses.

9. **What types of events are generally recognized by courts of your jurisdiction as being force majeure?**

Most Force Majeure clauses included in commercial contracts include a list of specific events that would qualify as Force Majeure under the specific contract. Such events include but are not limited to wars, earthquakes, hurricanes, floods, typhoons, riots, governmental prohibitions, epidemics or the more general reference to "acts of God" but can also include strikes or shortage of labour and materials, especially in construction contracts.

It is useful to highlight the English case of ***Lebeaupin v Richard Crispin and Company*** [1920] 2 KB 714**,** which is often relied upon by Cyprus Courts, where the High Court undertook a useful review of previous authorities and, by way of example, contrasted war, strikes, actions of a state such as embargoes and licence refusal, all of which may amount to Force Majeure, with bad weather, funerals and the rising cost of fulfilling a contract, which will not constitute Force Majeure.

10. **What types of events have been dismissed by courts of your jurisdiction as being force majeure?**

In ***Cyprus Cinema (discussed above)*** the Court had to interpret a clause of a contract providing for Force Majeure. The clause provided that

"if any "injury or damage" is caused by fire or other force majeure to the premises which would prevent the holding of cinema performances, the tenant has two options: (a) either to rescind the contract-and in the present case there is not rescission or disclaimer of the lease; or (b) to continue the lease without payment of any rent for the period during which the premises will be under repair (the landlord having covenanted to carry out such repairs) or, during the period that such premises will be closed."

The Court had to consider whether in the case of Force Majeure (excluding fire which was explicitly stated in the clause) the phrase "injury, damage or other Force Majeure" referred to not only structural damage of the building but could also cover the case where the premises were occupied by military forces which prevented the holding of cinema performances. The Court held that *"If we were to hold so it would be straining the meaning of the words in their context in clause 6 beyond breaking point. We lay stress on the meaning of the words in their context, and in this case the expression "Force Majeure" (we note that the Greek equivalent of the term had been used which offers no legal certainty) following the word "fire" in clause 6 can only mean an Act of God, that is, the operation of uncontrollable natural forces, such as an earthquake, flood, storm or lightning, which could not happen by the intervention of man. For these reasons we hold against the appellant on the first ground."*

Furthermore, in ***Gerolemou (discussed above)*** the Court refused to recognise economic considerations as falling within the ambit of a Force Majeure clause. In this case, a contract provided that if the completion and delivery of apartments did not take place within the

period prescribed in the contract due to a serious and justified reasons or due to Force Majeure, the buyers would be entitled to an extension of the completion date of the project for as long as Force Majeure lasts. If it was to last more than 12 months, each party would be entitled to terminate the contract and in such a case, if a dispute existed, it would be referred to arbitration. The Court held that the disputed contract did not include a term or a condition that the execution of the project by Defendant 1 depended on receiving loans from banks and thus the suspension of lending due to an economic crisis could not fall within the ambit of "Force Majeure". It referred to, inter alia, case law by the Courts of Greece to substantiate the position that Force Majeure does not occur in the event that the claim falls within the scope of business activity and in its sphere of risk, as this was foreseeable and within common experience of business and could thus be addressed.

11. **Have courts recognized the COVID-19 pandemic as force majeure in your jurisdiction?**

No judgements from Cypriot Courts have been issued yet that provide any guidance on this issue. However, since COVID-19 has been declared by the World Health Organisation as a pandemic, it is likely to fall under the categories of "pandemia" or "epidemia" in a Force Majeure clause, provided that these are explicitly included in the clause. In addition to those, the consequences of COVID-19 may also fall under the category of "governmental acts" because measures have been put in place by governmental decrees or other emergency legislation that hinder certain activities such as travel restriction, prohibition of movement, imposed closing down of business etc. Of course, even if COVID-19 qualifies as Force Majeure it will have to be proven that COVID-19 affected or hindered the performance of contractual obligations as per the wording of the clause, and that possible steps to mitigate losses were taken.

12. **Would a governmental decision or announcement that an event is a force majeure influence courts of your jurisdiction (e.g. force majeure certificates provided by the Chinese Government to Chinese companies during the covid19 pandemic)?**

As discussed above under question 11, certain businesses have been directly affected by the COVID-19 pandemic. For example, restaurants and shops were ordered to remain closed for public health reasons for a certain period of time. To this effect, it is likely that these emergency government measures will influence Court decisions as the inability to perform a contract by a party was arguably in certain cases imposed by Law. However, we do not expect that the government will specifically designate this pandemic as a force majeure event. Common law jurisdictions in general do not depend on government designations as the Courts will take recent events into account and the caselaw guiding Force Majeure will evolve accordingly, and provide enhanced guidance for the future, as the circumstances of each case brought before the Courts are examined. We expect that Courts will examine the nature and extent of the government measures introduced on a case by case scenario, as those affected some businesses more than others.

13. **What is the approach taken to drafting force majeure clauses in your jurisdiction?**

Force Majeure clauses need to be as specific and detailed as possible to ensure proper allocation of risk in the event that such a Force Majeure event occurs but also to ensure that both parties agree to the events that would qualify as Force Majeure if they occur. It is imperative to include (a) what Force Majeure means under the contract especially given the lack of a universally accepted or statutory definition (b) a list of events that would qualify as Force Majeure and/or events that would not qualify (c) provisions describing is the remedies and action to be taken following a Force Majeure event. For instance, whether contractual obligations will be suspended, extended or excused and for how long and where the termination of the contract is automatic after the expiration thereof, and to ensure that the terminating party is provided with a remedy in some form.

14. **Is it common practice to include force majeure clauses in commercial contracts?**

Force Majeure clauses are usually included in commercial contracts precisely because the principles of Force Majeure will not be applied by the Courts at their discretion without a clause existing in the contract.

15. **If a force majeure clause is not explicitly provided for in a contract, would a party still be able to rely on force majeure?**

No, if the contract does not include a Force Majeure clause then it is most likely that Force Majeure will not be applied by the Courts. A party can alternatively rely on the doctrine of frustration. However, the principle of frustration is more restrictive and rarely applied due to the fact that, if applied, it renders the contract void, thereby releasing both parties from their obligations, something that is not always desirable or what the parties aim for in a commercial dispute.

16. **On whom would the burden of proof lie with when attempting to rely on force majeure?**

The burden of proof lies on the party which relies on the Force Majeure clause, in order to prove that the non-performance was solely due to the relevant event and that the event falls within the clause (this is further supported by caselaw, i.e. in ***Gerolemou*** discussed above) .

A very important factor in order to prove that the circumstances were beyond the party's control is the close connection of the Force Majeure event with the party's non-performance as evidenced in English caselaw which often offers guidance to Cypriot Courts (i.e. *National Bank of Kazakhstan and another v The Bank of New York Mellon SA/NV*, London Branch [2018] EWCA Civ 1390). Additionally, it is also crucial that the sole reason which allegedly deems a party unable to perform its contractual obligation should be the Force Majeure event and that such reason was communicated to the other party (as discussed in *Intertradex v Lesieur* [1978] 2 Lloyd's Reports 509).

In ***Tennants (Lancashire) Ltd v G.S. Wilson & Co. Ltd [1917] AC 495*** it was stated that "if a Force Majeure clause provides that the relevant event must "prevent" performance, the relevant party must demonstrate that performance is legally or physically impossible, not just difficult or unprofitable". Mere hindrance, unprofitability or delay would not be sufficient.

The rule that Force Majeure covers events outside the control of the parties implies that reasonable steps were taken if possible to mitigate the results of an event occurring. Hence, even if a Force Majeure clause does not explicitly provide for mitigation of loss, in practice, a party may still be required to prove that he could not mitigate losses as it would be reasonably expected.

Further to this point, In ***Channel Island Ferries Ltd v Sealink UK Ltd [1988] 1 Lloyd's Rep 323***, the Court of Appeal stated that any clause which included language referring to events "beyond the control of the relevant party" could only be relied on if that party had taken all reasonable steps to avoid its operation or mitigate its results.

17. **Are there any hurdles applicable to the reliance on force majeure?**

Further to the discussion above under question 18, the existence of an unforeseen event covered by a Force Majeure clause is not the only element that needs to be proven. The non-performing party also has to prove that the occurrence of the unforeseen event has actually affected or hindered his ability to perform his contractual obligations, that the circumstances where outside the parties' control and that the consequences could not have been mitigated by any means.

18. **Are there any applicable notice requirements which an affected party would be required to comply with before invoking force majeure?**

Force Majeure clauses may require parties to give notice before invoking Force Majeure. Specifics as to notice may also be set out in the relevant provision of how such notice is to be given, within which particular time period and the consequences.

This will again depend on the wording of the Force Majeure clause. In ***Gerolemou*** (above) the Court, having analysed the facts of the case, noted that the Defendant Company relying on a Force Majeure clause had not notified the Plaintiffs of the issues it was facing and despite demanding for an extension of time to perform its contractual obligations it never notified the Plaintiffs of the alleged Force Majeure event or any of the facts that it was alleging before the Court. This played a significant role to the Court as the facts of the case did not fall under the ambit of the Force Majeure clause as alleged by the Defendant. Therefore it is important to note that the occurrence of a Force Majeure event should be explicitly stated on any such notice along with details of such event and the effect on the agreement.

19. **What would be the impact of force majeure on any prepayments made under contractual arrangements?**

This would depend on the specific agreement and circumstances. For example if the agreement would concern a recurring service, then service could be discounted, delayed or any balances carried forward. A refund is likely only when such an agreement would be seriously affected by delay.

20. **What other contractual remedies are available to affected parties?**

As mentioned above, the doctrine of frustration would be available to affected parties. The principle of frustration is a common law principle which has been transplanted and codified into Cyprus Law under section 56 of the Cyprus Contract Law (Cap. 149) and states that a contract will be deemed automatically discharged where it becomes illegal or otherwise impossible to perform (by an event unforeseeable at the time of contract).

Under normal circumstances, the use of frustration as a principle is rare as the threshold for frustration, as established by legal precedent, is very high. When claiming frustration, the party seeking to terminate the contract must prove that the obligations to perform certain actions have become impossible, illegal, or radically different from what was contemplated when the contract was made. Further the party must be able to prove that applying prudent business sense, it could not have prevented or mitigated the causes leading to the frustration of the contract.

21. **What effect does force majeure have on consumer contracts? When can a producer or retailer effectively rely on this concept?**

For a trader to be able to effectively rely on a Force Majeure clause for the suspension of the performance of a contractual obligation, or to be excused from the performance thereof altogether:

(a) The term has to be incorporated in an effective manner into the contract, determined and defined in line with common law principles.

(b) Limited in terms delays that are caused inevitably by factors beyond his control.

(c) The trader takes reasonable steps to prevent or minimise delay.

(d) If there is a risk of substantial delay, the consumer shall have a right to terminate the contract.

A party would not be able to rely Force Majeure where it is not explicitly stated in the clause of the contract.

However, depending on the nature of the consumer agreement (i.e. provisions of goods, travel, banking) certain specific legislation may apply that may provide alternative remedies and/or insert different provisions for consumers.

22. **Does force majeure provide adequate protection for consumers?**

Depending on the circumstances, Force Majeure would enable traders and businesses to delay and/or alter services, therefore consumer protection is not directly connected to this legal principle, although certain consumers could benefit depending on the specifics of their agreement.

23. **What type of insurance policy could cover force majeure events in your jurisdiction?**

As there is no general rule or legislation guiding this issue, it would depend on the circumstances of the case, the specific clauses inserted in the insurance policy, the type of insurance, and the wording of the applicable Force Majeure clauses.

24. **Are there any plans for reform in your jurisdiction, in terms of enacting new legislation or amending existing legislation (both for the short-term and long-term), to assist parties with force majeure, given the recent COVID-19 pandemic?**

Although a number of emergency legislative measures have been implemented to assist business and individuals to cope with the financial fallout from the COVID-19 pandemic that range from eviction protection to grants and loan subsidies, to the best of our knowledge there are no plans to enact any reforms concerning Force Majeure. As discussed above, Force Majeure is not codified or enshrined in any legislation in Cyprus and can be used by parties, at their discretion, when drafting agreements in order to protect from liability under unforeseen circumstances and it is expected that case law in the future will provide guidance for the future of this legal concept.