Russia: Force Majeure

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

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

Yes, the legal definition of Force Majeure is given in paragraph 3 of Art. 401 of the Civil Code of the Russian Federation, namely Force Majeure is both an emergency and an inevitable circumstance, in the given conditions. The law does not establish a list of circumstances that can be recognized as Force Majeure; however, it directly states that Force Majeure circumstances do not include, in particular, violation of obligations by the debtor’s counterparties, lack of goods necessary for performance of a contract, nor lack of necessary funds.

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

Though the legal concept of Force Majeure is given in the Civil Code of the Russian Federation, judicial practice (clause 8 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of March 24th, 2016 No. 7; the Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation of June 21st, 2012 No. 3352/12 in the case No. A40-25926/2011-13-230) further explains that “emergency” means going beyond the normal, which does not apply to life risk and cannot be taken into account under any circumstances, while “inevitable” means that any participant in a civil turnover carrying out activities similar to a debtor, could not avoid the onset of this circumstance, nor its consequences. Further, inevitability must be objective, not subjective, that is: Force Majeure circumstances must occur from the outside and not depend on the parties’ will.

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

Occurrence of Force Majeure releases a debtor from the liability for violation of his / her contractual obligations for a reasonable period, until these circumstances disappear (question 7 of the “Review of selected issues of judicial practice related to the application of legislation and measures to counteract the spread in the territory of the Russian Federation of a new coronavirus infection (COVID-19) No. 1”. It was approved by the Presidium of the Supreme Court of the Russian Federation of April 21st, 2020). There is no automatic termination, nor suspension, of contractual obligations due to Force Majeure, but parties can agree on such consequences in their contract. Further, if Force Majeure substantially changes the equilibrium under a contract, each of the parties may demand a change in, or termination of, such contract in court, in connection with a substantial change in circumstances (Article 451 of the Civil Code of the Russian Federation).

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

Indeed yes, generally, a debtor shall be released from the liability for violation of contractual obligations, but only if such violation (i.e. non-performance, or improper performance of the contract, including in case of delay in performing) is directly caused by Force Majeure.
5. **Does force majeure give a party the potential right to terminate the contract?**

The occurrence of the Force Majeure circumstances does not in itself terminate the contract, if further performance remains possible, after such Force Majeure circumstances cease to exist. In cases where performance of the contract is hindered by physical impossibility (that is, the contract cannot be objectively performed by any person), or legal impossibility (when the obligation can be physically performed, but this will be a violation of an act of a state authority, or local government), such obligation shall terminate automatically, however not due to Force Majeure, but because of the impossibility of performance according to Article 416 and Article 417 of the Civil Code of the Russian Federation.

At the same time, a creditor has the right to unilaterally terminate the contract if the debtor cannot perform the obligation by the agreed deadlines (para. 2 of Art. 328 of the Civil Code of the Russian Federation), or if the creditor has lost interest in further performance of the contract, due to the delay on the debtor’s side (para. 2 of Art. 405 of the Civil Code of the Russian Federation).

Without prejudice to the foregoing, the parties may agree directly, in the contract, that consequences of Force Majeure shall be termination of contractual obligations.

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

   Yes, please see Questions 1 and 2 for more details.

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

   The courts will take into account the presence of a Force Majeure clause in the contract, but this does not oblige the court. The court can be reluctant to qualify a particular circumstance as Force Majeure if it does not affect the performance of the obligation, even though parties can directly mention such circumstance as Force Majeure in the contract. In each case, the court will find out whether the circumstance constitutes an emergency and is inevitable, and whether the debtor could change something, to avoid the consequences.

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

   In order to relieve the debtor of liability, the court must establish the existence and duration of Force Majeure circumstances. In order to recognize the fact of Force Majeure, it is necessary to establish that it is emergency and inevitable. For more information about these criteria, see Question 2.

   The court also needs to establish the existence of a causal link between Force Majeure and the impossibility, or delay, in performance of obligations, the absence of the debtor’s influence on the occurrence of these circumstances, and the debtor taking reasonable steps...
to prevent (minimize) possible risks.

Documents (conclusions, certificates) that confirm the presence of Force Majeure circumstances may be taken into account. They must be issued by authorized bodies, or organizations.

In addition, the court establishes whether there are any conditions regarding Force Majeure in the contract between the parties.

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

There is no specific list of Force Majeure circumstances for domestic contracts, since in each specific case the court recognizes the circumstances as being Force Majeure, depending on their effect on the possibility of performance. However, there are a number of circumstances that judicial practice most often recognizes as a form of Force Majeure. It can be natural emergencies, for example, stormy weather (the decision of the Supreme Court of the Russian Federation of September 1st, 2015 No. 303-ES15-5226), high water (the decision of the Arbitrazh Court of the Far Eastern District of November 28th, 2014 No. F03-5191 / 2014), atypical rainfall (the decision of the Arbitrazh court of the Moscow district of December 9th, 2015 No. F05-16473 / 2015).

For foreign trade contracts, the Chamber of Commerce and Industry of the Russian Federation (CCI of the RF) has developed an approximate list of Force Majeure circumstances (clause 1.3 of the Regulation on the procedure for CCI of the RF to testify to Force Majeure circumstances (Appendix to the Resolution of the CCI RF Board of December 23rd, 2015 No. 173-14). It includes natural disasters (e.g. earthquake, flood, hurricane), fire, mass diseases (epidemics), strikes, military operations, terrorist acts, sabotage, traffic restrictions, prohibitive measures of state authorities, economic restrictions (bans) and other circumstances beyond the parties’ control.

The court may recognize the same circumstances as Force Majeure in resolving internal disputes.

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

The courts decline any claims relation to the Force Majeure circumstances if the occurrence of such circumstances is depended on the will, or actions, of a party to the contract, in particular (clause 8 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of March 24th, 2016 No. 7; para. 3 of Art. 401 of the Civil Code of the Russian Federation): a lack of necessary goods on the market, a breach of obligation by the counterparty, a lack of financial resources from the debtor, illegal actions of the
representative of the debtor.

Moreover, courts do not consider the Force Majeure circumstances related to entrepreneurial risk: the financial economic crisis (the Resolution of the Federal Arbitrazh court of the Volga Region of May 21st, 2013 in the case No. A55-25687 / 2012); unlawful actions of third parties, for example, stealing (the Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation of June 9th, 1998 No. 6168/97); revocation of a license of a bank (the Resolution of the Arbitrazh court of the Moscow district of March 3rd, 2016 No. F05-2728 / 2016); loss, damage to cargo as a result of fire during transportation by its professional carrier.

Without prejudice to the above, the Supreme Court of the Russian Federation has recently stated that during the COVID-19 pandemic, certain circumstances that, as a general rule, are not recognized as Force Majeure circumstances, may be recognized as such, for example, the lack of sufficient funds, if the is a direct link between such insufficiency and the pandemic (question 7 of the “Review of selected issues of judicial practice related to the application of legislation and measures to counteract the spread in the territory of the Russian Federation of a new coronavirus infection (COVID-19) No. 1” approved by the Presidium of the Supreme Court of the Russian Federation of April 21st, 2020).

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

The Supreme Court of the Russian Federation clarified that the COVID-19 pandemic cannot be recognized as Force Majeure for all situations, regardless of the type and conditions of activity of the debtor. The presence of Force Majeure must be established in each contractual obligation.

The circumstances caused by the COVID-19 pandemic, as well as the restrictive measures taken by state authorities and local governments (in particular, the ban on the movement of vehicles, the restriction of the movement of individuals, the suspension of the activities of enterprises and institutions), can be recognized as Force Majeure circumstances, if it is established that they meet the criteria for Force Majeure circumstances and the causal relationship between these circumstances and the non-performance (question 7 of the “Review of selected issues of judicial practice related to the application of legislation and measures to counteract the spread in the territory of the Russian Federation of a new coronavirus infection (COVID-19) No. 1 “ approved by the Presidium of the Supreme Court of the Russian Federation of April 21st, 2020).

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)?

It is worth bringing to mind that the certificates of Force Majeure, issued in a foreign state,
the CCI of the RF, and any recognition of the circumstances by Force Majeure by state authorities, are only of probative value in court. Whether the coronavirus and the measures of the public authorities are considered to be Force Majeure, the court will decide in each particular case.

At the same time, in order to prove to the court the presence of Force Majeure, it is necessary to provide any evidence. For local contracts, the evidence will be acts issued by authorities, documents issued by the Ministry of Internal Affairs of Russia, EMERCOM of Russia and certificates of branches of the CCI of the RF in the Russian regions. For foreign trade contracts, it is necessary to obtain a certificate of Force Majeure in the CCI of the RF.

In order to obtain a certificate of the CCI of the RF, it is necessary to provide evidence of the onset of Force Majeure. For foreign trade contacts, certificates of Force Majeure issued in a foreign country, including by the China Committee for the Promotion of International Trade (the Letter of the CCI of the RF No. PR0125 of 2nd of February, 2020), are appropriate evidence for the recognition of Force Majeure.

Also, the CCI of the RF issues a certificate of Force Majeure when a foreign state imposes prohibitions and restrictions in the field of entrepreneurial activity, foreign exchange transactions, as well as other restrictive and prohibitive measures applicable to the Russian Federation, or Russian business entities (clause 2.2 of the Regulation on the procedure for the Chamber of Commerce and Industry of the Russian Federation to certify Force Majeure circumstances (Force Majeure) (Appendix to the Resolution of the Board of the CCI of the RF of December 23rd, 2015 No. 173-14)).

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

It is recommended that the contract establishes what circumstances are qualified as Force Majeure, the procedure, form and term for notification of the occurrence of a Force Majeure event, as well as a list of evidence of Force Majeure. If the parties are interested in maintaining the obligation for the period during which the Force Majeure circumstances exist, it is better to state expressly in the contract that the occurrence of Force Majeure does not terminate the parties’ obligations (either completely, or partially). Further, it is reasonable to agree that, upon expiry of the period of validity of the Force Majeure circumstances agreed upon by the parties (for example, 2 – 3 months), each party, or one of the parties, has the right to repudiate of the contract an out-of-court procedure.

At the same time, it is worth mentioning that, although the parties can rely on an approximate list of typical cases agreed in the contract, this does not guarantee that the court will also recognize their situation as Force Majeure. For more details see clause 9.

14. **Is it common practice to include force majeure clauses in commercial contracts?**
Yes, the parties quite often include a Force Majeure clause in the contract.

The parties can provide deadlines for notification of the occurrence of Force Majeure circumstances, or agree on the procedure for providing evidence of the occurrence of such a circumstance, in the contract. The parties may also include in the contract the right of the parties to unilaterally terminate the contract in the event of Force Majeure, or they can agree that the contract automatically suspends in case of occurrence of Force Majeure circumstances.

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?**

   Yes, a party may invoke Force Majeure in accordance with the law. The creditor has the right to challenge the position of the debtor and the court will ascertain whether the circumstance can be qualified as Force Majeure.

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

   The debtor must prove the onset of Force Majeure circumstances (clause 8 of the Decision of the Plenum of the Supreme Court of the Russian Federation of March 24th, 2016 No. 7).

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

   The debtor must prove:
   - the fact of the occurrence of Force Majeure circumstances. These may be acts issued by authorities, documents issued by the Russian Interior Ministry, EMERCOM of Russia, the Weather Service, etc.;
   - emergency and inevitability of what happened;
   - compliance with the procedure, established by the contract, for notifying the creditor of the occurrence of Force Majeure and taking other reasonable measures to mitigate possible losses to the creditor (clause 10 of the Decision of the Plenum of the Supreme Court of the Russian Federation of March 24th, 2016 No. 7);
   - the fact of appeal to the CCI of the RF, if the agreement provides for confirmation of Force Majeure using this document.

The Russian based company being the debtor under the foreign trade contract must receive a certificate of Force Majeure in the CCI of RF.

The certificate of Force Majeure can be issued only if a direct causal relationship between the circumstances that have arisen and the inability to perform obligations under the contract is proved.
18. To what extent is a party required to mitigate its position/losses before seeking to rely on force majeure?

The debtor is obliged to take all reasonable measures to reduce the losses caused to the creditor by Force Majeure (clause 3 Article 307, clause 1 Article 393 of the Civil Code of the Russian Federation). The most common measure for mitigating possible losses is the debtor’s obligation to notify the creditor of the occurrence of such a circumstance as soon as practically possible, or within the period specified in the contract. Should the debtor fail to serve the notification, or perform other actions reasonably necessary to mitigate possible damages, the debtor will be obligated to compensate the creditor for the corresponding losses.

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

Force Majeure circumstances cannot be recognized, the occurrence of which depended on the will, or actions, of the party to the obligation, for example, the debtor lacking the necessary money (as a general rule), violation of obligations by its counterparties, unlawful actions of its representatives (clause 8 of the Decision of the Plenum of the Supreme Court of the Russian Federation of March 24th, 2016 No. 7). For more details please see Question 9.

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

Yes, the debtor is obliged to notify the creditor of the occurrence of a Force Majeure circumstance. Otherwise, the debtor will pay for the damages of the creditor for failure to notify (clause 10 of the Decision of the Plenum of the Supreme Court of the Russian Federation of March 24th, 2016 No. 7).

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

As mentioned above, occurrence of Force Majeure may release the debtor from liability for violation of contractual obligations. In case the contract is terminated due to Force Majeure circumstances, the debtor will be obligated to return the prepayment amount. Otherwise, the prepayment can be recovered in the court proceedings, in accordance with the legal rules on unjust enrichment.

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

If the contract is silent in relation to Force Majeure, general remedies apply, i.e. the debtor is exempted from the liability, and the creditor gains the right to termination the contract due to loss of interest in further performance.

At the same time, in the contract parties may provide for other remedies, including an
indemnity clause formulated in accordance with Art. 406.1 of the Civil Code of the Russian Federation (indemnity in this case is carried out regardless of the violation of the obligation, by the relevant party, and regardless of the causal relationship between the behaviour of that party and the losses to be compensated), or agree on the either party’s right to unilaterally terminate, or amend, the contract in case of Force Majeure. Further, the termination of the contract concluded by legal entities may be subject to the payment of termination fees in accordance with para.3 Article 310 of the Civil Code of the Russian Federation.

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

The Consumer Protection Act No. 2300-I dd. February 7th, 1992 (para. 4, Art. 14) establishes the liability of the manufacturer (executor) for harm caused to the life, health and property of the consumer, regardless of whether the level of scientific and technical knowledge enabled them to identify harmful associations, or not. Accordingly, the manufacturer (contractor) is responsible to the consumer, which cannot be limited by any conditions, including Force Majeure.

In other cases, general rules on Force Majeure apply to consumer relations. In other words, the seller (manufacturer or performer) may be exempted from liability, if there is proof of the Force Majeure circumstances presence. At the same time, it is worth mentioning that the consumer has the right, at any time, on this basis, to terminate the contract and demand the return of previously paid money.

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

Yes, the consumer is provided with adequate protection in the event of Force Majeure. The manufacturer (seller, executive) is exempted from liability for non-performance, but the consumer has the right to terminate the contract and demand the return of previously-paid money. The consumer also has the right to agree on the postponement of the obligation, or to agree to the deadlines proposed by the manufacturer (seller, executor).

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

According to Art. 930 of the Civil Code of the Russian Federation, citizens and legal entities can insure their property, including against Force Majeure circumstances (fires, floods, etc.). If an insured event happens, losses will be compensated by the insurance company.

It should also be noted that, under Russian law, (Art. 932 of the Civil Code of the Russian Federation), such type of insurance policy, as insurance against liability for contractual breach, is generally restricted and may be possible only in cases directly prescribed by law that are specific (e.g. liability of notary officers, tour operators, auditors). Therefore, insurance against liability in the cases of improper performance, or non-performance of contractual obligations, due to COVID-19 may be limited.
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?**

The main measures to support citizens and legal entities that have encountered Force Majeure have already been taken by the Government of the Russian Federation. Among them are the following:

The Ministry of Finance of Russia, EMERCOM of Russia and FAS Russia recognized the COVID-19 pandemic infection as Force Majeure in relation to public procurement (the Joint letter of the Ministry of Finance of Russia, EMERCOM of Russia, FAS Russia of March 4th, 2020 No. 24-06-05 / 26578/219-AG-70 / ME / 28039/20). Thus, if the debtor under this contract cannot perform the obligation in connection with the COVID-19 pandemic, such debtor will be released from liability. Also, the changes have been introduced into the rules for writing off fines and penalties (the Rules for writing off the penalty, approved by the Decree of the Government of the Russian Federation of July 4th, 2018 No. 783). Now, they are establishing, among other things, the procedure for writing off penalties for non-performance of contractual obligations for 2020 due to the spread of the COVID-19 pandemic.

The CCI of the RF and its units in the regions issue certificates of Force Majeure free of charge. The CCI of the RF considers the circumstances in each case and, on this basis, makes a decision and issue a certificate of Force Majeure.

In addition, the Supreme Court of the Russian Federation gave explanations to lower courts on the application of Force Majeure rules to situations involving the COVID-19 pandemic. The Ministry of Finance of the Russian Federation, EMERCOM of Russia, the Federal Antimonopoly Service of the Russian Federation and the CCI of the RF issue newsletters with statements about this situation and recommendations for citizens and legal entities (for example, the Information of the Ministry of Economic Development of Russia “Services in issuing certificates of Force Majeure circumstances have become free for business”; the Letter of the CCI of the RF of March 27th, 2020 No. 02в / 0241 “On Methodological Recommendations on the Issuance by the Chambers of Commerce and Industry of Opinions on Force Majeure Conditions under Agreements Concluded between Russian Entrepreneurships”; the Letter of the CCI of the RF of April 17th, 2020 No. 04в / 0088 “On the provision of clarifications”).

There have also been some measures put in place to support the tenants (Federal Law of April 1st, 2020 No. 98-FZ “On introducing amendments to certain legislative acts of the Russian Federation on the prevention and liquidation of emergency situations”). This law, adopted due to COVID-19 pandemic, specifically states that tenants of real property are entitled to a reduction of rent payments due to the impossibility to use the property if a higher alert regime, or state of emergency, is introduced. The tenants may also postpone rent payments in cases provided for in the Resolution of the Russian Government of April 3rd,
2020 No. 439 “On requirements to conditions and periods of postponement of rent payments under real estate lease agreements”.

Moreover, there have also been adopted measures of state support aimed to protect businesses and individuals related to public duties. For instance, there has been adopted Federal Law of April 1st, 2020 No. 102-FZ “On Amendments to Parts One and Two of the Tax Code of the Russian Federation and Certain Legislative Acts of the Russian Federation”, which entitles the government, and the highest executive bodies in the regions, to extend the deadlines for reporting to tax authorities. Specifically, the Resolution of the Government of the Russian Federation of April 2nd, 2020 No. 409 “On measures to ensure sustainable economic development” (together with the “Rules for granting deferred tax payments (installments), advance tax payments and insurance contributions”) introduced postponement of tax, accounting and insurance contribution statements due to COVID-19. Further, the Resolution No. 409, among other things, states that until 30th June 2020, the tax authorities will not conduct on-site inspections.

Besides, until September 30th, 2020 the goods imported for the purpose of preventing the spread of coronavirus infection in the EAEU territory are exempt from import duties. The duty relief is established by the Decision of the Council of the Eurasian Economic Commission of March 16th, 2020 No. 21 regarding personal protective equipment, disinfectants, diagnostic reagents, certain types of medical equipment and materials.

In order to protect the companies and individuals that have been hit the most by COVID-19, a six-month moratorium on initiating bankruptcy proceedings has been introduced (Resolution of the Government of the Russian Federation of April 3rd, 2020 No. 428 “On imposing a moratorium on the initiation of bankruptcy proceedings, at the request of creditors against individual debtors”).