Germany: Force Majeure

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

For a full list of jurisdictional Q&As visit [here](#)
1. **Is there a legal definition of force majeure in your jurisdiction?**

   There is no legal definition of force majeure (in German: “höhere Gewalt”) in German codified law, nor has force majeure historically been a distinct legal concept under German civil law. Rather German law typically analyses both contractual and non-contractual liability in terms of culpability or fault. Consequently, events of force majeure could be a reason for finding that a party was not responsible for a breach of contract because of the absence of any fault or culpability on its part.

   However, the term gained relevance in the course of Germany’s membership of the European Union. European Community law makes force majeure a relevant criterion in many of its rules and regulations, which has in turn led to the European Court of Justice to establish a body of case law around the subject.

   The German Federal Supreme Court (Bundesgerichtshof) has, in relation to the German Liability Act (Haftpflichtgesetz), defined force majeure as:

   "an event outside the ordinary course of business that is brought about externally by elementary forces of nature or by the actions of third parties, that is unforeseeable according to the norms of human insight and experience, that cannot be prevented or rendered harmless by economically acceptable means even by the utmost care to be reasonably expected in the circumstances, and that does not occur with such frequency that a party can be expected to regard it as forming part of its regular business operations".[1]

   The concept of force majeure is, therefore, typically characterised by three distinct elements: unpredictability, inevitability and exceptional circumstances.[2] The event must be such that it cannot be reasonably attributable to the sphere of risk of one of the contracting parties.[3] The German Federal Supreme Court has ruled that “force majeure only exists if the impossibility of performance is caused by events which could not be prevented even by the utmost diligence that could reasonably be expected. Even the slightest culpability excludes force majeure.”[4]


2. **If there is not, give a brief overview of this concept.**
The German Civil Code ("Bürgerliches Gesetzbuch" or BGB) generally bases contractual and tortious liability on the principle of fault. A contracting party is liable for breaches of contract to the extent that it is responsible for those breaches. Under German law, force majeure was traditionally subsumed within a broader concept of “non-responsibility” or absence of fault, but it has since emerged as a distinct manifestation of that concept.

To constitute force majeure, three main criteria must, therefore, be met: (i) unpredictability, (ii) inevitability and (iii) exceptionality. Whether and to what extent all of these three conditions are present must be assessed on a case-by-case basis and will depend on the specific contract and circumstances of the individual case. An objective standard applies to this assessment.

In order for a circumstance to be considered as “force majeure”, it must result in a contracting party being unable to perform one or more of its obligations under the contract altogether or only with excessive difficulty. Decisive factors include the location of the respective contracting parties, the nature of the contractual obligation, the agreed performance conditions and the ability of the affected party to render performance in another way.

If all of these conditions are met, the party is under German law released from its obligation to perform the affected obligation for the duration of the impediment and does not incur liability or have to pay damages. However, the affected party must, within a reasonable period after it has (or should have) become aware of the impediment, inform the other party of the event of force majeure and its effect on the notifying party’s ability to perform. The reciprocal obligation of the other party is then likewise suspended for a corresponding period.[5]

In addition, the parties may negotiate individual contractual clauses that regulate force majeure. They are free to deviate from the standard legal “definition” of force majeure established by the case law as well as its legal consequences. This means that, for a proper interpretation, one has to look at the actual content of any such clauses first. Other relevant factors include the nature of the contract and whether the force majeure clause forms part of the standard terms and conditions of one of the contracting parties or constitutes a bespoke agreement.

[5] Section 326, para. 1 BGB

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

German civil law does not automatically permit a party to suspend its contractual obligations owing to an event of force majeure. Whether (and the extent to which) a party is exempted from its obligation to perform and any associated liability must always be examined on a case-by-case basis.
Legal grounds for the suspension are provided by sections 275 and 313 of the German Civil Code and, in case of international supply relationships, also Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG).

According to the German Civil Code[6], liability for performance is excluded if performance has been rendered impossible for a contracting party. An exemption from liability is also provided where a contracting party would have to incur disproportionate expenditure in order to render performance.[7]

Depending on the course of events, a temporary impossibility may become indefinite, with the result that obligation to perform will cease completely.

In addition, German Civil Law provides for the possibility of varying the contract.[8] This requires a so-called disruption to the commercial basis of the transaction (Störung der Geschäftsgrundlage), meaning a serious change in circumstances that occurs after the conclusion of the contract, that lies outside the contractual risk allocation between the parties and that would make it unreasonable to expect the affected party to adhere to the contract if left unchanged. In such cases, there is usually the right to adjust the contract to compensate for the impairment, for example delaying the due date of delivery.

However, the threshold for qualifying for these exemptions is very high and the party wishing to invoke any of them must bear in mind that the other party’s reciprocal obligation to perform (e.g. payment) may also be suspended or waived for the period of force majeure.

Where Article 79 CISG applies, a party may postpone its obligation to perform for as long as the event of force majeure persists. Certain notification requirements must be met[9].

In addition, the parties may in their contract agree upon the right of a party to suspend its obligation if it is affected by force majeure. A clause to this effect usually provides for the temporary suspension of the obligation in question. In some cases, the parties even agree on the possibility of terminating the contract altogether in those circumstances. The exemption is typically not automatic, but rather the affected party must notify an event of force majeure immediately after becoming aware of it.

[6] Section 275, para. 1 BGB

[7] Section 275, para. 2 BGB

[8] Section 313 BGB

[9] This subject is discussed in more detail in relation to question 20 below.
4. Does force majeure allow a party to totally or partially avoid liability for failure or delay in performing its obligations?

Under German law, a claim for damages usually requires some kind of fault on the part of the being sued. However, sometimes such claims can arise independently of fault, e.g. in the case of a guarantee or with certain deadlines.

In principle, a party is obliged to fulfil its contractual obligations, irrespective of external circumstances. This principle is called *pacta sunt servanda* (agreements must be observed). The exclusion of a party’s liability for failure to perform due to force majeure is an exception to this principle. The requirements for qualifying for this exception are consequently set high.

According to the German Civil Code[10], liability for performance is excluded if performance has been rendered impossible for a contracting party. For example, German Civil Law provides for the possibility of varying the contract to compensate for the impairment, as delaying the due date of delivery.[11]

Where Article 79 CISG applies, a party may postpone its obligation to perform for as long as the event of force majeure persists. Certain notification requirements must be met.

In addition, the parties may in their contract agree upon the right of a party to suspend its obligation if it is affected by force majeure. A clause to this effect usually provides for the temporary suspension of the obligation in question. Decisive factors include the location of the respective contracting parties, the nature of the contractual obligation, the agreed performance conditions and the ability of the affected party to render performance in another way. Appropriate notification and information must usually be given to the other party.

[10] Section 275, para. 1 BGB

[11] Section 313 BGB

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

Under certain conditions, German law permits a contracting party to terminate the entire contract by reason of force majeure. This is the case, in particular, where the event of force majeure leads to a party being permanently prevented from making performance (e.g. long-term export bans, the authorities forcing businesses to close or in the case of a delay that continues beyond a key date). If the obstacles to performance are only temporary in nature, German law requires that the party not suffering from force majeure first set the affected party a further reasonable deadline for performance. It can only withdraw from the contract if performance has still not been rendered by the affected party by the time that this deadline has expired.[12]
If an adjustment to the contract under section 313 of the German Civil Code is not possible or would be unreasonable, the party affected by the event of force majeure can cancel the contract by termination. Whether the provisions of sections 275 or 313 of the German Civil Code are relevant depends on the individual case. An overall consideration of all circumstances and economic aspects needs to be made to see whether a right of termination is triggered.

Under section 314 of the German Civil Code, continuing obligations may be terminated for cause without observing any notice period if the continuation of the contractual relationship would not be reasonable.

Under the CISG, the termination of a contract by one party requires a material breach on the part of the other. Similarly, the party affected by the event of force majeure can avoid the contract in the case of, for example, an unduly long delay in performance or in cases where the underlying purpose of the contract has been frustrated.

Finally, the parties may agree upon contractual rights of termination due to force majeure. The conditions, scope and validity of such agreements must be carefully examined based on the specific agreement. Appropriate notification and information must usually be given to the other party.

[12] Section 323 BGB

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

Force majeure is not defined in German codified law, but is accepted by implication. More recently, German civil law has adopted several rules that either explicitly or implicitly contain a concept of force majeure.

For example, it is addressed in section 675 ff. of the German Civil Code in conjunction with section 676 c (payment obligations), section 701 para. 3 of the German Civil Code (hospitality services), section 4 of the German Environmental Liability Act (Umwelthaftungsgesetz), section 1 para. 2 German Liability Act (Haftpflichtgesetz) and section 7 para. 2 Road Traffic Act (Straßenverkehrsgesetz).

Furthermore, Article 79 of the UN Convention on Contracts for the International Sale of Goods (CISG) has general application. The term “force majeure” is not explicitly mentioned in its first paragraph, but it is included there by paraphrase, too.

However, in German law the concept of force majeure derives principally from case law.
7. **Would the courts be willing to imply force majeure terms into contracts?**

Under German law, parties are generally free to decide themselves what to include in their contracts. If the proper interpretation of a particular contract indicates that the parties wanted to regulate force majeure, the courts will imply the necessary provisions.

However, due to the fault-based nature of liability under German law, it is generally not necessary to imply such provisions. If there is neither intent nor negligence, then under German law a party is usually not liable for the breach of its contractual obligations. However, there are two major exceptions to this rule. The first is contracts where one party provides a guarantee for a particular event or action to the other. The second is in the case of strict liability, where one party is generally held liable on the basis that it carries out an inherently dangerous activity. The best example for this is driving a car. In both cases, liability is only excluded if the circumstances of the particular case are beyond the control of either party, just as is the case with an event of force majeure.

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

The approach of the German courts depends primarily on the nature of the agreement in question. One decisive factor is whether the provision in question is a bespoke agreement or forms part of the standard terms and conditions of one of the parties. Their validity is then determined under section 305 of the German Civil Code.

The interpretation of the clause itself is based on sections 133 and 157 of the German Civil Code and on the presumed intent of the parties. Accordingly, close attention must be paid to the actual wording chosen by the parties and the objectively declared intention that can be derived from it. In addition, the context in which the parties perform their contractual relations is relevant. Finally, the subsequent conduct of the parties can be used as a further indicator of the actual intention of the parties.

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

There is no exhaustive list of types of event of force majeure under German law. What events qualify depends on the specific transaction or contractual provision at issue. However, all events recognized as constituting force majeure must be unforeseeable, unavoidable and derive from exceptional circumstances (in the sense that they cannot be reasonably attributable to the sphere of risk of one of the contracting parties).

Natural disasters such as floods, earthquakes or extreme weather conditions may constitute a case of force majeure. However, the event must be exceptional, e.g. a storm of unusual intensity.
Strikes regularly constitute an event of force majeure, but this would not be the case where the parties were aware of the possibility of the strike in advance and could therefore reasonably be expected to have taken effective countermeasures to avoid their negative impact. In some cases, force majeure arises during a politically unstable situation or as a result of a terrorist threat. However, this only applies if the situation or the threat were unforeseeable. Epidemics may be regarded as force majeure under certain circumstances.

In addition, government decisions may constitute force majeure: for example, the sudden introduction of a visa requirement that prevents travel by a relevant deadline stipulated in the contract has been considered to constitute an event of force majeure. So has the decision of the Russian authorities to open the usual hunting season later than expected.

According to Article 79 CISG, governmental interventions that prevent the implementation of a contract are recognized as force majeure, including in particular export bans, import bans, plant closures, blockades and the blocking of transport routes. However, even in these cases, it must always be established that the obstacle was unforeseeable, unavoidable and the cause of the non-performance. In all cases, it is also necessary to check the actual provisions of a contract to establish to what extent an exemption from performance obligations has been agreed between the parties in the event of force majeure.

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

Under German law, there is in principle no force majeure if the event itself (or its intensity) was foreseeable or if it results from faulty performance on the part of one of the contracting parties.

Anything that constitutes a so-called “general life risk” (*allgemeines Lebensrisiko*) does not qualify. For instance, flight turbulences, emergency landings, slipping on a wet hotel floor, seasickness or becoming a victim of a crime have all been held to be general life risk and were, therefore, not considered as force majeure.[13]


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

As the requirements for establishing force majeure are high under German law, COVID-19 will not automatically qualify as an event of force majeure.

In determining whether COVID-19 constitutes an event of force majeure, one important criterion will be whether the restriction or non-fulfilment of the relevant contractual
obligation resulted directly from the outbreak of COVID-19 or from measures taken by competent authorities to address the disease.

In the past, there have been some decisions relating to the travel industry that address the question of whether an epidemic can be considered as force majeure. For example, the occurrence of the SARS epidemic in China in 2002/2003 and the cholera epidemic in South America in the early 1990s have both been considered as force majeure. In a case involving the danger of plague, the assessment of the German Foreign Ministry, being a federal authority, was regarded as relevant.

We expect numerous decisions to be made by the German courts in relation to COVID-19.

It is likely that companies will have to accept additional expenditure in order to meet their contractual obligations during the epidemic.

Since, with the benefit of hindsight, things often look different to how they seemed when we lived through them, it is advisable for parties to document the actual state of their knowledge and contemporaneous discussions in order to justify business decisions taken at the time.

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)?**

   Governmental decisions or announcements declaring an event to force majeure are taken into account by the German courts. In particular, the statements of the Federal Foreign Ministry, the recommendations of the WHO and statements by the Robert Koch Institute for public health have indicative effect. However, since the impact of the COVID-19 epidemic is bound to vary considerably from one case to the next, an analysis of each specific case will still be required.

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

   Force majeure clauses are intended to protect the parties from liability resulting from events that they could not have foreseen and over which they had no influence. The risk must be such that it would be unreasonable to expect one of the contracting parties to bear it. Whether or not these requirements are met in any particular case will depends on the nature and content of each contractual relationship.

   Since there is no prescribed form of force majeure under German law, it is up to the parties themselves to agree on what they want to define as force majeure and what the legal consequences should be if it occurs. Normally, the parties create a list of certain events that are explicitly deemed to constitute force majeure. These events usually include natural disasters, but also events such as war or a general strike.
With regard to the legal consequences, the parties usually agree that the affected party will not be liable if it cannot fulfill its contractual obligations due to one of these events, or they agree to extend deadlines for their performance.

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

Yes, it is common practice to include force majeure clauses in commercial contracts that are subject to German law.

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?**

Even if not explicitly provided for in a contract, the German Civil Code is able to imply force majeure provisions into a contract.

Due to the general principle of fault-based liability under German law, a party would typically not be considered liable for a force majeure event. If the event makes the contractual obligation impossible, the party does not have to fulfil this obligation (section 275 German Civil Code). However, the other party then does not have to perform its corresponding contractual obligation either. If the force majeure event reaches a level that deprives the original contract of its purpose (section 313 German Civil Code), the parties are obliged to try and adapt the contract to the new situation. If this is not possible, then the parties are allowed to terminate the contract.

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

The burden of proof generally lies with the party that is attempting to rely on force majeure. Under German law, the party wishing to avoid liability for non-performance generally bears the burden of proving the existence of circumstances that would shield it from such liability. A party seeking to invoke relief or an exemption from liability, must consequently prove the circumstances that it claims give rise to such relief or exemption.

17. **What would a party seeking to rely on force majeure be required to show?**

A party invoking force majeure would usually have to prove that its failure to perform is due to an impediment over which it has no influence and which it could not reasonably have foreseen when the contract was concluded. Both, the objective conditions (impediment that causes non-performance) and the subjective conditions (unforeseeability and unavoidability) must be proven.

18. **To what extent is a party required to mitigate its position/losses before seeking to rely on force majeure?**
Generally, German law requires a party to make every reasonable effort to meet its contractual obligations, even under difficult external circumstances. If the party affected by force majeure has possibility for rendering its contractual services in a different way it is obliged to do so.

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

   In principle, the party invoking force majeure must follow certain procedures. Almost always, it must within reasonable time inform the other party of the existence of the impediment to its performance and its effects.

   It is open to the parties to agree additional procedural and other obligations in their contract.

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

    Such obligations arise primarily from the express terms of the contract or as a secondary obligation arising under the contract (good faith, section 242 German Civil Code).

    According to Article 79 CISG, the affected party must inform the other about the impediment to its performance and its effects. If it fails to comply with this obligation within a reasonable period, the defaulting party becomes liable for the resulting damage.

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

    Again, the answer to the question depends on the circumstances of the specific case. In principle, the party that received the prepayment is obliged to reimburse it. However, this issue must be decided on a case-by-case basis.

    For example, if a prepayment was made in preparation for the execution of the contract (e.g. for the purchase of materials), a repayment obligation is less likely to be implied.

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

    This depends largely on the specific provisions of the contract and the concrete circumstances of each case.

    In the event of force majeure Article 79(5) CISG states that either party may exercise any right available to it except claiming damages.

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

German law does not have any specific rules on force majeure in relation to consumer contracts. The effect of force majeure on the consumer contract will have to be decided on a case-by-case basis. The same criteria as discussed herein above (unforeseeability, unavoidability and exceptional circumstances) apply.

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

There is no specific protection for consumers in relation to force majeure. However, standard terms and conditions (Allgemeine Geschäftsbedingungen) that operate to the detriment of consumers are often held to be invalid by the German courts.

In addition, consumers are protected under German civil law by various specific regulations, such as a separate right to withdraw from a contract and special rights to receive certain information. These rules are not directly related to force majeure, however.

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

There are various ways to safeguard against the consequences of force majeure through insurance. Depending on the specific terms of an insurance contract, the coverage may include loss of profit, unearned fixed costs or even cover consequential losses.

The German insurance market is very large and there are numerous ways to arrange insurance contracts.

However, in standard insurance contracts, insurers often exclude their obligation to pay out under the contract in cases of force majeure. In connection with COVID-19, there is currently a lively discussion as to whether losses are covered by business closure insurance policies or not.

26. **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?**

On 27 March 2020, Germany adopted a law to mitigate the consequences of the COVID 19 pandemic in civil, insolvency and criminal proceedings. It contains transitional provisions with which the legislator intends to mitigate the consequences of the spread of the coronavirus both in the private and in the commercial sphere.

Other legislative projects are in preparation, such as the law on mitigating the consequences of the COVID 19 pandemic in contracts for public events.
In addition, there are plans for temporary tax cuts and the European Commission has published guidelines for foreign investment.

However, the majority of the proposed legislation relates to the public sector and is designed to ensure an adequate public health response to the pandemic.