

Force majeure events and their consequences come to an end sooner or later. What happens when they do end, or they continue for so long that the contract cannot be performed as intended?

When Force Majeure Ends

Few contracts make provision for what to do when *force majeure* ends and the contract can be performed again. Questions usually are:

1. Who determines when force majeure has ended?

The facts may be exclusively in the control of the affected party and difficult for the other party to ascertain. Some notice provisions require regular updates by the affected party, including as to for how long performance is expected to be affected. If those estimates of duration are not genuine, the affected party runs the risk of being in breach of the notice provisions and of its entitlement to rely on the *force majeure* clause.

If the unaffected party suspects the effects of *force majeure* have ended – apart from making independent enquiries – it can write to the affected party asking how performance is being affected, the expected duration, what steps are being taken to mitigate the effects, whether the affected party is performing other similar contracts and how, and the level of performance expected once it is possible again.

An affected party will be in breach of the contract if it continues to rely on *force majeure* after the effects have ended and does not resume the contracted performance. Ultimately, a court or tribunal determines whether the effects of *force majeure* have ceased when the unaffected party sues for breach of contract for failure to perform without excuse. Rarely, if ever, would a *force majeure* clause grant the affected party's declaration of *force majeure* the status of a final, binding, unchallengeable determination.

2. What happens if *force majeure* "ends" gradually?

A gradual end to *force majeure* suggests performance could be resumed gradually, probably by smaller quantities allocated across unaffected parties (where there is more than one unaffected party). Unless the clause says otherwise, affected parties should usually allocate any possible performance on a fair and reasonable basis across their unaffected parties rather than satisfying the most profitable or most important of them.

Force majeure does not formally end until performance is no longer affected in the way described in the *force majeure* clause. For example, if the clause requires performance to be "prevented or hindered", *force majeure* does not end until performance is no longer prevented or hindered.

3. Is notice required when *force majeure* ends?

Yes, either contractually or practically. A contractual requirement to give period updates would include giving notice when the *force majeure* event and its consequences were expected to, and did in fact, end. An affected party would be in breach of contract if it failed to perform after the *force majeure* ended. Practically, it would need to notify the other party that it was able to perform once again and to make arrangements. Silence at that stage could be interpreted as a failure to perform and put the affected party in breach.

4. What must be performed when *force majeure* ends?

A real question in a long-term or instalment contract is whether the performances due but excused during the *force majeure* must be performed when the *force majeure* ends. Either party may be concerned to see that they are or are not performed. A buyer may have bought goods from another supplier during the *force majeure* period and may not want to take the additional goods from the affected seller. Conversely, the buyer may not have been able to buy alternative goods and may be depending on the delayed goods from the affected seller. Sellers might be able, and desperate, to increase production when *force majeure* ends and to supply the delayed product, or they may not be able. Reverse situations may apply where the buyer is the party affected, with buyers and sellers in different commercial positions either wanting or not wanting to buy and sell.

Contract wording will determine whether the delayed product must be delivered and taken at the end of the *force majeure* period. It will depend on what we can call the primary obligation. If the contract is for a stated quantity in a longer period to be delivered in instalments over shorter periods, the primary obligation will usually be for the larger quantity.

For example, a contract to deliver and take 12,000 tonnes per year in 12 monthly instalments of 1,000 tonnes would usually have the 12,000 as its primary obligation. *Force majeure* lasting three months affecting the seller would relieve the seller from supplying in those three months, but it would have to make up the shortfall over the remainder of the year.

This has the obvious limitation that even though the *force majeure* event and its consequences may have ceased and the seller is able to supply again at pre-*force majeure* levels, the event may prevent the seller from increasing supply sufficiently to make-up the shortfall within the period for performance – 12 months in our example. The seller will then still be affected by, and be able to rely on, the *force majeure* clause.

On the other hand, if the contract were for the supply of 1,000 tonnes each month for 12 months, the primary obligation is simply the 1,000 tonnes each month. *Force majeure* affecting the performance of three months' supply would excuse that performance permanently and it would not need to be made up when *force majeure* ended. The obligation is merely to supply 1,000 t in January, 1000 t in February and so on. Once the obligation to supply in February is prevented, it cannot be imposed again as February will never return.

The questions to resolve this issue are:

- A. What is the primary obligation?
- B. Is it possible to perform the primary obligation after the apparent end of *force majeure* and within the period for performance of the primary obligation (12 months in our first example, one month in the second)?

If it is not possible, then the *force majeure* continues to affect performance and it has not truly ended. The affected party is excused from making-up performance to the extent it continues to be affected after the apparent end of *force majeure*.

5. Is the term extended by the *force majeure* period?

The short answer is no, unless the contract expressly or impliedly provides. The period for performance will always be before or coterminous with the end of the contract, and it is the period for performance that is the determinant. Parties can always agree to an extension following the lifting of a *force majeure* event and amend the terms to ensure smooth performance of the remaining obligations.

When Force Majeure Continues

If *force majeure* continues to a point where performance would be radically different from that contemplated, the contract will be frustrated, and terminated, without recourse by either party. Non-performance in the period between the onset of *force majeure* and frustration will be excused by *force majeure*; non-performance after that point will be excused because the contract is terminated by frustration.

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