The Legal 500
Country Comparative Guides

Japan
FORCE MAJEURE

**Contributor**
Mori Hamada & Matsumoto

*Yoshinori Tatsuno*
Partner | yoshinori.tatsuno@mhm-global.com

*Ryo Kawabata*
Associate | ryo.kawabata@mhm-global.com

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

For a full list of jurisdictional Q&As visit [legal500.com/guides](http://legal500.com/guides)
1. May force majeure be relied on by a party to a contract, even if the parties have not included a force majeure clause?

There is no general statutory provision in Japan on which a party to a contract may rely in case of “force majeure”. However, as detailed in Questions 16 and 17 below, some provisions of the Civil Code of Japan (the “CCJ”) will achieve outcomes similar to force majeure clauses in the context of damages and termination of contracts, even if a force majeure clause is not explicitly provided. Further, the parties may be able to rely upon the principle of clausula rebus sic stantibus, which allows for a contract to become inapplicable due to fundamental changes in circumstances, although the hurdle for the application of this principle is quite high.

2. If so, please explain in which circumstances force majeure may be relied on.

As stated in Question 1 above, there is no general statutory provision for force majeure in Japan. With respect to the requirements for the provisions of the CCJ which will achieve outcomes similar to force majeure clauses in the context of damages and termination of contracts, see Questions 16 and 17 below.

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

Although force majeure is not defined under the statutory laws of Japan, some statutory laws use the words “force majeure” (e.g., Article 419(3) of the CCJ and Article 596(1) of the Commercial Code of Japan). Moreover, as stated in Questions 16 and 17 below, the CCJ has some provisions covering situations where the performance of an obligation has become impossible due to reasons not attributable to the parties; thus, the obligor is protected to a certain extent. The rationale for those provisions is the same as or quite similar to the one behind the principle of force majeure.

4. If so, may the parties agree to derogate from the provisions of this legislation?

As stated in Question 1 above, there is no general statutory provision for force majeure in Japan. With regard to some provisions of the CCJ, which will achieve outcomes similar to force majeure clauses in the context of damages and termination of contracts as explained in Questions 16 and 17 below, parties to a contract may agree to deviate or derogate from those provisions unless the agreement is against public policy or other basic principles in Japan.

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

It is recommended that the definition and scope of force majeure events be provided clearly. In this regard, it often comes down to an issue between the parties as to whether a “catch-all” term should be adopted. In addition, when and how the force majeure clause is to be triggered should be made clear (e.g., delay or failure in performing certain obligations due to force majeure events). Further, it is also recommended that the effects of the application of the clause be made explicit, such as the temporary suspension or permanent extinction of obligations, and the termination or expiration of contracts.

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

Force majeure clauses are not rare, or at least it does not seem unnatural to include them in commercial contracts under Japanese practice. That said, Japanese contracts do not often contain force majeure clauses. One of the reasons is that, as far as damages and termination clauses are concerned, the provisions of the CCJ will likely lead to a reasonable conclusion regardless of the existence of force majeure clauses, as described in Questions 16 and 17 below.
7. Would the courts be willing to imply force majeure terms into contracts?

As a cardinal principle of contractual interpretation under Japanese law, courts will look into not only the language of the clause at issue, but also the parties’ reasonable intent behind the clause (Our jurisdiction does not have the parol evidence rule unlike many common law countries). Thus, the courts are ready to reflect the viewpoint of “force majeure” in their interpretation of a specific contractual clause when they find it consistent with the reasonable intent of the parties, although it may not be exactly the same as the principle of force majeure.

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

With the doctrine of private autonomy, like in many other jurisdictions, Japanese courts in principle respect the explicit terms of contracts including force majeure clauses. Only when the content of a clause is against public policy or other basic principles will courts find all or part of such a clause void to the extent necessary to protect basic principles. When a force majeure clause is vague or silent on some points, courts tend to try to seek a reasonable outcome by looking into the parties’ reasonable intent behind the clause.

9. Are there any legislative or statutory controls on the use of force majeure clauses?

If the application of a force majeure clause brings about an unjust outcome, courts may deny the application under the general principle of good faith or prohibition on abuse of rights. Other than such exceptional cases, courts will respect what is provided in the contract.

10. Must an event have been unforeseeable at the time of the contract to permit a party to rely on it as force majeure?

In case that a contract has a force majeure clause, it depends on how the word “force majeure” is defined in the contract whether an event must have been unforeseeable at the time of the contract to permit a party to rely on the clause.

As to non-contractual remedies which Japanese law offers based on a common rationale with force majeure clauses, whether an event was unforeseeable at the time of the contract may be a requirement or a factor to be considered in relying on those remedies. For example, the principle of clausula rebus sic stantibus, which allows for a contract to become inapplicable due to fundamental changes in circumstances as stated in Question 1, requires the fundamental changes in circumstances to be unforeseeable at the time of the contract. Also, some of the provisions of the CCJ explained in Questions 16 and 17 below, which will achieve outcomes similar to force majeure clauses in the context of damages and termination of contracts, require the default to be unattributable to the obligor. For those provisions, whether an event was unforeseeable at the time of the contract could be a factor to be considered in determining the attributability of the default to the obligor.

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

In general, force majeure means facts, events or circumstances that arise extrinsically from outside of the contract or parties thereto and cannot be prevented by taking precautions and preventive measures that can be required in the course of business. Typical examples of the events that Japanese courts have recognized as a force majeure event include earthquakes (such as the Great East Japan Earthquake in 2011 and the Great Hanshin Earthquake in 1995), severe typhoons and floods (as recognized in Kobe Dist. Ct., Sep. 20, 1999; Tokyo Dist. Ct., Sep. 21, 2010; and Tokyo Dist. Ct., Apr. 7, 2016).

12. What types of events have been dismissed by courts of your jurisdiction as not being force majeure?

In general, force majeure means facts, events or circumstances that arise extrinsically from outside of the contract or parties thereto and cannot be prevented by taking precautions and preventive measures that can be required in the course of business. Therefore, even an event that is usually seen as a natural disaster is not always a force majeure event, if it or its effects can be predicted and prevented by taking reasonable measures. For example, in certain cases where typhoons or strong winds affected obligors’ performance of their contractual obligations, the courts denied the obligors’ defense which relied on force majeure and held that the typhoons or strong winds in those cases were not significantly severe compared with what should be expected under normal circumstances in Japan (e.g.,
13. Have courts recognized the COVID-19 pandemic as force majeure in your jurisdiction?

As far as we are aware from published databases, no Japanese courts have recognized the COVID-19 pandemic as force majeure yet.

As a side note, however, in response to the COVID-19 outbreak and the subsequent declaration of a state of emergency by the Japanese government, many courts in Japan cancelled hearing dates. For example, the Tokyo District Court and the Tokyo High Court cancelled hearing dates scheduled in April and May 2020 except for urgent matters.

14. 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 of the date of this article, the Japanese government has not made any decision or announcement that specific events including COVID-19 are force majeure. Further, unless a new legislation requires courts to find or presume that certain events are force majeure, any governmental decision or announcement will just be one of the factors that courts will consider in determining whether such events are force majeure (although it would be a strong factor). It is pertinent to note that even if an event is found to be a force majeure event based on a governmental decision or announcement, the party seeking the application of a force majeure clause further needs to establish that the delay or failure in the performance of its obligations is caused by that event.

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

When a contract has a force majeure clause, the remedies that may be awarded to the parties in consequence of force majeure will depend on the contents of the clause.

Besides contractual remedies, the statutory laws of Japan do not specifically provide that force majeure allows a party to suspend its obligations. However, if force majeure brings about an unjust outcome, courts may grant a remedy to the party who is prevented from performing its obligations due to force majeure, under the general principles of good faith and prohibition on abuse of rights. In addition, although this provision is not about the suspension of obligations, Article 161 of the CCJ stipulates that if a prescription cannot be interrupted due to any natural disaster or other unavoidable contingency, the prescription shall not be completed until two weeks have elapsed from the time when such impediment has ceased to exist.

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

When a contract has a force majeure clause, the remedies that may be awarded to the parties in consequence of force majeure will depend on the contents of the clause.

Besides such contractual remedies, under the laws of Japan, if a default cannot be attributed to the obligor in light of the contract or common business practice, the obligee may not claim for damages based on the default (CCJ, Article 415). In addition, if the obligor’s performance of an obligation has become impossible due to reasons not attributable to the parties, the obligee may also refuse to perform its counter-obligation (Id., Article 536(1)). Thus, if a party fails or delays in performing its obligations due to a “force majeure” event, that party may be exempted from liability for damages, but the other party may refuse to perform its counter-obligations. See also Question 17 below on the termination of contracts.

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

When a contract has a force majeure clause, the remedies that may be awarded to the parties in consequence of force majeure will depend on the contents of the clause.

Besides such contractual remedies, under the laws of Japan, if the performance of all or part of a contractual obligation has become impossible, whether or not it is attributable to the obligor, the obligee may terminate all
or part of the contract (Id., Article 542). Thus, if a “force majeure” event makes it impossible for a party to perform all or part of its obligation, the other party (the obligee) may terminate all or part of the contract.

In this regard, the CCJ was amended recently (effective as of April 1, 2020), and the discussion above is based on the current, amended CCJ, the termination provisions of which apply to contracts executed on or after April 1, 2020. Before the amendment, the termination of a contract by the obligee is allowed only if the default is attributable to the obligor, which means that the obligee may not always be able to terminate the contract despite the existence of a “force majeure” event.

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

The allocation of the burden of proof depends on how a force majeure clause is written in the contract. That said, in principle, the party who argues for the application of a force majeure clause will usually bear the burden of proof.

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

What should be established in order to rely on a force majeure clause depends on how the clause is written in the contract. That said, it should at least be established that a force majeure event (as defined in the force majeure clause) exists, and that the obligor’s default was caused by such a force majeure event.

20. To what extent is a party required to mitigate its position/losses before seeking to rely on force majeure?

Technically speaking, Japanese law does not recognize the obligation to mitigate losses before seeking to rely on force majeure. That said, as stated in Question 19 above, it should at least be established that the obligor’s default was caused by a force majeure event. In analysing this causation, whether the obligor did its best to avoid the default even under force majeure circumstances will be a factor.

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

The necessity of a notice from the obligor to the obligee depends on how the force majeure clause is written in the contract. At least, with respect to CCJ provisions regarding damages and termination of contracts (See Questions 16 and 17 above), there is no such requirement. However, in analysing the causation between the force majeure event and the obligor’s default, the lack of notice may adversely affect the obligor’s position, e.g., the obligee may have been able to mitigate its position or losses had it been notified of the existence of the force majeure event.

22. What is the consequence of failing to comply with such notice requirements?

The effect of failing to comply with such notice requirements also depends on how the force majeure clause is written in the contract. As for the CCJ provisions regarding damages and termination of contracts, as stated in Question 21 above, there is no such requirement.

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

It depends on how the force majeure clause is written in the contract. Usually, if the obligations corresponding to such prepayments have already been fulfilled at the time of the force majeure event, the force majeure clause will not rescind bilateral performances of contracts. However, if the force majeure clause admits retroactive effect, then the conclusion may be different. Further, if the obligation corresponding to the prepayment has not been satisfied at the time of the force majeure event, naturally, such a unilaterally prepaid amount should be returned.

24. What contractual remedies are available to affected parties, other than force majeure?

Other than force majeure clauses, other clauses (for example, damages clauses or termination clauses) may include certain requirements for claiming damages or termination which are related to whether default is attributable to the obligor. As described in Questions 16 and 17 above, such terms sometimes lead to results which are similar to those of force majeure clauses.

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

Whether or not a contract containing a force majeure clause is a consumer contract is usually not a key factor in the application of the force majeure clause. Article 8 of the Consumer Contract Act of Japan (the “CCAJ”) provides, among others, that clauses which completely exempt a business entity from liability to compensate a consumer for damages arising from that business entity’s default are void. Article 10 of the CCAJ also provides that, if a clause in a consumer contract restricts a consumer’s rights or expands a consumer’s obligations beyond those provided under statutory laws or regulations, thereby unilaterally prejudicing the interests of the consumer in violation of the principle of good faith, then such a clause will be void. However, usually, typical force majeure clauses will unlikely fall under these types of provisions.

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

Typically, insurance covering natural disasters, such as fire insurance and earthquake insurance, could cover force majeure events. Moreover, some insurance companies provide event cancellation insurance, which could cover damages caused by the cancellation of events such as festivals, sports events, and concerts due to force majeure events.

27. 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?

Various new legislations have been made in Japan to cope with the recent COVID-19 pandemic. For example, in the case of a significant decrease in income due to the COVID-19 pandemic, a deferral of taxation will be granted under certain requirements. That said, as far as we are aware, there have been no new legislations or amendments to assist parties in utilising contractual force majeure clauses.

Contributors

Yoshinori Tatsuno
Partner
yoshinori.tatsuno@mhm-global.com

Ryo Kawabata
Associate
ryo.kawabata@mhm-global.com