



Force Majeure Tracker

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GLOBAL LITIGATION FORCE

EXECUTIVE SUMMARY

We live in an increasingly uncertain world, with pandemics, natural disasters, political unrest and war dominating global headlines. When unpredictable events such as these interfere with the performance of a contract, how should the parties react, and who should bear the risk? This guide offers a high-level comparative analysis of the laws of force majeure and similar legal concepts in 37 jurisdictions, together with alternative remedies that may apply depending on the governing law of the relevant contracts. If you have any additional questions, please do not hesitate to contact our practitioners listed throughout the document.



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1 Is FM recognized in statute? If yes, what is impact of statutory rules on FM clauses in contracts?

 AUSTRALIA	No statutory recognition.
 CHINA	Yes - FM doctrine exists pursuant to article 180 and article 590 of the PRC Civil Code, which came into effect on 1 January 2021 and replaced and superseded the prior article 180 of the PRC General Rules of the Civil Law and Article 117 and Article 118 of the PRC Contract Law. Where a contract contains FM provisions, the provisions will apply to the extent that they do not conflict or derogate from the statutory principles.
 HONG KONG	No statutory recognition.
 INDONESIA	Yes - a general FM doctrine exists pursuant to articles 1244 and 1245 of the Indonesian Civil Code. FM provisions should not derogate from the statutory principles.
 JAPAN	Some statutory recognition in article 419-3 of the Japanese Civil Code which provides that an obligation to pay money of any kind cannot be excused or waived due FM unless otherwise agreed between the parties. Enforceability of FM clauses may be affected by restrictions imposed under mandatory rules.
 MALAYSIA	Yes, FM is given recognition in the Civil Law Act 1956. FM clauses are enforceable and will displace statutory provisions in respect of the adjustment of the rights and liabilities of parties to a frustrated contract.
 PHILIPPINES	Yes. FM is recognized under article 1174 of the Civil Code: "Except in cases specified by the law or when it is otherwise declared by stipulation, or when the nature of the obligation requires the assumption of risk, no person shall be responsible for those events which could not be foreseen, or which, though foreseen, were inevitable." If the contract has a specific provision on FM, the contract provision will apply provided that such provision is not deemed contrary to law, morals, good customs, public order or public policy.
 SINGAPORE	No statutory recognition.
 TAIWAN	Yes, FM doctrine exists under the Taiwan Civil Code. Under the liability theory of Taiwan Civil Code, FM means the occurrence of the incident is out of control of human beings, such as earthquakes, wars, typhoons, etc., and the occurrence is not avoidable even anyone exercises the most diligent care, i.e., the occurrence of incident is not attributable to the debtor's intent or negligence.

1 Is FM recognized in statute? If yes, what is impact of statutory rules on FM clauses in contracts?



THAILAND

Section 8 of the Civil and Commercial Code (the CCC) provides the statutory definition of FM which denotes any event the happening or pernicious result of which could not be prevented even though a person against whom it happened or threatened to happen were to take such appropriate care as might be expected from him in his situation and in such condition. In short, FM refers to an event that no one under the same situation can prevent from occurring, and once occurred, no one can prevent its harmful result, even though reasonable care has been applied. If the event or its consequence can be reasonably prevented with a reasonable care/effort, it shall not be regarded as FM.












As the statutory definition of FM is not a mandatory law, contracting parties are free to define their own FM and relevant consequences under the contract. Otherwise, the statutory FM will apply if contracting parties have not agreed an FM clause in their contract.










VIETNAM

Yes. A FM event is defined under article 156.1 of Vietnam Civil Code as an event which objectively cannot be foreseen and cannot be remedied although all permissible and necessary measures have been applied.





2 FM pursuant to contract?

 AUSTRALIA	Yes. Availability of remedies depends on the terms agreed between the parties. FM clauses are construed according to contract law principles under the common law.
 CHINA	Yes. However, FM clauses only apply to the extent that they do not conflict with the statutory principles.
 HONG KONG	Yes. Availability of remedies depends on the terms agreed between the parties. FM clauses are construed according to contract law principles under the common law.
 INDONESIA	Parties are free to include FM clauses, so long as they do not derogate from the statutory principles.
 JAPAN	Yes. FM clauses are considered as enforceable agreed terms by the courts. However, interpretation is often fairly strict and focused on the explicit wording of the clause.
 MALAYSIA	Yes. Availability of remedies depend on terms agreed between the parties. FM clauses are construed according to the wording in the FM clause.
 PHILIPPINES	The FM provision will apply provided that such provision is not deemed contrary to law, morals, good customs, public order or public policy.
 SINGAPORE	Yes. Availability of remedies depends on the terms agreed between the parties. FM clauses are construed according to contract law principles under the common law.
 TAIWAN	Yes. Parties may include FM clauses in contracts as long as it does not conflict with mandatory provisions.
 THAILAND	Parties may agree to define their own FM and consequence under the contract, as the statutory FM definition is not a mandatory law.
 VIETNAM	Yes. Parties are free to include FM provisions in their commercial contracts that enumerate more specifically the kinds of FM events that would excuse performance under their agreement.









3 Formalities to invoke?

 AUSTRALIA	<p>Depends on the specific wording of the FM clause and the factual circumstances, typically:</p> <ul style="list-style-type: none"> ▪ The party relying on the FM clause has the burden of proving the FM event by producing evidence of the impact of the event. ▪ The affected party is usually required to give a written notice of the FM event to the counterparty. Note time limits imposed on such notification and the consequence of non-compliance.
 CHINA	<p>Need to establish causation between the FM event and the non-performance of the contract. Requires prompt notification of the counterparty by the invoking party and proof of existence of the FM and its impact.</p>
 HONG KONG	<p>Depends on the wording of the FM clause. If the FM clause requires any steps to be taken to invoke it, such steps should be followed.</p>
 INDONESIA	<p>There are no formalities under the Indonesian Civil Code to invoke FM. If parties agree on the formalities in their FM clause, such steps should be followed.</p>
 JAPAN	<p>There is no formality to invoke under Japanese law. As such, any formality for invoking the FM clause will be as set out in the clause (or contract) itself.</p> <p>In the courts, however, a party seeking to invoke a FM clause will ordinarily be required to show:</p> <ol style="list-style-type: none"> Occurrence of the FM event; and Failure to perform was caused by the FM event. <p>Further, as any negligence by the claimant will be considered with respect to damages (see next section - "Obligation to mitigate"), prompt notification of the FM event is advisable.</p>
 MALAYSIA	<p>Depending on the wording of the FM clause. If the FM clause requires any steps to be taken, such as any notice requirement, that such steps should be followed. Generally:</p> <ul style="list-style-type: none"> ▪ FM event is within the scope of the FM clause ▪ FM event is beyond the party's control ▪ Performance of the contract is substantially affected by the FM event
 PHILIPPINES	<p>For the FM principle to apply, the following requisites must be present:</p> <ol style="list-style-type: none"> Breach must be independent of the will of the party claiming; The event must be either unforeseeable or unavoidable; The event must be such as to render it impossible for the debtor to fulfill his obligation in a normal manner; and The party claiming did not participate in, nor aggravate, the injury to the other party.

3 Formalities to invoke?

 SINGAPORE	<p>Depends on the wording of the FM clause. If the FM clause requires any steps to be taken to invoke it, such steps should be followed. Generally:</p> <ul style="list-style-type: none">▪ FM event must be within the scope of the FM clause▪ FM event is beyond the party's control▪ Performance of the obligations would be substantially or materially interfered with or affected by it.
 TAIWAN	<p>Depends on the wording of the FM clause. Causation must be established if a party seeks to rely on the concept of "non-attributable" clauses under the Civil Code.</p>
 THAILAND	<p>Under the CCC, there is no specific formality to invoke the FM, but it is recommended that the party seeking to invoke the FM formally serves the FM notice to the other party as soon as the FM has occurred and caused impact on the ability to perform the contract.</p> <p>If parties have agreed an FM clause, the steps will depend on the terms of the contract.</p>
 VIETNAM	<p>Under Vietnam's Commercial Law, the party wishing to invoke a FM event must:</p> <ol style="list-style-type: none">i. immediately notify the other party in writing of the FM event and of the possible consequences; andii. promptly notify the other party when the FM event terminates. <p>The affected party should also collect all available evidence to support their claim that the FM event directly caused the failure of performance.</p>

4 Obligation to mitigate?

 AUSTRALIA	Depends on the wording of the FM clause. Generally, the affected party is required to use reasonable endeavors or diligence to overcome or mitigate the impact of the FM event.
 CHINA	Both parties suffering from the FM event shall take appropriate preventive measures to mitigate losses on a "best efforts" basis.
 HONG KONG	Depends on the wording of the FM clause. Generally, the affected party is required to use reasonable endeavors or diligence to overcome or mitigate the impact of the FM event.
 INDONESIA	The law is silent on this. Parties can agree on obligation to mitigate in contracts.
 JAPAN	<p>In principle, Japanese law does not provide specifically for a duty to mitigate. With that being said, a recent first instance court decision linked an obligation to mitigate to acting as "a good manager". Here, in addition to the FM event, the court held the supplier was required to mitigate in order to be released from its liability for defaulting on its timely delivery obligation under a continuous supply contract. We note, however, that a judgment issued by a first instance court in Japan is not legally binding on other judges and courts.</p> <p>Also, article 418 of the Japanese Civil Code does, however, provide that the courts can take into account any negligence by a claimant when determining the entitlement to, and amount of, damages. As such, a claimant's failure to mitigate, i.e., negligence, would likely result in a loss or reduction of the claimed amount.</p> <p>Additionally, the FM clause itself may contain an obligation to minimise loss or damage.</p>
 MALAYSIA	Depends on the wording of the contract but generally a party relying on an FM clause is required to use reasonable endeavors to mitigate the impact of the FM event.
 PHILIPPINES	No express obligation to mitigate damage but this can be implied from the requirement that in order to claim the defense of fortuitous event, the claiming party must not aggravate the injury to the other party. Also, as a general principle, Philippine law provides that every person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith.
 SINGAPORE	Depends on the wording of the FM clause. Generally, the affected party is required to use reasonable endeavours or diligence to overcome or mitigate the impact of the FM event.

4 Obligation to mitigate?



TAIWAN

Depends on the wording of the FM clause.



THAILAND

Under the CCC, this includes the obligation to exercise reasonable care expected from the person in the same circumstance to prevent the harmful result, or if it is impossible to prevent, the duty to mitigate is extended to limit a greater loss/damage.







If parties have agreed an FM clause, mitigation obligations will depend on the terms of the contract.








VIETNAM

Depends on the wording of the FM clause.

5 Outcome of invoking FM?

 AUSTRALIA	<p>Depends on the specific wording of the FM clause, typically:</p> <ul style="list-style-type: none"> ▪ Performance is suspended for a short period or for the duration of the FM event. ▪ Following such suspension, an extension of time for performance may then be granted automatically or by agreement. ▪ If the FM event is prolonged or permanent then the clause may provide for termination by default or by agreement.
 CHINA	<p>The party successfully invoking FM is absolved of civil liability for nonperformance. A party may request to terminate the contract under article 563 of the PRC Civil Code.</p>
 HONG KONG	<p>Depends on the specific wording of the FM clause. Common types of relief include the right to:</p> <ul style="list-style-type: none"> ▪ suspend contractual obligations; ▪ be excused from liability for non-performance or delay; ▪ terminate the contract; ▪ launch an extension of time to target dates; ▪ renegotiate the terms of the contract; and ▪ instigate remediation and/or contract governance measures.
 INDONESIA	<p>The affected party is excused from its obligations and is not liable to damages during the FM event.</p>
 JAPAN	<p>Under Japanese law, the outcome of invoking FM (and the performance of the obligation to mitigate as a 'good manager,' if requested by court) will usually be release from liability for default of an obligation to deliver a product or service in a certain time frame (with certain limited exceptions). Additionally, a party that successfully invokes a FM clause, depending on the remedies set out in the contract, may be entitled to:</p> <ol style="list-style-type: none"> Rescission of an order or voiding a contract; Adjusting the scope or steps for performance, such as timing and method of delivery; Forfeiture of paid-in-advance costs, fees or price (release from refund obligation); and/or Excusing a breach of contract, waiving an obligation or otherwise releasing a party from liability.
 MALAYSIA	<p>Depends on the specific wording of the FM clause.</p> <p>Common types of relief include:</p> <ul style="list-style-type: none"> ▪ suspension of contractual obligations; ▪ exclusion from certain liabilities for non-performance or delay; ▪ termination of the contract.

5 Outcome of invoking FM?

	PHILIPPINES	The party invoking the defense or relief of fortuitous event is absolved from civil liability regardless of non-performance of all or part of the obligation. A party may seek rescission (i.e., nullifying a contract as if it never became effective) depending on the impact of the FM event.
	SINGAPORE	Depends on the specific wording of the FM clause. An outcome might include an extension of time to perform obligations under the contract or excuse an affected party from performing at all allowing the other party to terminate the contract. If performance is merely postponed until the FM event ceases, then the invoking party would be considered to be merely suspending performance of the contract.
	TAIWAN	Depends on what is provided in the contract. Common types of relief include the right to: <ul style="list-style-type: none"> ▪ suspend contractual obligations; ▪ be excused from liability for non-performance or delay; ▪ terminate the contract; ▪ launch an extension of time to target dates; ▪ renegotiate the terms of the contract; and ▪ instigate remediation and/or contract governance measures.
	THAILAND	Section 8 of the CCC does not provide legal consequences upon the occurrence of FM. To determine whether a debtor is discharged from his or her obligation as a result of the FM, the question is whether or not the performance of obligations is impossible: <ul style="list-style-type: none"> ▪ If the performance of obligations becomes impossible without the debtor's fault, the debtor is discharged from his obligation (section 219 of the CCC) ▪ If the performance of obligations becomes impossible in consequence of a circumstance for which the debtor is responsible, the debtor will be liable for compensation for the non-performance.
	VIETNAM	Depends on the terms of the contract. Common types of relief include: <ul style="list-style-type: none"> ▪ Suspension of contractual obligations; ▪ exclusion from certain liability for non-performance or delay; ▪ termination of contract; ▪ extension of deadlines/target dates; ▪ renegotiation of the terms of the contract; ▪ imposition of remediation and/or certain contract governance measures; and ▪ exemption from compensation.

6 Any other concepts/remedies?



AUSTRALIA

Frustration: If there is no FM clause, parties may rely on the doctrine of frustration but the inclusion of an FM clause may oust the operation of frustration as the FM clause may demonstrate that the parties have already considered the issue and risk allocation. A frustrating event is a supervening event that is:

- not the fault of either party;
- significantly changes the nature of the contractual rights and/or obligations; and
- makes it unjust to hold the parties to the contract.

It is not sufficient if the event makes performance more expensive, onerous or impracticable or if alternative performance is available.

Frustration results in the termination of the contract. A term may continue to operate after frustration if this is the parties' intention.

The common law provides that if a contract is frustrated, losses lie where they fall. However, losses may be borne differently in New South Wales, Victoria and South Australia where legislations allow alternative allocation of losses for a fairer result.



CHINA

Doctrine of change of situation:

- Article 533 of the PRC Civil Code established the doctrine of change of situation on a statutory level.
- The two regimes are no longer exclusive to each other under the Civil Code and a FM event is remediable either by invoking force majeure or the change of situation, depending on circumstances of the case.
- In general, if performance is not possible, a claim to invoke FM should be made under the FM doctrine; If performance is still possible but "obviously unfair," then a claim to modify/terminate the contract should be made under this regime;
- Unlike the FM regime, a judicial court proceeding must be initiated, potentially requiring multiple levels of review.



HONG KONG

Other contractual remedies which cover similar circumstances include material adverse change clauses in the M&A context but this is usually highly negotiated.

Similar to other common law jurisdictions, the doctrine of frustration is also available.



INDONESIA

Under articles 1444 and 1445 of the Indonesian Civil Code, an agreement is terminated in case the object of the agreement is destroyed, can no longer be traded, or lost due to an unexpected event.



JAPAN

In the absence of an FM clause, a small number of doctrines under Japanese statutory law and court precedents offer similar remedies in limited circumstances, e.g the ability to seek cancellation, suspension of obligations or re-negotiation of terms and conditions of contracts.

6 Any other concepts/remedies?



MALAYSIA

If the contract does not contain an FM clause, then parties may have to ascertain whether the common law doctrine of frustration as found in section 57 of the Malaysian Contracts Act applies. The circumstances under which the alternative doctrine of frustration apply are more limited than typical FM clauses - performance must be rendered legally or physically impossible to perform. If frustration applies, the contract will be deemed void and parties will be discharged from further performance. The Court will have a wide discretion to allocate rights and liabilities.

Section 15 of Civil Law Act 1956 regarding the rights and liabilities of parties to frustrated contracts will require refund of fees paid (subject to judicial discretion).

Section 7 of the Malaysian Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 – an act that was introduced to provide some form of temporary relief to parties affected by the pandemic from certain legal obligations – bars the enforcement of a contractual right against a defaulting party if such default arose due to measures prescribed, made or taken under the Malaysian Prevention and Control of Infectious Diseases Act 1988 to control or prevent the spread of Covid-19. This provision is only applicable to specific categories of contracts, such as construction work contracts, professional services contracts and leases of non-residential immovable property. While the provision was due to expire on 31 December 2020, its operation has since been extended to 22 October 2022.



PHILIPPINES

There are other related principles under Philippine law under which a party may be released from their contractual obligations:

- Legal or physical impossibility, i.e., when the obligation becomes legally or physically impossible without his/her fault (article 1266, Civil Code); and
- Extreme difficulty, i.e., when the service has become so difficult as to be manifestly beyond the contemplation of the parties (article 1267, Civil Code).

Important distinction - FM focuses on the event while the above remedies focus on the contractual objective or obligation.



SINGAPORE

If the contract does not contain an FM clause or the FM event is outside the scope of the clause, then parties may have to ascertain whether the common law doctrine of frustration applies to discharge contractual obligations. The doctrine of frustration has a high threshold in Singapore: the event must be a supervening event resulting in performance being physically or legally impossible, or fundamentally different from the originally undertaken performance.



TAIWAN

There is another legal doctrine called "Doctrine of Circumstance Change" under article 227-2 of the Civil Code, which provides "[i]f there is change of circumstances which is not predictable then after the constitution of the contract, and if the performance of the original obligation arising therefrom will become obviously unfair, the party may file the lawsuit asking the court for increasing or reducing his payment, or altering the original obligation." The application of article 227-2 is subject to the court's decision.

"Non-attributable" clauses:

- Under articles 225, 230, 266 of Taiwan's Civil Code, companies may be released from obligations if the performance or default are caused "by reason of a circumstance to which companies are not imputed".
- Causation must be established between the supervening event and the failure to perform.
- Whether this concept applies is considered on a case-by-case basis.

6 Any other concepts/remedies?



THAILAND

Thai law has statutory provisions comparable to the common law doctrine of impossibility and frustration of purpose, i.e., the impossibility of performance of obligations, which would release a contracting party (or both parties) from the obligations under the contract (sections 218 and 219 of the CCC).

Moreover, the parties may also agree on some clauses, such as Change of Law, Material Adverse Effect, or Hardship clause, to govern their contractual rights and liabilities as a result of some event which may not fall under the statutory FM.



VIETNAM

"Material adverse change" clauses:

- Article 420 of Vietnam's Civil Code regulates "performance of contract in the event of a basic change of circumstances".
- The affected party may re-negotiate contract terms with the other party within a reasonable timeline if there is a basic change in the circumstance after contract execution.
- If re-negotiation is not possible, either party may request the court to
 - i. terminate the contract at a specific time; or
 - ii. amend the contract.



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1 Is FM recognized in statute? If yes, what is impact of statute on FM clauses?

 AUSTRIA	<p>No statutory recognition.</p> <p>Case law: The Austrian Supreme Court (OGH) has characterized FM as "an elementary external event which could not be prevented even by exercising the utmost reasonable care and which is so exceptional that it cannot be regarded as a typical operational hazard."</p>
 BELGIUM	<p>Articles 1147 and 1148 B.W. provide that a debtor is released from his obligations if he can show that his non-performance is due to FM. Defined by case law as "insurmountable and unforeseeable impediment to the fulfillment of an obligation", which is not the debtor's fault. Note: in certain cases, courts are willing to broaden definition to any situation making performance "reasonably impossible". This is not mandatory law and parties are therefore free to agree otherwise.</p>
 CZECH REPUBLIC	<p>Generally, yes.</p> <p>Czech law does not provide for statutory definition of FM. However, the concept has been implemented in several provisions of the Civil Code which provide the contractual parties with the following options:</p> <ol style="list-style-type: none"> Renewal of contractual negotiations in case of unexpected change of circumstances leading to a gross disproportion in the rights and obligations of the parties (section 1765 of the Civil Code); Possibility to withdraw from the contract in case the party to a contract is entitled to choose the performance and such choice was frustrated by force majeure or by the other party; Liberation from the contractual obligation if performance of the contract becomes impossible due to an event not attributable to the debtor (section 2006 of the Civil Code); and Exemption from liability for damages caused by failure to fulfill the contractual obligation if such failure results from extraordinary and unpredictable circumstances arising independently of the will of the debtor (section 2913 of the Civil Code).
 ENGLAND & WALES	<p>No statutory recognition.</p>
 FRANCE	<p>Yes. FM provisions are contained in article 1218 of the French Civil Code, which defines an FM event as:</p> <ul style="list-style-type: none"> an event beyond the control of the debtor could not be reasonably anticipated at the time of the conclusion of the contract whose effects cannot be avoided by appropriate measures prevents debtor from performing obligation <p>Judges carry out a case-by-case analysis of the situation. There is no standard case law that could apply to all cases.</p>
 GERMANY	<p>No statutory recognition.</p>

1 Is FM recognized in statute? If yes, what is impact of statute on FM clauses?



HUNGARY

Hungarian contract law does not regulate FM as such. However, Hungarian law regulates frustration/impossibility of performance. FM events typically either lead to frustration/impossibility of performance or breach of contract. The parties are free to agree an FM clause and apply the provisions of that clause instead of the statutory provisions relating to frustration/impossibility of performance or breach of contract in cases falling within the scope of that FM clause.



ITALY

Italian law does not provide for a statutory definition of FM.

However, the general concept used to describe situations like those falling within the FM is essentially reflected in article 1256 of the Italian Civil Code (ICC) which provides, *inter alia*, that an obligation fades when the relevant performance becomes impossible due to a cause not attributable to the same debtor.

Italian court precedents has set forth that FM shall consist in a particular impediment in carrying out a specific action, that shall

- i. neutralize any efforts of the acting party aimed at overcoming such event, and
- ii. not be attributable to the acting party in any way. In other words, a FM event is deemed to be an objective event or situation which is:
 - extraordinary;
 - unforeseeable (at the time of entering into the contract);
 - "absolute" (i.e., impossible to overcome).

Causes which may be invoked for the purpose of the above-mentioned "impossibility to perform the contractual obligations" are *inter alia* the orders or prohibitions issued by the European and/or domestic authority so-called "*factum principis*": specifically, they are legislative or administrative measures, arising from general interests, which make it impossible to fulfil obligations, irrespective of the conduct of the obligor. In brief, it is a circumstance which exempts the debtor from liability, irrespective of the contractual provisions in effect.



LUXEMBOURG

Article 1148 of the Luxembourg Civil code provides that: "Damages are not due when, because of An FM or a fortuitous event, the obligor-debtor either was prevented from giving or doing what he was obligated to give or did what he was forbidden to do." According to case law and legal authors, FM is an unforeseeable event that prevents a contracting party from fulfilling its obligations.



THE NETHERLANDS

Yes, article 6:75 of the Dutch Civil Code (DCC) provides that FM can be invoked if a party cannot perform because of a factor that is:

- i. not their fault, and
- ii. not something that they have assumed the risk for (under statute, contract, or other generally accepted principles of Dutch law).

Dutch law does not require that performance is impossible. However, only in exceptional cases will reliance on FM be honored if performance would technically still be possible. In the end, whether a party will be able to rely on FM is highly dependent on the particular circumstances of the case.

When examining whether FM can be relied upon, an analysis should be made of the consequences of the FM event that has allegedly lead to the non-performance and whether that non-performance is caused by that FM event.

In general, the threshold for successful reliance on FM is high. This is in part due to the fact that many contracts contain separate FM clauses that simply attribute the risk of the occurrence of an FM event to a particular party, and exclude reliance on statutory remedies.



POLAND

There is no general definition of FM. Nonetheless, as a rule a debtor is not liable for improper or non-performance, if it results from the circumstances beyond the debtor's control.

1 Is FM recognized in statute? If yes, what is impact of statute on FM clauses?



RUSSIA

Yes. FM provisions are contained in article 401 (3) of the Civil Code.

There is no exhaustive list of FM events in the statute and parties are free to include those in their contract provided such events are

- i. of extraordinary nature and
- ii. unforeseeable, and
- iii. such events do not depend on the will or actions of any of the parties.



SOUTH AFRICA

No statutory recognition.



SPAIN

Yes, FM doctrine reflected in article 1105 of the Spanish Civil Code.

Applies in the absence of any specific agreement on the contrary reached by the parties.



SWEDEN

No statutory recognition. FM is rather a legal principle commonly used in commercial agreements.



SWITZERLAND

While the term "force majeure" is not defined in Swiss statutory law, the concept of force majeure (FM) is recognized in Swiss legal doctrine and case law.

If the parties have not agreed on a clause dealing with the impossibility or delay of performance due to FM, the statutory provisions of Swiss law apply. If the performance is permanently impossible due to circumstances beyond the non-performing party's control which were not foreseeable when the contract was concluded, the affected party is generally excused from its contractual obligation to perform and does not have to compensate damages since it is not at fault. For example, if a supplier is not able to supply its products to their partners for the foreseeable future because of sanctions, under Swiss law, the supplier would not be held liable for any damages resulting from the non-delivery as it is not a fault. However, depending on the contract, the affected party will normally also lose its right to claim contractual performance from the other party, or has to reconstitute what it has already received.

The question of which circumstances are considered to be foreseeable depends on the specific circumstances. For example, a sanctions regime or government measures against a pandemic that make it impossible for a party to perform its contractual obligations may lead to an unforeseeable and unavoidable impossibility to perform. On the other hand, in a country that is regularly hit by natural disasters or by civil riots, such events may be considered foreseeable in some cases. Similarly, the constraints that arose in connection with the COVID-19 crisis may be considered foreseeable if the parties have concluded a contract after the outbreak of COVID-19 and should have anticipated such constraints when agreeing on delivery dates. Therefore, it has to be assessed on a case-by-case basis whether or not an event was actually unforeseeable for the parties at the time the contract was concluded. Currency fluctuations or changes in law that do not prevent performance of the contract but merely render the performance more costly typically do not amount to impossibility.

1 Is FM recognized in statute? If yes, what is impact of statute on FM clauses?



TURKEY

Turkish law does not explicitly define "FM." However, article 136 of the Turkish Code of Obligations (TCO) regulates the consequences of the impossibility of performance, which is the counterpart concept of an FM event. Turkish jurisprudence and scholars overall agree to apply the TCO's impossibility of performance provisions to FM events. The bottom line is that the concept is clearly present in Turkish law.











UNITED ARAB EMIRATES

Yes. FM provisions are contained in article 273 of the UAE Civil Transactions Code. This applies automatically to commercial contracts governed by UAE law where the contract contains no FM provisions.

In addition to article 287 of the Civil Transactions Code, where the FM provisions of the contract supersedes the provisions of the law.

Article 287 of The Civil Transactions Code recognizes the diminished or exemption of liability for damages incurred as a result of FM and other causes (act of God, sudden event, etc.) in tort and contracts. It states that, "if a party proves that the loss arose out of an extraneous cause in which he played no part such as a natural disaster/act of God, sudden accident, FM, act of a third party, or act of the affected person, he shall not be bound to make it good in the absence of a legal provision or agreement to the contrary."

2 FM remedies pursuant to contract?

 AUSTRIA	<p>Parties are generally free to determine the consequences of FM on the contract.</p> <p>In many cases, FM clauses will set out the allocation of risks and entitle to potential suspension of performance in case of FM events.</p>
 BELGIUM	<p>No, it is implied in every contract.</p> <p>However, parties are in principle free to exclude FM from their contractual relationship, or – as the case may be – to modify the definition, conditions and effects of FM (except in some limited circumstances, like in consumer contracts).</p>
 CZECH REPUBLIC	<p>The contractual parties are free to modify or eliminate sections 1765 and 2913 of the Civil Code to the extent that contractual obligations do not become unbalanced to the sole profit of one of the parties.</p> <p>The contractual parties can also introduce different FM definition or modify the consequences of FM in the contract.</p> <p>Section 2006 of the Civil Code is mandatory and therefore, it cannot be derogated by the parties.</p>
 ENGLAND & WALES	<p>Yes, FM must be expressly referred to and defined in a contract. Parties have the freedom to agree on the risk allocation and determination of a FM event.</p>
 FRANCE	<p>Parties have the freedom to override article 1218 by changing definition of FM/excluding it completely from their contract (to the extent the clause does not appear unbalanced). The parties can also decide to include specific contractual provisions relating to the consequences of the FM.</p>
 GERMANY	<p>Yes, FM must be expressly referred to and defined in a contract. Parties have the freedom to agree on the risk allocation and determination of an FM event.</p> <p>Generally, the FM clause contains a carve-out for payment obligations.</p>
 HUNGARY	<p>The parties are free to agree an FM clause. The remedies depend on the FM clause agreed by the parties. Typical remedies include exclusion of liability for breach of contract, exclusion of breach of contract itself, termination rights etc.</p>
 ITALY	<p>The parties to a contract are free to determine</p> <ol style="list-style-type: none"> the events considered as FM under the contract and also the consequences of the occurrence of such events. <p>If a contract provides an FM clause, it should be assessed on a case by case whether</p> <ol style="list-style-type: none"> Epidemics/pandemics or wars are included in the wording of the clause; the clause provides for a "catch-all" wording relating to events caused by nature similar to the one at hand; and/or the situation meets the requirements defined in the clause to consider an event as FM. <p>If the contract does not contain a clause listing such consequences, one might argue that the general principles regarding the "supervening impossibility" or "excessive economic burden" under Italian law may apply (please refer respectively to answers 5 and 6).</p>

2 FM remedies pursuant to contract?



LUXEMBOURG

FM is deemed to arise when a contracting party's performance is prevented by an event beyond its control, the effects of which could not have been foreseen at the time the contract was entered into and avoided by appropriate measures. In the event a debtor of a contractual obligation is unable to perform the obligation due to an FM event, he will be exempt from the performance of this obligation.

These rules apply by default to agreements governed by Luxembourg law and can be supplemented and/or derogated from by specific FM and/or material adverse change clauses. Such clauses are even required if the agreement is governed by foreign law, which does not always contain default rules on FM events.

It is therefore very important to refer first to the clauses of the contract.



THE NETHERLANDS

No, although many contracts contain specific provisions on FM. The effects of applying FM provisions in contractual relationships may differ. Certain contracts specify that if FM can be relied upon, performance is suspended, or the contract may be terminated. Contracts can also specify that FM is simply a risk that is attributed to a specific party.

Furthermore, contracts may also specify that relief under Dutch statutory FM law is excluded. The enforceability of such provisions, however, is not beyond dispute.



POLAND

Yes, if agreed between the parties. Availability of remedies depends on terms agreed between the parties.



RUSSIA

Yes, but FM can also be basis for prolongation of procedural terms (except for preclusive ones).



SOUTH AFRICA

Yes. FM must be expressly referred to and defined in a contract. Parties have the freedom to agree on the risk allocation and determination of a FM event.



SPAIN

No. FM doctrine applies in the absence of any specific agreement on the contrary reached by the parties.



SWEDEN

FM must be expressly referred to and defined in the contract. Parties have the freedom to agree on the risk allocation and determination of an FM event. Parties usually agree on suspension of performance and/or termination of the contract in case of an FM event.



SWITZERLAND

International commercial contracts governed under Swiss law frequently include FM clauses. They foresee specific remedies and typically excuse or suspend performance, termination or adjustment of the contract if the contract becomes impossible, difficult or extremely onerous to perform due to unforeseeable and unavoidable events outside the affected party's control.

Whether an event is an FM event depends on the wording of the clause and the hypothetical will of the parties. Most FM clauses are "open" or inclusive, in the sense that the event does not need to be specifically listed as an FM event. Many contractual FM provisions will include a list of example FM events.

2 FM remedies pursuant to contract?



TURKEY

A good number of sophisticated commercial contracts include FM clauses. There are conflicting opinions as to whether contractual FM provisions prevail over article 136 of the TCO. The majority of Turkish scholars argue that the provisions of article 136 of the TCO are supplementary rather than a mandatory rule of law, allowing parties to contractually agree otherwise and allow their provisions to prevail over article 136 of the TCO. We also share this opinion. However, there are various situations where the contractual provisions may end up being unenforceable and/or null and void, but we will not elaborate on those. In any event, this needs to be a case-specific review because there can be many other case-specific factors that may cause the provisions of the TCO outweigh the contractual provisions or vice-versa.



UNITED ARAB EMIRATES









Yes, although in principle, FM should be an unforeseeable event.

The parties may agree on additional or alternative remedies that may be agreed between the parties.








The parties may also agree to a scheme of allocation of risk in the event of FM.

If the parties did not agree to special remedies, the court has wide discretion to either cancel the contract and return the parties to their status before entering into the contract. If not possible, the contract is terminated and the corresponding obligation ceases to exist.

3 Formalities to invoke?

 AUSTRIA	Any formalities will usually be contained in the specific FM clause. Many contracts require timely notice in writing. Generally, the party relying on the FM clause has the burden of proving the FM event by producing evidence of its impact.
 BELGIUM	None – it is however advisable to notify the other party as soon as possible when confronted with an FM event. This notification requirement has been included in the draft bill on the introduction of a Book 5 "Obligations" in the new Belgian Civil Code (which was approved by the Belgian Justice Committee in March 2022 but is still to be voted by the Belgian Parliament). Generally, the party relying on the FM event also has the burden of proving the FM event by producing evidence of the impact of the event.
 CZECH REPUBLIC	Renewal of contractual negotiations under section 1765 of the Civil Code must take place "within a reasonable time" which is presumed to be two months if not proved otherwise. The contractual parties should also inform each other of any changes to the contract performance related to FM without undue delay.
 ENGLAND & WALES	<ul style="list-style-type: none"> ▪ Depends on the specific wording of the FM clause and the factual circumstances. ▪ Generally, the party relying on the FM clause has the burden of proving the FM event by producing evidence of the impact of the event. ▪ The affected party is usually required to give a written notice of the FM event to the counterparty. Note the potential time limit imposed on such notification and the consequence of non-compliance.
 FRANCE	There is no particular formality provided for by the text. However, the other party must be informed of the suspension or termination of the agreement and of its reasons.
 GERMANY	<ul style="list-style-type: none"> ▪ Depends on the specific wording of the FM clause and the factual circumstances. ▪ Generally, the party relying on the FM clause has the burden of proving the FM event by producing evidence of the impact of the event. ▪ The affected party is usually required to give a written notice of the FM event to the counterparty. Note the potential time limit imposed on such notification and the consequence of non-compliance.
 HUNGARY	The parties are free to agree an FM clause and agree on the formalities to invoke. Typical formalities include the requirement of a written notice that typically must be given without delay. Based on the statutory rules, a party learning about frustration/impossibility of performance must notify the other party without delay, and is responsible for damages caused by the delay of this notification. This statutory rule applies if the parties have not agreed otherwise.
 ITALY	Italian law does not provide for any statutory formalities that should be complied with by the acting party in terminating the contract or suspending the relevant performance. In any case, however, the party must inform the other party of its intention to terminate/suspend the agreement and the underlying reasons. It is advisable that such notice be given in writing and via a traceable mode (certified e-mail, registered letter, fax etc.). Obviously, the party should also comply with the formalities established under the contract, if any.

3 Formalities to invoke?

	LUXEMBOURG	There is no particular formality provided for by law, unless expressly provided for specific formalities in the contract. It is, however, recommended to notify in writing the other party of the reason for which the performance of an obligation will be suspended or that the obligation shall not be capable of being performed at all.
	THE NETHERLANDS	Under Dutch law, the concept of statutory FM is treated as a defense from the non-performing party against a claim for performance or damages. The burden of proof for demonstrating FM is on the non-performing party. Contracts that contain FM clauses, typically also specify formalities which must be observed for invoking such clause. This is typically a notification requirement to the other party within a certain timeframe after the FM event has occurred.
	POLAND	Depends on the wording of the FM clause. If the parties agree on certain steps to be taken, such steps should be followed.
	RUSSIA	The law does not stipulate any formalities in order to invoke FM. Parties to a contract may provide for such formalities in their contract. In practice, for example, parties to a foreign trade contract may provide that a Certificate of the Chamber of Commerce and Industry of the Russian Federation be presented to confirm the occurrence of a FM event (the procedure is stipulated in the Regulation on certifying FM events by the Chamber of Commerce and Industry of the Russian Federation" (attachment to resolution of the Board of the Chamber of Commerce and Industry dd. 23.12.2015 N 173-14). From 10.03.2022 until 30.04.2022 the certification of BM events is free of charge (Order of the Russian CCI dd. 09.03.2022 N 24)
	SOUTH AFRICA	Yes. FM must be expressly referred to and defined in a contract. Parties have the freedom to agree on the risk allocation and determination of a FM event.
	SPAIN	There is no formality to invoke, but for an event to qualify as FM, it must: <ul style="list-style-type: none"> i. cause an absolute impossibility for the affected party to fulfill its contractual obligations; ii. be totally unforeseeable or unavoidable; and iii. not be caused by the parties, i.e., it must be beyond the control of the parties.
	SWEDEN	This will depend on the wording of the FM clause. The party claiming FM will generally need to provide evidence that FM exists, that the FM-events prevents performance, that there are no alternative ways to perform under the contract and notify the other party as soon as possible.

3 Formalities to invoke?



SWITZERLAND

The FM clause may stipulate the prescribed form and time limitations for giving notice of a FM event after it occurs. The non-performing party has to ensure that timely notice is given in the prescribed form.



TURKEY

The FM clause may stipulate the prescribed form and time limitations to give notice about an FM event after it occurs.

We strongly recommend that merchants serve a notice of an FM event via notary, considering that notices or communications of default or termination/rescission between merchants must be made via notary, pursuant to the Turkish Commercial Code. In any event, this is also an ideal method for evidentiary purposes. This recommendation also applies to non-merchants, especially for practical evidentiary purposes.











UNITED ARAB EMIRATES










In practice and in the normal state, if either of the parties has breached or defaulted in the performance of their obligation, the other party notifies the defaulting party to either perform their obligation or terminate the contract (article 272 of the Civil Code). The sensible thing to do is to notify the other party of claiming the FM to avoid notification of default from the other party.

There are special procedures that are stipulated in Maritime Law.

4 Any obligation to mitigate?

 AUSTRIA	<p>Obligations to mitigate will usually be contained in the specific FM clause.</p> <p>Such obligations may also rise from the general duty to act in good faith. For example, a party may be required to inform contractual partners of any difficulties on time, or even to develop alternative sources of supply and/or means of delivery.</p>
 BELGIUM	<p>Depends on the specific wording of the FM clause. However, when there is an actual situation of FM, which requires an insurmountable and unforeseeable impediment to the fulfillment of an obligation, there is not much the debtor can do to mitigate.</p>
 CZECH REPUBLIC	<p>Yes. There is a general statutory obligation to mitigate damages (section 2900 of the Civil Code).</p>
 ENGLAND & WALES	<ul style="list-style-type: none"> ▪ Depends on the specific wording of the FM clause. ▪ Generally, the affected party is required to use reasonable endeavors or diligence to overcome or mitigate the impact of the FM event.
 FRANCE	<p>No, there is no general duty to mitigate loss under French law, including in relation to FM, although parties may choose to include such a duty in their contracts.</p> <p>However, the contracts must be executed in good faith, which can sometimes imply to mitigate loss if possible.</p>
 GERMANY	<ul style="list-style-type: none"> ▪ Depends on the specific wording of the FM clause. ▪ Generally, the affected party is required to use reasonable endeavors or diligence to overcome or mitigate the impact of the FM event.
 HUNGARY	<p>The parties are free to agree an FM clause and agree on the damage mitigation obligations.</p> <p>The statutory provisions allowing for relieving one's liability for either frustration/impossibility of performance or breach of contract require, among others, that the party takes reasonable measures to avoid the FM event and prevent its consequences. In addition, the damaged party is required to take reasonably expectable measures to prevent and mitigate the damage, and the damaging party will not be liable for part of the damage arising from the damaged party not taking the reasonably expectable damage prevention and mitigation measures. These statutory rules apply if the parties have not agreed otherwise.</p>
 ITALY	<p>The general obligations of good faith in the execution of the contract and fair dealing (articles 1175 and 1375 ICC) could lead to a substantial obligation to mitigate loss where possible.</p> <p>"In contracts for continuous or periodic performance or for deferred performance, if extraordinary and unforeseeable events make the performance of one of the parties excessively burdensome, the party who owes such performance can demand termination of the contract". (article 1467 ICC - please refer to answer 6 "excessive economic burden")</p> <p>Article 1467, paragraph 3 of ICC, however, offers the party against whom the termination is required a chance to avoid it by offering to revise the terms of the agreement to re-achieve fairness.</p>

4 Any obligation to mitigate?

 LUXEMBOURG	There is no express legal duty for a party to mitigate its loss. This being said, the principle of good faith could be invoked. In fact, good faith in the negotiation, conclusion and performance of contracts (as well as in their termination) is a fundamental principle of Luxembourg contract law. Parties should consider framing the principle in the contract.
 THE NETHERLANDS	Under Dutch statutory law, all parties to a contract have a duty to take reasonable steps to mitigate damages. The requirement to mitigate damages applies with respect to damages claims but not with respect to claims for specific performance. If parties do not observe their obligation to mitigate, the damages that could have been mitigated are deducted from the damages claim. Contracts may also provide an obligation to mitigate damages. If so, these obligations should be carefully reviewed.
 POLAND	In principle, Polish law does not provide specifically for duty to mitigate. However, there are a numerous courts' decision, where the courts recognize that such obligation exists. While the previous decisions are not legally binding, they are frequently accounted for in the subsequent courts' decisions.
 RUSSIA	There is a general obligation of parties to a contractual obligation to mitigate losses (article 307(3), 393(1) of the Civil Code) which also covers losses caused by FM events. It also flows from the general obligation of <i>bona fide</i> conduct and exchange of information in the course of performing obligations (article 307(3) that the debtor is to immediately inform the creditor of the FM event. In case the debtor fails to do this, it will be liable for damages caused to the creditor due to non-informing or delayed notice of the FM event.
 SOUTH AFRICA	No, save as provided for in the contract. Generally, the affected party is required to use reasonable endeavors or diligence to overcome or mitigate the impact of the FM event.
 SPAIN	There is no specific obligation to mitigate the damages in the event of FM, other than the obligation to act always in good faith.
 SWEDEN	This will depend on the wording of the FM clause. The party claiming FM will generally need to overcome or mitigate the impact of the FM-event.
 SWITZERLAND	If an FM event renders the performance impossible, the parties are required to mitigate damages. This may require the affected party to notify the counterparty of the FM event promptly or in a timely manner. This duty may also include accepting an alternative means of delivery if reasonable (e.g., video conference instead of personal meeting). If the responsible party does not take such mitigation measures, it may become liable for losses suffered by both parties due to such omission.
 TURKEY	Article 136 of the TCO requires the party invoking FM to notify the counterparty of the event without any delay and to mitigate losses. Otherwise, it will be liable for any losses suffered.

4 Any obligation to mitigate?



UNITED ARAB
EMIRATES

Yes, the parties must act in good faith at all times. This includes the duty to mitigate loss.

A party cannot claim FM if this party has participated in the damage incurred or default of performance.

5 What is outcome of invoking FM?



AUSTRIA

Depends on the specific wording of the FM clause. FM event can trigger impossibility of performance:

If performance of a contractual obligation becomes

- factually impossible (due to the FM event) or
- legally impossible (by the imposed government measures) or
- economically unfeasible as a consequence thereof

the parties are released from their mutual performance obligations (section 1447 ABGB).

If effects of FM event are temporary and end of the FM event is foreseeable, statutory default provisions apply (section 918 et seq. ABGB).

Please note that default interest for claims that have become due between 1 April 2020 and 30 June 2020 has temporarily been capped and delay sanction penalties for contractual relationships concluded before 1 April 2020 have been suspended by special statute for delays caused by COVID-19. This statute will expire on 30 June 2022.



BELGIUM

In the event of a temporary impossibility, the debtor's obligation to deliver is suspended until the FM situation disappears and the performance of the obligation is thereby made possible again. The counterparty will in turn also be entitled to suspend its own obligations (based on the risk theory). Following such suspension, an extension of time for performance may then be granted automatically or by agreement. In case the FM event is permanent in nature, the debtor will be freed from its contractual obligation. Such termination of contractual obligations may give rise to an obligation to refund the other party.



CZECH REPUBLIC

- i. Renewal of contractual negotiations (section 1765 of the Civil Code), under which the parties either come to an agreement on contract amendment or it is possible to file a request to the court to restore balance of the contractual obligations of the parties or cancel the contractual obligation;
- ii. Liberation from the contractual obligation (Section 2006 of the Civil Code); and
- iii. Exemption from liability for damages (Section 2913 of the Civil Code)



ENGLAND & WALES

- Depends on the specific wording of the FM clause.
- Performance is usually suspended for a short period or for the duration of the FM event.
- Following such suspension, an extension of time for performance may then be granted automatically or by agreement.
- If the FM event is prolonged or permanent then the clause may provide for termination by default or by agreement.



FRANCE

- If effects of FM event are temporary, performance is suspended, unless the delay is such that the contract should be terminated.
- If the effects are permanent, the contract will automatically be terminated and the parties discharged from their obligations.

5 What is outcome of invoking FM?



GERMANY

- Depends on the specific wording of the FM clause.
- Performance is usually suspended for a short period or for the duration of the FM event.
- Following such suspension, an extension of time for performance may then be granted automatically or by agreement.
- If the FM event is prolonged or permanent then the clause may provide for termination by default or by agreement.



HUNGARY

The parties are free to agree an FM clause and agree on the consequences of successfully invoking that FM clause.
For the outcome under the statutory provisions relating to frustration/impossibility of performance or breach of contract, please see the next column.



ITALY

Based on the combined provisions of articles 1256 and 1463 ICC, if a supervening impossibility to perform occurs:

- the debtor is released from the relevant obligation;
- the debtor shall return the consideration already received; and
- the contract shall be automatically terminated.

Note:

If the performance becomes only partially impossible, the creditor has the right to either withdraw from the contract (if he/she does not have a notable interest in a partial performance) or to a corresponding reduction of its own counter-performance (article 1464 ICC)

If the impossibility is only temporary, the debtor is not deemed to be liable for the delay in the performance. In such a case, the contract remains suspended (article 1256 ICC).



LUXEMBOURG

The debtor of the obligation that cannot be performed following a FM event will be exempt from the performance of its obligation. This does not have an impact on the performance of the obligations due up to the date on which the specific FM event occurred.

Luxembourg case law has recognized that where the obligations are reciprocal ones, the occurrence of FM will result in the application of the "risk theory" (*théorie du risque*). The applicable principle is in fact the same as for unilateral obligations; the obligor will be exempted from the performance of his obligation. Luxembourg courts have considered that in contracts with mutual obligations, FM does not only prevent one of the contractors to perform his obligations, but also the other contracting party, given that the extinction of one obligation due to FM leads to the extinction of the other one and, consequently, may lead to the "dissolution or termination" as of right of the contract.



THE NETHERLANDS

When FM is successfully invoked, performance of a contract cannot be enforced and the non-performing party cannot be held liable for the damages.

If performance is impossible but the non-performing party cannot successfully rely on FM, non-performance will be considered a breach of contract and that party will be liable for damages.

The counterparty to the non-performing party can also suspend its obligations under the contract in the event of FM.

Furthermore, under Dutch FM law, the principle applies that the non-performing party that successfully relies on FM, should not be in a better position than when the contract would have been ordinarily performed. Should a non-performing party rely on FM and attain a better position than when the contract would have been ordinarily performed, the counterparty generally has a claim on the non-performing party on the basis of unjust enrichment.

5 What is outcome of invoking FM?



POLAND

Depends on the wording of the FM clause.

Typically, the debtor is excused for improper or non-performance for the duration of the FM.



RUSSIA

- i. Release from liability for failure to perform or undue performance of a contractual obligation in the course of entrepreneurial activities (article 401(3) of the Civil Code). The FM event does not terminate the debtor's obligation and once the FM event or its consequences stops affecting the performance of the obligation, this obligation becomes due.
- ii. 2) Where an FM event has led to a substantial breach or the creditor has lost interest in the performance of the contract, FM event does not preclude the creditor from using certain contractual remedies, such as termination or rescission of the contract, suspension of performance etc.

Where FM events are of temporary nature, a party may be released from liability for a reasonable period of time when FM events preclude the performance of the party's obligations.

Unless otherwise provided for by the law, to be released from liability for failure to perform its obligations, a party is to prove:

- a) occurrence and duration of FM events;
- b) cause-and-effect relationship b/w such FM events and the impossibility/ delay in performing obligations;
- c) the fact that the party was not involved in the occurrence of FM events;
- d) the party's taking reasonable steps to prevent (minimize) possible risks.

(Supreme Court's Presidium Overview of court practice issues No 1, approved on 21 April 2020)



SOUTH AFRICA

Depends on the specific wording of the FM clause.

Generally performance is suspended for the duration of the FM event, coupled to extension of times for such performance where applicable.

In the case of extended or permanent FM events, the clause may provide for termination.



SPAIN

As for article 1105 of the Civil Code, if the legal or physical impossibility to perform obligations:

- is temporary, the FM could entail suspension of the contract;
- is absolute and final, FM would entail termination of an agreement, without liability of any party.

In any event, no party shall be liable for the damages arising from the FM event.



SWEDEN

This will depend on the wording of the FM clause.

The invoking party may be relieved from performing its obligations.

Existing obligations that are not affected by the FM-event are, however, not suspended.

Obligations will need to resume once the FM-event has ended. A contract may in some cases be terminated if an FM-event is extended for a longer or unforeseeable period of time.

5 What is outcome of invoking FM?



SWITZERLAND

The available remedies under statutory Swiss law vary depending on whether the performance of the contract is either

- i. permanently or
- ii. temporarily impossible.

If the performance has become permanently impossible due to circumstances beyond the non-performing party's control generally no damages have to be paid. In this case, the claim of the counterparty is deemed extinguished but the non-performing party also loses its claim for compensation.

If the performance is only temporary impossible, the counterparty may in its discretion:

- i. continue to insist on performance and claim for damages due to the delay;
- ii. waive performance and claim damages for non-performance; or
- iii. terminate the agreement.

However, as a general principle, the non-performing party has to pay damages only in the event that it cannot prove that it is not at fault.

The allocation of the risk due to impossibility of the performance may differ depending on the contract. Therefore, the contract has to be assessed in detail on a case-by-case basis.



TURKEY

The consequences of an FM event will depend on the contractually agreed terms and the underlying situation.

If the contract does not address the consequences of FM events, Turkish law foresees that in a permanent FM event, the obligor will be discharged from its obligations under the contract. In a contract with reciprocal obligations, the obligor who has been discharged from its obligations (due to the impossibility of performance) cannot request the counterparty to perform its obligation. Additionally, when a party invoking FM is relieved from performance, it must refund the consideration it previously received from the counterparty, as per the unjust enrichment provisions of the TCO.

If the event preventing the parties from fulfilling their obligations is temporary, article 136 of the TCO becomes inapplicable because it only regulates the circumstances where the performance of the contract is permanently impossible (e.g., due to the permanent nature of the FM, the nature of the performance, etc.).

With regard to temporary FM events, the majority of Turkish scholars argue that parties' obligations are suspended for the duration of the FM event. However, once the FM event ends, the obligations become performable.

In cases where the purpose of the contract becomes moot mainly due to a temporary FM event, and it is not reasonable to expect any of the parties to be bound by the contract until the end of the temporary event pursuant to the good faith principle, the event also constitutes a permanent impossibility of the performance. Again, this must always be reviewed in a case-specific way; these are general/preliminary explanations and case-specific circumstances may alter this interpretation significantly.



UNITED ARAB EMIRATES

In assessing whether an event is a FM event, the court assesses whether the event is extremely unavoidable, unforeseeable and renders the performance obligation impossible. If the court finds the FM test has been met, the court dissolves the contract and returns the parties to their status before entering into the contract.

In the event of partial impossibility, the court terminates the contract within the extent of the impossible part of the performance of the obligation.

Also, the court may exempt a party from liability if the FM event interrupted the causal link between the damage incurred and the error.

6 Any other concepts/remedies?



AUSTRIA

Change of circumstances / frustration:

If performance is still possible, but has become worthless due to a FM event, the parties may amend or terminate the contract (in analogy to section 871 *et seq.* ABGB) if:

- the parties assumed certain circumstances that are typical for such contracts (e.g., in the industry),
- those circumstances are affected by the unforeseeable FM event,
- the FM event is not in the sphere of a party.



BELGIUM

Prohibition of abuse of rights: courts may prevent a party from abusing its right to enforce a contract in a situation where the contractual balance has been significantly disturbed due to a considerable change in market conditions. However, it is to be noted that hardship (i.e., an unexpected event leading to a more onerous, more costly or less profitable performance) and the theory of "imprévision" (i.e., the French legal provision which consists of disequilibrium between reciprocal obligations due to an unexpected event allowing the revision of the contract) are in principle not recognized under (current) Belgian law (except under public procurement contracts and contracts subject to the CISG). This may, however, change in the very near future as the draft of Book 5 "Obligations" in the new Belgian Civil Code does provide a legal basis for the theory of "imprévision". Parties are of course free to include a hardship clause in their contract.



CZECH REPUBLIC

If the parties agreed on mutual performance of the contract, the first party to fulfill the obligation may refuse to do so under the circumstances that the performance of the other party is in jeopardy due to the newly arisen circumstances which were unknown at the time the parties had entered into the contract.



ENGLAND & WALES

Doctrine of frustration: A frustrating event is a supervening event that is:

- not the fault of either party;
- significantly changes the nature of the contractual rights and/or obligations; and
- makes it unjust to hold the parties to the contract.

It is not sufficient if the event makes performance more expensive, onerous or impracticable or if alternative performance is available.

The incorporation of a FM clause may oust the operation of frustration as the FM clause may demonstrate that the parties have already considered the issue and the risk allocation.

Frustration results in the termination of the contract. A term may continue to operate after frustration if this is the parties' intention.

The common law provides that if a contract is frustrated, losses lie where they fall.



FRANCE

Defense of non-performance (*exception d'inexécution*): a party could invoke the non performance of the other party to refuse to perform its own obligations.

Alternatively, "imprévision" under article 1195 of the French Civil Code could be invoked in order to convince the other party to revise the terms of the contract, on the basis that performance of which has become excessively onerous due to circumstances that were unforeseeable at the time the contract was concluded. Failing agreement between the parties, the judge may be asked to revise the terms of the contract.

6 Any other concepts/remedies?



GERMANY

Exemption from duty to perform (section 275(1) German Civil Code): a debtor is "exempt" from performance in case the performance of an obligation is impossible, e.g., the performance of an obligation could become impossible in case of a lock-down imposed by the Government.

Frustration / *clausula rebus sic stantibus*: recognized under German statutory law. In essence, German law provides that a contract may be amended if one party cannot reasonably be expected to uphold the terms of the contract due to a significant change in circumstances

from when the contract was entered into. In general, the threshold for frustration is very high. Courts would only allow an adaptation of the contract in exceptional circumstances. However, there are some cases where courts have adapted the commercial terms of the contract if the contract has become loss-making for one of the parties and if this is due to a change that was unforeseeable at the time of the conclusion of the contract.



HUNGARY

FM events typically either lead to frustration/impossibility of performance or breach of contract, unless the parties agree otherwise, e.g., by adopting a FM clause. Under the statutory provisions in case of frustration/impossibility of performance the contract terminates. Further consequences depend on whether either party is liable for the frustration/impossibility of performance. If neither party is liable, the parties basically have to settle services already performed and counter value already paid. If either party is liable, then the other party may claim damages. If both parties are liable, then both parties may claim damages from the other party in proportion to their share of liability. If the FM event does not render the performance impossible, but results in breach, the non-breaching party may claim damages and may exercise other rights resulting from the breach, depending on type of breach and type of contract (these may include the right to claim performance, the right to rescind or terminate the contract, the right to withhold own performance etc.). The liability for impossibility of performance and breach of contract can be relieved if the impossibility/breach results from a circumstance not foreseeable at the time of entering into the contract and being outside of that party's control, provided the party took reasonably expectable measures to avoid the circumstance or prevent the resulting damage.

In addition, under Hungarian contract law, a party to a long term contract may request the amendment of the contract from the court if the (continued) performance of the contract would violate its material legal interests due to a circumstance arising following the conclusion of the contract, provided that the possibility of arising of that circumstance was not foreseeable at the time of conclusion of the contract and such circumstance was not caused by and does not belong to the ordinary scope of business risks of the party requesting the amendment.



ITALY

- i. Supervening excessive economic burden on one party (see also answer 4): pursuant to article 1467 ICC, which states that in contracts providing for continuous or periodic performance, if extraordinary and unforeseeable events make the performance of one of the parties excessively burdensome, the party who owes such performance can demand termination of the contract. The other party may prevent termination by offering to amend the terms of performance of the contract in such a way as to make them fair
Burden of proof is on the party seeking to be released from its obligations.
Please note that, although Italian law does not expressly recognize the concept of frustration of contracts leading to termination of the entire agreement/a right to renegotiate, the two remedies above are similar in effect.
- ii. Right to withhold (*eccezione d'inadempimento*): under 1460 ICC, the party which is not receiving the performance due under the contract (i.e., the aggrieved party) might be entitled to suspend his/her performance.
- iii. Actual purpose of the contract (*causa in concreto*, i.e., actual contractual cause) theory: created by certain Italian court precedents (see decisions no. 18047/2018, 26958/2007. 16315/2007 of the Italian Supreme Court). The rationale behind the application of the so-called "*causa in concreto*" doctrine lies in the supervening impossibility, not of the performance per se, but to achieve the intrinsic purpose of the contract (e.g., a party may be no longer interested in receiving the counterpart performance).

6 Any other concepts/remedies?



LUXEMBOURG

Luxembourg law does not include the concept of frustration. However, contracts with mutual obligations may lead to the dissolution or termination of the agreement where the non-performance of one of the co-contractors due to FM may lead to the non-performance of the other co-contractor and hence have the effect of the mutual extinction of the obligations of the parties. Parties have always the right to renegotiate the terms and conditions of the agreement if they both agree to.



THE NETHERLANDS

i. Unforeseen circumstances (article 6:258 DCC)

This article applies where unforeseen circumstances are of such a nature that a party cannot reasonably expect the other party to continue to perform the agreement under its current conditions. When this is the case, a party may ask the court to modify or set aside the agreement in whole or in part, with retrospective effect. Whether a circumstance is unforeseen depends on whether the parties have made an (explicit or implicit) allowance for the occurrence of the circumstance in the contract. This Article is applied restrictively.

ii. Reasonableness and fairness (article 6:248 DCC)

General principles of reasonableness and fairness (*redelijkheid en billijkheid*) apply to all Dutch law governed contracts and may impact reliance on contractual provisions. These principles must be applied irrespective of whether a contract contains specific provisions on FM. For contracts which do not contain such provisions, and where parties fall back on Dutch statutory law, these principles must also be applied. Even if an event does not qualify as an FM event or as an unforeseen circumstance under Dutch statutory law, a party may still not be permitted to demand performance from the non-performing party if such a demand would be unacceptable in light of the standards of reasonableness and fairness.



POLAND

Expiry of the obligations (article 495, section 1 of the Polish Civil Code): an obligation expires, in case the performance of an obligation is impossible. If the obligation became only partially impossible, the other party obligation reduces itself accordingly. However, the other party may withdraw from the contract, if the partial performance would be meaningless, due to the nature of the obligation or due to the purpose of the contract known to the first party.

Rebus sic stantibus (article 357 of the Polish Civil Code):

If, following an extraordinary change of circumstances, the performance would be faced with excessive difficulties or threaten one of the parties with substantial loss, which the parties did not foresee when concluding the contract, a court may change the mode of performance, the degree of performance or terminate the contract.

6 Any other concepts/remedies?



RUSSIA

In Russia there is a concept of the material change of circumstances (article 451 of the Russian Civil Code) which can be basis for amending and nullifying the contract.

The change is considered material where the circumstances have changed so much that could the parties have reasonably foreseen it, they would not have entered into the contract at all, or have entered into it on substantially different terms.

On 22 March 2022 a draft law with temporary changes to the Russian Civil Code in support of Russian business was introduced(#92282-8). The draft law provides i.a. for the legal effect of "unfriendly acts" of foreign states and international organizations, connected with the introduction of restrictive measures against Russian parties, on contractual obligations.

- i. Where the contractual performance objectively becomes conclusively impossible, the obligation terminates in full or in the relevant part.
- ii. Where due performance objectively becomes temporarily impossible, the obligation gets "frozen" and the party shall not be held liable for the failure to perform. For the purposes of security, the debtor will not be considered in breach of the obligation, unless the parties agree otherwise after the draft law takes effect.
- iii. A party may refuse to perform a contract where the other party failed to duly perform because its performance became temporarily impossible.



SPAIN

Rebus sic stantibus (fundamental change of circumstances)

Summary: entitles a party to review or to terminate an agreement due to an extraordinary change in the circumstances. However, used very restrictively by the courts.

Requirements:

- i. an extraordinary change in circumstances occurs, beyond the control of the parties;
- ii. the change was unforeseeable at the time of signing the agreement; and
- iii. the change frustrates the purpose of the agreement or makes compliance with the contract excessively onerous for one of the parties and eliminates the balance in the mutual obligations assumed by both parties.

Consequences: obligations of parties should be reviewed and adapted in order to restore the balance for both parties. If the balance cannot be restored by adapting the parties' obligations, the contract may be terminated.



SWEDEN

In the absence of explicit provisions on FM, a party may claim to be excused for non-performance due to **unforeseeable events**, only if there is another legal ground for it.

It is unlikely that a general principle of FM can be applied in Sweden and it must be assessed in each case by the courts. The absence of a contract provision on FM therefore means that the possibility of claiming relief is highly uncertain.

6 Any other concepts/remedies?



SWITZERLAND

Events requiring an adjustment of the contract (*clausula rebus sic stantibus*)

If the fulfilment of contractual obligations was not impossible but only commercially impractical, the discretionary Swiss law generally does not provide for an exception from the non-performing party's liability for damages. However, if the current situation would result in a serious discrepancy between the costs for the performance of the contract and the remuneration paid by the customers, Swiss law provides that the contract may have to be adapted to the new situation. However, such an adjustment of the contract is only possible if the changed circumstances were neither foreseeable nor avoidable and result in a lasting imbalance of the parties' contractual obligations.

If the parties cannot agree on an adjustment of the contract, the matter may be referred to a court or arbitral tribunal, who may adjust the contract to the changed circumstances or terminate it. In such a case, the judge or arbitrator must determine what the parties would have agreed in good faith if they had considered the changed circumstances when concluding the contract.

Whether an extraordinary increase in costs can justify an exceptional adjustment of a contract in the absence of a price review or price adjustment clause depends on the specific case. In principle, each party must bear the risks arising from the promised performance. Even in the case of long-term contracts with momentous obligations, the parties have no right to expect that performance will be a "good deal" for them and that the contract will be adjusted if circumstances change to their disadvantage and the contract no longer meets their expectations. Indeed, there have only been a few cases where the Federal Supreme Court concluded that a contract adjustment is justified. Most of these decisions date back to the time after the First World War and deal with the extraordinary economic turbulences caused by it. However, legal doctrine and case law have not developed specific percentages for how great the changes and the resulting imbalance must be to justify a judicial adjustment of the contract.

Termination of the contract for cause or material error

Under Swiss law, each party has the right to terminate the contract if continuing the contractual relationship is no longer acceptable for them due to changed circumstances. It has to be assessed on a case-by-case basis whether there is good cause for termination. Purely economic reasons, such as a weakened financial situation, are generally not sufficient for terminating the contract for good cause. In exceptional cases, a party may be able to claim a material error for the occurrence of a future event that it had expected, provided that the other party had realized that the expected future event was decisive for this party to enter the contract.



TURKEY

Turkish law entitles parties to the contract to request the revision of the contract's provisions and conditions, if despite the parties' agreement, the circumstances existing at the time of the execution of the contract changed extraordinarily, resulting in the hardship of the performance of one's contractual obligations to the extent that the obligor cannot be expected to perform the contract in good faith.

If all of the conditions for the existence of hardship are fulfilled, the party affected by the hardship may request the revision of the contract pursuant to article 138 of the TCO. If the revision is impossible, and depending on the other specific circumstances, the rescission of the contract may come into question, as a last resort.



UNITED ARAB EMIRATES

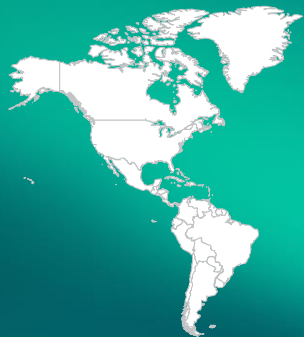
Article 249 of the Civil Transactions Code recognizes the theory of exceptional circumstances. It states that:

"If exceptional circumstances of a public nature which could not have been foreseen occur as a result of which the performance of the contractual obligation, even if not impossible, becomes oppressive for the obligor so as to threaten him with grave loss, it shall be permissible for the judge, in accordance with the circumstances and after weighing up the interests of each party, to reduce the oppressive obligation to a reasonable level if justice so requires, and any agreement to the contrary shall be void"

The application of the theory of exceptional circumstances is more flexible than FM. It is sufficient that the hardship event renders the performance of the obligation onerous and of extreme economic imbalance, or more onerous than it should be in the normal case, instead of impossible as required in case of FM.

Also, there are special provisions on diminished responsibility and FM that apply to maritime law, as well as to the carriage of goods and people (by land and air) in articles 279, 301, 308, 324 and 325 of the Commercial Transactions Code.

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1 Is FM recognized in statute? If yes, what is impact of statute on FM clauses?

 ARGENTINA	<p>Yes, in article 955 and related ones (e.g., 1730) of the Argentine Civil and Commercial Code (ACCC).</p> <p>In principle the impact of the provisions of the ACCC is not material on FM clauses, as generally the parties to a contract may agree something different to what is established in the ACCC.</p>
 BRAZIL	<p>Yes, the Brazilian Civil Code provides, as a general rule, that the party is exempt of liability in case of FM. A FM is a necessary fact which affects the parties and could not be avoided or prevented. Beyond the legal definition, the parties may expand or elaborate on the consequences of the FM by written agreement.</p>
 CANADA	<p>FM is recognized in the Civil Code of Québec (CCQ). The CCQ applies FM principles (or "superior force") to contracts even in the absence of an FM clause. However, the scope can be modified by contract.</p> <p>In the rest of Canada, FM is a contractual remedy and is not included by statute.</p>
 COLOMBIA	<p>Yes. Article 64 of the Colombian Civil Code defines FM. FM is defined as an unforeseen and irresistible incident, such as a shipwreck, an earthquake, a war, the capture by an enemy, or some acts of the authorities.</p> <p>The FM event must be:</p> <ol style="list-style-type: none"> External; Unforeseeable; and Irresistible. <p>In case the parties have not agreed to an FM clause in their agreements, the FM stated in the Colombian Civil Code will apply.</p>
 MEXICO	<p>Yes, FM is recognized in the Civil and Commercial Codes and related laws.</p> <p>The principle in civil/commercial matters is that the will of the parties is the "supreme law" between them and that they are obliged to comply in the terms agreed upon them (<i>pacta sunt servanda</i>); however, if the parties did not agree any covenants or clauses in regards to FM, the statutory provisions in such regard would apply to rule the relationship among those parties.</p>
 PERU	<p>Yes, FM is recognized in article 1315 of the Peruvian Civil Code (CC) as an event that is:</p> <ol style="list-style-type: none"> extraordinary (an out of the ordinary event); unforeseeable (impossible to predict or foresee); and irresistible (impossible to be controlled by the affected party) <p>which prevents the execution of an obligation or determines its partial, late or defective performance. FM is a defense for attribution of liability.</p> <p>Under Peruvian law, contracts are interpreted according to the parties' autonomy. Thus, an FM clause can contain specifications and variations (e.g., a specific list of assumptions that the parties agree to refer to as FM events) other than the provided in the FM statute.</p>

1 Is FM recognized in statute? If yes, what is impact of statute on FM clauses?











There is no overarching federal statute governing FM in the US, and FM issues are a matter of state law. Statutory recognition varies state-by-state and each state's statute will be interpreted according to its specific language and the state's rules of construction and application of FM. General FM interpretation is often a matter of state common law. But many states have adopted article 2 of the Uniform Commercial Code, which governs the sale of goods and contains a provision that, in certain circumstances, will excuse performance as a result of unforeseeable events beyond a party's control. By way of additional example, California has a Civil Code section that allows cancellation of a contract for "irresistible, superhuman cause."









Yes. FM is recognized in the Civil Code, the Commercial Code and other statutes in terms similar to the laws of most Civil Law countries. FM legal provisions apply to all type of contracts even if the particular contract is silent on the matter. Special rules contained in the 2014 Public Contracting Law deviating from general contract law apply to contracts executed with State entities, particularly when the FM event is invoked by the private contracting party.

FM clauses take precedence over statutory provisions except if contrary to strict public policy provisions or bones mores. Additionally, under articles 1 and 31 of the 1998 Act on Private International Law, the 2016 UNIDROIT Principles for International Commercial Contracts apply to international contracts. The UNIDROIT Principles also contemplate FM and other extraordinary remedies for COVID-19 type-of-situations.

2 FM remedies pursuant to contract?

 ARGENTINA	<p>FM clauses in contracts typically provide a list of specific events that constitute FM. However, as FM is available in the ACCC, suspension or termination of a contract for this cause is available even when the contract does not include a provision in this regard.</p> <p>Generally, the parties to a contract may agree to override the provisions of the ACCC and agree allocation of risk between themselves.</p>
 BRAZIL	<p>If the agreement is silent on the occurrence and consequences of a FM event, the Brazilian Civil Code will mandatorily apply the general concept that in case of a FM event the party affected by it will be exempt from liability.</p>
 CANADA	<p>Yes, excluding Québec. FM is a creation of contract and its application is purely a function of the terms of the contract (including the manner and effect of invoking FM).</p> <p>In Québec, FM exists as a matter of law, although parties may define FM more broadly or narrowly than the CCQ default provisions.</p>
 COLOMBIA	<p>Yes. Availability of remedies depend on terms agreed between the parties.</p>
 MEXICO	<p>Only if the parties agreed on such remedies on the contract, being that statutory provisions on civil/commercial laws do not contemplate them.</p>
 PERU	<p>According to article 1315 of the CC, the affected party with a FM event may claim exemption from liability as long as it provides compelling evidence establishing that the event was beyond its control and it acted with diligence.</p> <p>The contracting parties are free to specify the consequences and remedies of a FM event in the contract.</p>
 UNITED STATES	<p>Yes, FM rights created by contract are enforceable and typically honored. Some states construe FM clauses narrowly, while others apply a more generous interpretation.</p>
 VENEZUELA	<p>Yes. Subject to the above contracting parties can define the remedies in case of FM, either providing for temporary suspension of contract performance, renegotiation, and cancellation of the relevant contract or precluding ordinary effects of FM situations. Contracting parties often use this type of drafting to allocate risk of FM events to the affected party (risk allocation provisions or <i>pactum de non praestando casus</i>).</p>

3 Formalities to invoke?

 ARGENTINA	Depends on what the parties agreed in the contract. Generally, sending a registered letter (or equivalent formal notification) suffices. The party alleging the FM must evidence the same.
 BRAZIL	Brazilian Civil Code is silent on this but general practice is the affected party should immediately give written notice to the other party.
 CANADA	<p>Yes. Outside of Quebec, a party that seeks to rely on a FM provision must adhere to the terms of the clause. In general, a party must establish:</p> <ul style="list-style-type: none"> i. The event is captured within the FM provision; ii. The event itself was the cause of the non-performance; and iii. Reasonable efforts to mitigate the losses suffered were taken. <p>FM clauses typically contain written notice provisions. Failure by the impacted party to provide notice within this time period will void the party's FM rights. When proper notice is given within the relevant time frame, the FM rights will be deemed to have commenced retroactively from the start of the FM event.</p> <p>In Québec, to invoke FM, the debtor must establish:</p> <ul style="list-style-type: none"> i. The unforeseeability of the event; ii. Irresistibility (performance must be impossible, impracticability is will not satisfy the condition); and iii. Exteriority (the event must have occurred independently of the non-performing party).
 COLOMBIA	<p>There are no formalities under the Colombian Civil Code.</p> <p>Nevertheless, If the FM clause requires any steps to be taken to invoke it, such steps should be followed. We recommend the party to inform to the other party of the occurrence of the FM event and its consequences as soon as the party becomes aware.</p>
 MEXICO	<p>The party invoking the FM would bear the burden of proof in regards to the existence of the event outside of the contracting parties' control that excuse or delay the invoking party's performance, or permit the cancellation of the contract.</p> <p>It is common that contracts require that a party seeking to assert FM as a basis for suspending or terminating performance must provide notice to its counterparty with certain formalities (i.e., in written, in certain domicile, etc.), and failure to timely send such notice may result in waiver or have other adverse consequences.</p>
 PERU	<p>The CC does not specify special formalities to invoke an FM event, but according to the good faith principle (article 1362 of the CC) the invoking party should ensure that it gives its counter-party a reasonable and timely notice.</p> <p>Usually the parties agree on a specific procedure and conditions to invoke an FM clause. Generally, contracts require the invoking party to send an official communication at the time it becomes aware of the FM event.</p>

3 Formalities to invoke?



Depends on the wording of the FM clause. If a FM clause requires any steps to be taken to invoke it, such steps should be followed.

Contracts typically require that a party seeking to assert FM as a basis for suspending or terminating performance must provide notice to its counterpart. Failure to timely send such notice may result in waiver or have other adverse consequences.









If the FM clause is silent, a party should ensure that it gives the counter-party seasonable/timely notice of the FM event.

For contracts involving the sale of goods, the Uniform Commercial Code requires that the party in receipt of An FM notice respond within thirty days, or the contract will lapse with respect to any affected deliveries.











There are no formalities to invoke FM. As such, any special formality for invoking FM clause should be set out in the relevant contract. Important is that there is certainty of the date of receipt of the FM notice by the other party. Under certain circumstances, this can be achieved by electronic means.

4 Any obligation to mitigate?

 ARGENTINA	Not expressly foreseen in the ACCC. The parties can agree so in the contract.
 BRAZIL	Yes, to the extent possible the non-complying party must mitigate the consequences of the FM event as much as possible.
 CANADA	Yes. FM clauses also typically include an express duty to mitigate on the part of the impacted party, so far as possible, and remedy the situation in good faith, with due diligence or with all reasonable dispatch.
 COLOMBIA	Depends on the wording of the contract but generally a party relying on an FM clause is required to use reasonable endeavors to mitigate the impact of the FM event. Under Colombian law, parties must execute contracts in good faith, which implies the duty to mitigate loss when possible.
 MEXICO	Not expressly provided in Mexican law. However, there is a general obligation of repairing any and all damages that are a direct and immediate consequence of a breach of an obligation or an unlawful conduct.
 PERU	Peruvian law require the invoking party of FM event to act with ordinary and reasonable diligence (Article 1314 of the CC).
 UNITED STATES	The agreement can specify what the parties are required to do to mitigate the losses resulting from the FM and, if not, the law of each jurisdiction in the US will determine what is required. Some jurisdictions require absolute impossibility of performance (New York) while others require mere impracticability (California). The laws of most states will require a showing that the party claiming FM made every reasonable effort to perform through alternative means.
 VENEZUELA	Under general contract law principles, the affected party is required to use reasonable endeavors or diligence (i.e., to perform in good faith) to overcome or mitigate the impact of the FM event. Additionally, contracting parties can contractually regulate the terms of the obligation to mitigate.

5 What is the outcome of invoking FM?

	ARGENTINA	If the parties to a contract disagree as to whether an event constitutes a FM, a court will rule on this, as well as the parties' rights and obligations. If it is a FM event, then the court may excuse a party's delay in performing the contract or permit the cancellation of the contract, with no liability.
	BRAZIL	Exemption of liability.
	CANADA	Outside of Quebec, the initial effect of invoking a FM clause is typically only to delays performance by the impacted party for the duration of the FM event. Often, the contract will set out a much longer period before either party has the right to terminate the contract entirely. In Québec, the effect of invoking FM is to relieve a party of its duty to perform (temporarily or permanently) and also has the effect of discharging contractual obligations, including the duty to pay compensatory damages.
	COLOMBIA	FM operates as an exclusion of liability. The main effect is that performance is excused during the FM event and liability for any of the parties to the agreement will be excluded.
	MEXICO	If the party invoking the FM supports its claim in evidence establishing that the event was beyond its control, was not able to foresee and was not able to avoid, the outcome shall be the excused delay on performance as long as the FM event stands, the adjustment of contractual obligations (as pricing) or even the early termination of the contract.
	PERU	Under article 1315 of CC, the general outcome of invoking FM is that the party is exempt from liability for its non-performed obligation. There may also be additional effects depending on each case according to the agreement of the parties.
	UNITED STATES	Depends on what is provided in the contract and which state jurisdiction is making the determination. Common types of relief include: <ul style="list-style-type: none"> ▪ terminating contractual obligations; ▪ being excused from liability for non-performance or delay; ▪ extending the time to perform under the contract.
	VENEZUELA	Subject to the wording of the FM clause, where an event conforms a FM scenario, the party invoking it may suspend, defer, or be released from its duties to perform, without liability. The parties may also renegotiate the terms of the contract. Depending on the nature of the obligation, the FM event can excuse the non-performance of an obligation entirely or permanently. In that case, contract performance is suspended only for the duration of such event. In extreme cases, it may even lead to contract cancellation.

6 Any other concepts/remedies?



ARGENTINA

The ACCC sets forth that the frustration of the purpose of a contract authorizes the affected party to terminate the contract, provided that the termination is based on an extraordinary alteration of the circumstances existing when the contract was executed, and such extraordinary circumstances cannot be controlled by the affected party. If the frustration of the purpose of the contract is temporary, then the affected party may only terminate the contract if the timely performance of an obligation is of the essence.



BRAZIL

One of the elements characterizing a FM is that the parties could not have anticipated or predicted the FM event. Such requirement may also be characterized as an excessive burden that could give grounds to terminate the agreement. Note that unpredictability is not the only requirement for excessive burden.



CANADA

The contract law doctrine of frustration allows for the relief from performance in circumstances outside a supplier's control absent a FM clause. Frustration arises where an event occurs, without the fault of either party, which radically transforms the circumstances governing performance under the contract, which significantly changes the nature of the parties' rights or obligations from what they could have reasonably contemplated at the time of contract execution.



COLOMBIA

The theory of unforeseen events could be invoked in order to claim from the other party or request the judge to revise the terms of the contract, on the basis that the performance of the contract has become excessively onerous due to circumstances that were unforeseeable at the time the contract was executed.



MEXICO

No, unless such concepts or remedies are agreed upon in the FM clause. Please note that is common for contracts to include other concepts or remedies, besides FM events, that might trigger modifications on the terms and conditions or even early termination, as for example a material adverse change. But under Mexican law, a material adverse change is not necessarily considered an FM event, being that for an event to be considered an FM event it should meet the following elements: external, insurmountable, unpredictable and unavoidable. So from the latter, the contract might include other concepts and remedies different to an FM event.



PERU

The CC sets forth the concept of hardship (article 1440 and following) which may be invoked if performance of a contractual obligation becomes excessively onerous due to an extraordinary and unforeseeable event.

Hardship entails a disproportionate balance between obligations due to an alteration of the circumstances, which no party could diligently foresee. The affected party may request a judge or an arbitrator to restore the balance.



UNITED STATES

Many US states recognize common law doctrines such as "impossibility" and "frustration of purpose," which may be invoked to excuse contract performance under certain circumstances. A more limited number of states recognize the doctrine of commercial "impracticability." But parties choosing to invoke these common law doctrines often face significant hurdles placed by state laws.

In state jurisdictions like New York and Texas, which construe FM clauses narrowly, the inclusion of an FM clause may preclude a party from relying upon common law doctrines.

6 Any other concepts/remedies?



VENEZUELA

Yes. Besides FM, there are other theories under Venezuelan law that may apply:

- The "frustration of the purpose of the contract" theory, which may be invoked to excuse contract performance under certain extreme circumstances.
- The "Hecho del Príncipe" theory (*factum principis*), which refers to all those measures taken by the State for general public interest that must be observed by the parties and cause a breach of their duties. The same elements for a FM event apply. It is important to bear in mind that COVID-19 is not per se a case of Hecho de Príncipe but the measures implemented by the Venezuelan authorities to combat the COVID-19. The key element is that such measures preclude the party to fulfil its obligations.
- The theory of "Imprevisión". This is particularly relevant in case of long-term contracts. This theory refers to "non-compliance due to the fundamental change or alteration of circumstances" or extreme difficulty in the fulfilment of an obligation. In this case, there is no impossibility of complying with the obligations but there is a great difficulty in its execution due to unreasonable hardship. The change of the circumstances turns out the agreement unduly burdensome for one or more parties. The key elements for the application of this theory are that such circumstances must:
 - i. turn out the performance of obligations extremely difficult (not impossible);
 - ii. occur after the execution of the contract;
 - iii. be unforeseen;
 - iv. beyond parties' control; and
 - v. cannot be avoided.

This theory is akin to the theory of "hardship" as received in the 2016 UNIDROIT Principles. It is based on the principles of contractual balance, justice and good faith and despite the fact that it is not expressly provided in the Venezuelan Civil Code, courts and scholars consider its applicability to contracts.



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