



Legal handling of "force majeure"¹

Supply relationships are only successful if the supplier is reliable. Circumstances can arise that make delivery impossible, although the obligor is in no way responsible for this. For this reason, force majeure clauses can be of particular importance and have far-reaching consequences for suppliers and customers. Therefore, EuPC has commissioned the law firm Kapellmann und Partner Rechtsanwälte to prepare the enclosed handout for their member companies on how to deal with force majeure cases.

Force Majeure is understood to mean an event that

1. is **unavoidable** or inescapable and which could not be prevented by reasonable measures,
2. is due to an **external cause**, i.e. a cause beyond the control of the company invoking force majeure, and
3. is **unforeseeable**, i.e. could not reasonably have been expected.

All three conditions must be present at the same time. Force majeure may exist in particular in the case of natural disasters. As a rule, however, the supplier's own stockpiling, own production and own financial capacity are not covered by this term. However, the concept of force majeure is sometimes used by suppliers to conceal their own failures or to suspend their own contractual obligations.

If there is no specific contractual provision on force majeure, the basic statutory rules apply – which means: the supplier is released from the obligation to perform, but also loses its claim to remuneration; whether the supplier then has to pay damages in this situation, however, depends on whether it was responsible for the occurrence of the force majeure event or not.

Individual contractual provisions (i.e. force majeure clauses) are intended to fine-tune this basic legal concept. On the one hand, the usual definition of force majeure can be expanded: For example, it is sometimes contractually agreed that strikes and the like are also covered by this term. On the other hand, a contract can also stipulate special provisions on the legal consequences of force majeure, i.e. grant the supplier special rights. As a rule, such contractual provisions take precedence over the general principles. However, such special provisions may also be ineffective, which may be the case in particular with so-called general terms and conditions (GTC, see below).

¹ This guide only serves as an abstract illustration of the usual legal implications of force majeure situations when applying German law. It is not a substitute for the legal assessment of the specific facts required in each individual case, in particular taking into account the contractual relationships in each case and of course the relevant (national) laws governing the contractual relationship at hand.

1 Force Majeure declaration from your supplier

If your company receives a force majeure declaration from a supplier, you should react immediately in any case in order not to jeopardise your own legal position.

1.1 Step 1: Clarification

If you receive a force majeure declaration from your supplier, you should check the following:

- Has the supplier accurately described and explained the **cause** of the event that occurred? If this is missing, you should require an exact explanation of what happened and for what reason the supplier believes it can invoke force majeure.
- The **burden of proof** for the existence of a force majeure generally lies with the party invoking the occurrence of the force majeure. In the context of GTCs, an agreement to the contrary would be invalid anyway. If the declaration of force majeure is too abstract (e.g. "Due to technical problems..."), it is imperative to insist on a (written) specification of the facts.

→*Tip: It is not uncommon for suppliers to try to disguise production disruptions in their own operations or unexpected price increases in the manufacturing or procurement process as (alleged) force majeure in order to avoid any procurement obligations and/or claims for damages. This should be resisted because, as explained above, force majeure is generally only understood to mean external events that cannot be averted by reasonable measures, not disruptions of internal processes.*

- Has the supplier communicated **how long** the force majeure is expected to last - even though this is always associated with uncertainty? If not, ask to be informed of the expected duration so that you can plan better yourself. Combine this with a request to inform you immediately of any change in the schedule.
- According to your description, did the supplier notify you of the force majeure **immediately** or did it take its time with it (in which case it may be liable for damages for this reason alone)?
- What legal consequences does the supplier want to derive from the force majeure? For example, does it only want to deliver later - or not at all?

- Do force majeure notices from **several** suppliers accumulate for no apparent reason? If so, this may be an indication of collusion between suppliers in violation of antitrust law (see below).

Check the facts described and the legal consequences announced against the exact wording of the contract concluded with the supplier. Is the supplier entitled to act in this way under the contract? In the case of GTCs: Does it seem possible that the clause is illegal due to (other) circumstances that have nothing to do with the force majeure event that has occurred or that is alleged to have occurred?

In addition to the contract, the supplier shall comply with **antitrust law**:

- If the supplier is **dominant in the market** (reference point: at least 40% market share), it may not abuse this special position to the detriment of its customers. If it stops supplying without an objective reason, this may constitute an inadmissible abuse.
- The same applies to suppliers on whom companies as buyers of a certain type of goods are so dependent that they do not have sufficient and reasonable possibilities to switch to other suppliers (**relative market power**). A further prerequisite is that there is a clear imbalance between the supplier's position of power and the countervailing power of the other company.
- Antitrust law also generally prohibits suppliers from coordinating their behaviour towards customers among themselves (**prohibition of cartels**). Therefore, suppliers may not agree, for example, on how or when to invoke force majeure. If force majeure notices accumulate for no apparent reason, this may be an indication of coordination between suppliers in violation of antitrust law.

If you have doubts as to whether the supplier is entitled to behave as it does, you can point out to it that it may be threatened with **claims for damages** if it behaves unlawfully (see point 1.3 below). In the case of behaviour that violates antitrust law, the antitrust authorities may also impose **fines**. You can also announce that you will seek legal advice.

1.2 Step 2: Short-term delivery

Often your company will be dependent on short-term delivery. If there is indeed a case of force majeure, this can be very problematic.

- Has the supplier communicated which **(stock) inventories** are still available and whether and to what extent there are still available **production/procurement capacities**?
- Typically, the supplier should communicate an appropriate **allocation** of the quantities still available or still producible despite force majeure in favour of the buyers to whom it already had firm delivery obligations at the time of the force majeure.

→ *Tip: If a supplier is **dominant in the market** (reference point: at least 40% market share), it may be obliged under antitrust law to make a fair allocation of quantities/capacities still available. This also applies to suppliers on whom companies are so dependent as buyers of a certain type of goods that they do not have sufficient and reasonable possibilities to switch to other suppliers (**relative market power**). A further prerequisite for relative market power is that there is a clear imbalance between the supplier's position of power and the countervailing power of the other company. In such cases of market dominance or relative market power of the supplier, the supplier is therefore generally not released from its obligation to supply, but must distribute available quantities/capacities fairly.*

- Check the legal consequences announced by the supplier against your **contract** concluded with the supplier. Is the supplier entitled to act in this way under the contract?
- A court **interim injunction** for supply (with quantities or capacities still available) will only be achievable in the rarest of cases, as the supply would "anticipate" the main case, which is generally inadmissible in the context of an interim injunction. Exceptions may only apply in case of a threat to the existence or other special circumstances.

1.3 Step 3: Preparation of possible claims for damages

If a short-term delivery cannot be achieved by means of an interim injunction, but it turns out afterwards that a case of force majeure did not actually exist, your company may be entitled to claim damages against the supplier. Precise documentation is particularly important for this:

- Comprehensive documentation of **communication** with the supplier
- Comprehensive documentation of **own** stock, own capacity utilisation and open orders at the time of information about the force majeure
- Comprehensive documentation of the **impairments** of your company, such as:
 - Shutdown of own production due to lack of raw material supply,
 - Default towards own customers because of the bottleneck,
 - any claims for damages asserted by the customers,
 - lost orders due to non-delivery by suppliers,
 - Order enquiries that had to be rejected due to the supply bottleneck,
 - Deviations from planned figures or reliable forecasts or from the typical previous year's figures corresponding to the period, provided these are comparable,
 - Price changes of the undelivered (pre-)product or additional costs for other covering purchases that you make to maintain your own ability to deliver.
- Comprehensive documentation of force majeure notices **from other** suppliers, which may be an indication of collusion between suppliers in violation of antitrust law

2 Own force majeure declaration to your customers

The delivery failure of your supplier can now lead to your own inability to deliver. Here it will depend on your contractual arrangements with the customer. A force majeure can of course also occur for you as a result of other events.

- If your company is itself affected by force majeure or if such a case occurs in your own supply chain, the provisions of your own **customer contracts** must in turn be evaluated to determine whether force majeure actually exists and what rights and obligations you can derive from it.
- Here, what has been explained above for your supplier's declaration of force majeure also applies to your customers' rights **laterally reversed**.
- Check whether there is **actually** a case of force majeure or whether, in the case of mere supply bottlenecks, you could, for example, also cover yourself elsewhere on the market. What does your contract with the customer say about this?
- If it is certain that your company is no longer able to deliver to all customers as a result of force majeure, the affected customers must be notified immediately. Otherwise, even a delayed notification can trigger claims for damages as a breach of an accessory contractual obligation. Inform your customers about:
 - Reason for force majeure
 - Expected duration of the force majeure; also inform clients immediately of any deviation from an original expected duration
- Make a contractual quantity allocation of remaining quantities and residual production capacities. If you are dominant or have relative market power vis-à-vis customers (see above), this may result in additional obligations to allocate fairly.
- It is also important to take precautions against possible **claims for damages** by your own customers. In particular, the measures taken to maintain the company's own productivity must be documented (especially attempts to find alternative sources of supply and the associated additional costs, refusals to supply by alternative sources of supply, etc.).

3 Early prevention: creating a contractual basis that is interest-based

As explained above, it is also of particular importance for the case of force majeure that appropriate contractual provisions exist. The question of force majeure should therefore not be dealt with (only) when it occurs, but as early as possible, i.e. already during the negotiation of purchase / supply contracts with suppliers and contracts with customers.

3.1 Contracts with suppliers

Contractual regulations on force majeure do not necessarily have to serve only the interests of the supplier. The agreement of transparent and balanced clauses is better for both sides than no regulation of these cases at all. This is the only way providing clarity about the respective rights and obligations if the worst comes to the worst. The following aspects are regularly decisive here:

- When is force majeure present? The clause should not only refer to the general term "force majeure", but should first **define in general** what is to be understood by this and then, in the best case, also list **concrete examples** of when this is the case and when it is not.
 - *Tip: Without a clear regulation, disputes may arise as to whether not only events affecting the supplier itself but also events occurring (upstream) in its supply chain should constitute a case of force majeure.*
- What **rights and obligations** does force majeure trigger? In the interest of the buyer:
 - are not only the immediate notification of the force majeure,
 - but also an express obligation on the part of the supplier to provide (ongoing) information about the reason for the disruption,
 - the expected duration until the malfunction is remedied, and
 - especially on the scope and duration of the delivery impairment.
 - Furthermore, it should be regulated whether the supplier's obligation to perform ceases to exist without substitution or whether and within what (possibly also price-related) framework the supplier has a procurement obligation on the market and, if applicable, abstract statements on the allocation of quantities.
 - *Tip: From the buyer's point of view, a right to withdraw from the contract may also be favourable (from a certain intensity or duration) in order to be able to develop alternative sources of supply at an early stage and in a legally secure manner.*

- If a supplier is dominant or has relative market power over you (see above), it may be in violation of **antitrust law** for it to insist on regulations that unfairly favour it over you.

3.2 Contracts with clients

The conditions and legal consequences of force majeure should also be expressly regulated in the relationship with the company's own customers. With the change from the buyer's to the supplier's perspective, everything that was in the interest of the company from the buyer's perspective (see section 3.1) is fundamentally unfavourable.

- In relation to one's own customers, for example, it is essential to regulate that (indirect) force majeure situations in the **upstream supply chain** that affect the company's own performance also constitute a case of force majeure. It is essential to avoid having one's own delivery obligation to customers while having no claim against the supplier of the raw materials.
- A favourable provision is one according to which, in force majeure situations, a **procurement obligation** of the company is excluded or limited, or it is expressly stated that you are only obliged to deliver to the extent that you yourself have been supplied correctly and on time by your upstream suppliers (so-called "Reservation of self-supply").

3.3 General Terms and Conditions (GTC)

If force majeure clauses are not negotiated individually and in detail between the contracting parties, but are part of the GTC, there are increased requirements for their effectiveness. This applies on the one hand to the transparency of the clause and on the other hand to its legal consequences.

→ *Tip: As a rule, GTCs already include provisions that are intended for multiple use. Clauses that unilaterally impose the economic risk of force majeure situations on only one contracting party are particularly critical in GTCs, such as a provision in favour of the supplier according to which the latter is released from its obligation to perform but may keep advance payments already received or a provision in favour of the customer according to which the supplier is to owe damages in the event of force majeure irrespective of fault.*

*It is **advisable** to seek legal advice when drafting the contract. Such aspects are too important from an economic point of view to be left unregulated in the contract or for regulations to prove ineffective later on.*

3.4 Checklist

Provided your supplier's force majeure clause includes one or more of the following features, you should be alert, because this may suggest - in your interest - that the clause is completely or at least partially invalid:

- Does the clause explicitly or at least *mutatis mutandis* clarify that only events that are *unforeseeable* and at the same time *extraordinary* as well as *unavoidable* are eligible, or is one of these conditions missing?

→ Negative example: *"Seller shall not be liable for any failure to fulfil any term of the contract if such fulfilment has been delayed, prevented, restricted, or affected by any circumstance or event beyond the Seller's reasonable control including without limitation: (i) fire, explosion, flood, storm, earthquake [...]."*

[This clause is exclusively linked to an "unavoidability" and would thus also apply to foreseeable events.]

- Does the clause in principle cover operational disruptions "of any kind" (which is impermissible) or is it clear that, if at all, only such operational disruptions can be considered as force majeure events which are not attributable to the supplier's sphere of control and organisation, i.e. for which the supplier is not responsible?

→ Negative example: *"Operational disruptions of any kind, especially in the supplying plants, and other circumstances of any kind which impair delivery through no fault of the seller, release the seller from the obligation to deliver".*

[The supplier could also evade its contractual obligations here if events are in question which are directly attributable to its sphere of control and organisation.]

- Shall (inadmissible) price increases in procurement also constitute a case of force majeure?

→ Negative example: *"Circumstances which make the delivery considerably more expensive through no fault of the seller release the seller from the obligation to deliver."*

[Increases in the production cost which do not make the goods subject of the contract absolutely unaffordable in view of the agreed sales price and which are therefore below the so-called "sacrifice limit" must be accepted by the user; the linking of the right to dissolve to a "considerable increase in the price of the delivery" is therefore too general.]

- If no unlimited procurement obligation of the supplier is agreed, force majeure clauses can provide that the supplier is only obliged to perform if it was also supplied by its upstream suppliers itself (so-called "Reservation of self-supply"). But is it also made clear that this provision only applies to the extent that the supplier (i) had also concluded a sufficient contract with its upstream supplier and (ii) the supplier is not responsible for the failure to perform in the relationship upstream supplier / supplier - or is the clause impermissibly designed as an *unrestricted* reservation of self-supply?

→ Negative example: *"In the event of non-delivery to the seller by suppliers, both parties are entitled to withdraw from the contract insofar as it relates to non-deliverable items"*.

[The clause leaves it completely open for what reasons the seller was left in the lurch by its pre-supplier. According to case law, however, the wording "*correct and timely self-delivery reserved*" shall be sufficient.]

- Does the clause allow a complete withdrawal from the contract or its termination even if there is actually only a case of delay of short duration, e.g. in the case of a strike?

→ Negative example: *"Circumstances which delay delivery through no fault of the seller release the seller from the obligation to deliver"*.

[According to the legal starting position, a complete exemption from performance is regularly not yet permissible if the performance is only delayed and has therefore not yet finally ceased. Any such GTC inadmissibly departs from this basic valuation if - as in this case - it permits a complete right to refuse performance even in the case of short-term delays in delivery.]

- Insofar as you are obliged to perform in advance on the basis of the contract - is the (inadmissible) interpretation possible on the basis of the force majeure clause that the supplier who is exempt from performance due to force majeure may keep any advance payments received?

→ Negative example: *"Force Majeure events do not affect the seller's claims for remuneration"*.

[The clause unilaterally places the risks of force majeure on the buyer; the seller would be released from the obligation to perform, but would retain its claims to remuneration.]

- Does the clause also exclude claims for damages that could be considered because the supplier actually knew or should have known of the impediment to performance at the time the contract was concluded?

→ Negative example: *"Buyer shall not be entitled to any damages, irrespective of whether Seller was aware of the force majeure event at the time of conclusion of the contract"*.

[If the supplier already knows about the impediment to performance at the time of conclusion of the contract, it cannot exempt itself from liability.]

4 Sample letters to suppliers

If your supplier confronts you with a declaration of force majeure, you could react as follows (subject to the results of an assessment of the factual and legal situation, which must be carried out in advance in each case):

4.1 In the case of an empty, clichéd declaration of force majeure

"Dear Ladies and Gentlemen,

By letter dated [date], received by us on [date], you have notified us that your company has been affected by a Force Majeure event.

We note that your letter lacks any concrete information about the reason for and the consequences of the disruption beyond this simple notification. However, we assume that due to the contractual relationship with us you are obliged to inform us immediately and comprehensively about the exact circumstances of a possible force majeure and in this respect you are also obliged to provide evidence. The simple blanket assertion of a force majeure event, on the other hand, is not suitable for evading your contractual obligation to perform.

Against this background, we hereby request you to provide a detailed written statement without delay, but no later than [very short deadline],

- exactly what kind of force majeure event has occurred,*
- when exactly this occurred and when you became aware of it,*
- whether the event was foreseeable or avoidable,*
- how this event affects your operation and your obligation to perform,*
- how long the operational disruption is expected to last,*
- what measures you have taken and will take to eliminate the operational disruption and maintain or restore your ability to deliver,*
- the extent to which the event will affect your performance obligation to our company,*
- the extent to which residual production capacities/stocks are still available, as well as the extent to which you can meet your performance obligation by procuring on the general market and how you allocate the corresponding supply opportunities in favour of your customers, in particular also with regard to our company.*

In view of your unsubstantiated declaration of force majeure, we also expressly request you to immediately resume the contractual supply of our company in full. Should this not be possible in full, we hereby alternatively request you to allocate the deliveries still possible to you on the basis of your entire delivery obligations to your customers and to immediately commence a corresponding delivery to our company - based on our actual contractual delivery claims - as well as to provide corresponding evidence.

We expressly reserve the right to examine claims for damages.

Finally, we ask that you inform us immediately in writing of any relevant developments.

*Kind regards,
[Signature]"*

4.2 Variation/supplement in the event of an alleged "internal fault"

"Both according to the contract concluded between the two of us and, in particular, according to case law, force majeure events are exclusively to be recognised in situations that are external to the business, caused externally by elementary forces of nature or by the actions of third parties, i.e. therefore unforeseeable, unavoidable and extraordinary events for which the supplier is not responsible at all.

In our opinion, the reason given by you [e.g. "machine damage"] does not constitute a force majeure event. This is because a production stoppage due to a defect in operating equipment is fundamentally attributable to your sphere of control and organisation and is, therefore, neither a non-operational event nor one that could not be foreseen or prevented by exercising the utmost care that could reasonably be expected.

We therefore assume that your contractual obligations vis-à-vis our company have not been diminished in any way and hereby request you to immediately resume the contractual supply to our company and to ensure this in the future. Apart from that, we reserve the right to examine claims for damages."

4.3 Modification/supplementation in case of indications of abusive conduct under cartel law

"As you are certainly aware, it is not permissible under antitrust law to issue unauthorised force majeure declarations or to take unfair advantage of force majeure situations. Suppliers who behave abusively in this respect are not only threatened with liability for damages, but also with fines from the antitrust authorities, which have already picked up on abusive behaviour many times in the past."

5 Sample letter to own customer

"Dear Ladies and Gentlemen,

We refer to our supply contract for [product] dated [date].

As you will be aware, our company depends on being supplied with [insert product] by our suppliers in a timely and orderly manner. Therefore, we have concluded adequate purchase contracts with our suppliers, which obligate our suppliers to supply us with [insert product] on time and in sufficient quantity and quality, so that we are regularly able to meet our own delivery obligations vis-à-vis our own customers - i.e. also specifically to your company.

However, on [date] we received a letter from our supplier [name] informing us of a force majeure event, specifically [reason]. The [supplier] has advised that it can no longer supply us for the time being due to this event, but has assured us that it will remedy the impairment as quickly as possible. Unfortunately, this event in the organisational area of our supplier, which was neither foreseeable nor avoidable for us, now also has an impact on our supply relationship with your company. Specifically, the following delivery disruptions are to be expected:

- [Duration and effect of the delivery failure]*
- [possible allocation of quantities/capacities still available, if applicable].*

We will of course keep you informed of any developments in this matter in a timely and comprehensive manner. We deeply regret this matter and kindly ask for your understanding for any inconvenience this may cause. If you have any questions, please do not hesitate to contact us at any time.

*Kind regards,
[Signature]"*