



## Application of Force Majeure under English Law, New York Law and Russian Law (Comparative Analysis)

**April 29, 2020**

The current COVID-19 pandemic has, among other issues, highlighted the role of force majeure in commercial contracts. Whether contractual parties are able to rely on the concept of force majeure as grounds to suspend performance of their respective obligations where the performance of relevant obligations has been impeded by a force majeure event, i.e. an unexpected event outside the parties' control (like the COVID-19 outbreak and related governmental emergency measures), will depend on the applicable law and relevant contract provision.

In the table below we have briefly commented on the main questions related to application of force majeure under English, New York and Russian law, taking into account the existing COVID-19 situation.

No.	Position under English Law	Position under NY Law	Position under Russian Law
1.	<b>May a party refer to a force majeure event as grounds to suspend performance / be exempt from liability for non-performance if the contract does not contain a force majeure clause?</b>		
	<p>No. There is no independent concept of force majeure under English law. A party may only rely on force majeure if it is expressly provided for in a contract. Accordingly, under English law a party seeking to rely on force majeure may only do so if the contractual definition of force majeure event covers the relevant circumstances.</p>	<p>No. Under NY law, the presence of an express force majeure clause covering relevant events in a contract is a prerequisite for any claim of force majeure by a party. Accordingly, under NY law a party seeking to rely on force majeure would only be able to do so if the contract includes a force majeure clause covering relevant events.</p>	<p>Generally, yes. Russian law contains a general statutory rule that a party to a commercial contract may be released from liability for non-performance of its obligations if it proves that performance was impossible due to a force majeure event, subject to certain conditions (see <a href="#">section 3</a> below). This rule would generally apply even if the contract does not contain an express provision on force majeure. At the same time, the Russian Civil Code permits the parties to contractually exclude its application to their relationship under the contract, in which case a party whose performance under the contract has been affected by a force majeure event should not be able to invoke this statutory rule to be exempt from liability for non-performance (although such right of the parties has not been largely tested in the Russian court practice).</p>
2.	<b>In what circumstances can an event can be treated as a force majeure event that can be relied upon by a party in claiming exemption from performance? Can the COVID-19 outbreak be qualified as a force majeure event?</b>		
	<p>Under English law, a party seeking to invoke force majeure should, in particular, consider the following:</p> <ul style="list-style-type: none"> <li>• whether the event relied on (for example, COVID-19 outbreak itself or associated governmental measures) fall within the scope of the force majeure clause (e.g. is there a</li> </ul>	<p>Under NY law, in order to excuse a party from performance, a force majeure clause in a contract <i>must specifically include the event that actually prevents a party's performance</i>. Additionally, under NY law force majeure clauses are interpreted as though they contain <i>a requirement of</i></p>	<p>The Russian Civil Code requires the following criteria to be met for an event to be treated as force majeure:</p> <ul style="list-style-type: none"> <li>• exceptionality (<i>chrezvyichaynost</i>) of the event – relevant circumstances must be exceptional and their occurrence must be unusual in the given circumstances; and</li> <li>• unavailability (<i>nepredotvratimost</i>) of the event, which means that it must occur due to 'objective</li> </ul>

	<p>specific reference to 'pandemics' or 'governmental acts' or is there a general 'catch-all' provision?).</p> <p>Sometimes the parties will set out a full list of force majeure events, which may explicitly include "pandemics" or "governmental measures" [preventing particular performance under a contract]. More typically, contracts will include "catch-all" wording (for example "...or any similar event") and it will be a matter of contractual construction whether the parties should be taken to have intended that pandemics are captured by such language.</p>	<p><i>unforeseeability or lack of control</i> (i.e. an event to which the affected party refers must generally be unforeseeable and/or outside the control of a party).</p> <p>Similar to English law, the wording of the force majeure clause may either refer to certain specific events covering COVID-19 and its consequences or encompass such event by way of "sweeper" wording (which should be sufficiently clear that relevant events were intended to be covered).</p>	<p>factors' impeding performance and any person conducting similar activities is not able to avoid the occurrence of such event or its consequences.</p> <p>The ability of the affected party to claim exemption from performance due to the COVID-19 outbreak would depend on whether the relevant event arising from the COVID-19 situation, meets the above criteria. We note that such approach has been confirmed by the Russian Supreme Court in its recent clarifications issued on 21 April 2020. The Russian Supreme Court has also highlighted that if the restrictive governmental anti-COVID-19 measures have directly affected the party's financial standing, such party (e.g. the food service company incurring losses due to shutdown) may be excused from performance of the contract with reference to inability to pay its debts. We note that in March 2020 certain Russian regional (e.g. Moscow) legislation was adopted that confirmed that the current situation with COVID-19 (including relevant governmental restrictions) can be treated as force majeure. In addition, Russian Chamber on Trade and Industry started issuing certificates confirming existence of force majeure due to COVID-19 in respect of particular commercial contracts.</p>
<p><b>3.</b></p>	<p><b>What is the effect of a force majeure event? Is it possible to terminate a contract due to the occurrence of a force majeure event?</b></p>		
	<p>The force majeure clause should specify the effect / consequences of force majeure event – as discussed above, such effect / consequences are not specifically addressed under English law.</p> <p>Generally, force majeure clauses will suspend (but not cancel) the</p>	<p>A force majeure clause will typically specify the effect of the force majeure event on the contract – [as discussed above, such consequences are not specifically addressed under NY law].</p> <p>Similar to English law, under NY law force majeure will, as a general rule, suspend (but not cancel) the</p>	<p>Different from English and NY law, Russian law sets out the general consequences of force majeure, which have been further clarified by the Russian Supreme Court (SC). In particular, the SC has clarified that force majeure would exempt the affected party from liability for failing to perform its relevant obligations, but only for as long as the force majeure event in question continues to exist, i.e. force majeure does not</p>

	<p>performance of the affected contractual obligations and exempt a party from liability for non-performance. Once the force majeure event ends, the affected party will ordinarily be required to resume performance in full, otherwise it will be in breach of contract.</p> <p>The ability of either party to terminate the contract due to force majeure will depend on the force majeure clause providing for such termination or, if no such provision is made, on relevant party's ability to rely on English law <i>doctrine of frustration</i>.</p>	<p>performance of the affected contractual obligations and exempt a party from liability for non-performance. Once the force majeure event ends, the affected party will be required to resume performance in full, otherwise it will be in breach of contract.</p> <p>The ability of either party to terminate the contract due to force majeure will depend on the force majeure clause providing for such termination or, if no such provision is made, on relevant party's ability to claim termination based on the affirmative defenses of <i>frustration of purpose</i> or <i>impossibility of performance</i> under NY law.</p>	<p>terminate the obligation <i>if its performance remains possible after the relevant force majeure event ceases to exist</i>.</p> <p>In addition, Russian courts and legal doctrine have established that treatment of an event as force majeure by itself is not sufficient for a party to claim release from performance of an obligation on this basis, and the following conditions must also be satisfied for this purpose:</p> <ul style="list-style-type: none"> <li>– the event must not be caused by the actions of the affected party and it should not be within the control of the affected party to overcome such event;</li> <li>– the affected party, as a general rule, should not be aware of the event at the time of entering into a contract;</li> <li>– the event must not fall within any 'exemption' set out in the Russian Civil Code, such as breach of obligations by counterparties of the affected party, absence of necessary funds, absence of necessary goods in the market (or such other circumstances not allowing to treat an event as force majeure as a court may determine in a particular case);</li> </ul> <p>there must be a causal connection between the event and a party's inability to perform, i.e. the event must <i>actually prevent a party from performing the relevant specific obligation</i>. Force majeure would also entitle a creditor to terminate a contract if, due to a delay in the other party's performance caused by force majeure, <i>it loses interest in further performance</i>, but in this case the affected party will not be liable for damages caused by such delay.</p>
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If you have any questions please contact [Andrew Berhman](#), [Elena Stepanenko](#), [Konstantin Ponomarev](#), [Chris Caulfield](#) and [James Penrose](#).