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THE SHIFTING BOUNDARIES OF COMMERCIAL CERTAINTY: A CRITICAL APPRAISAL OF FORCE MAJEURE CLAUSES IN MODERN CONTRACT LAW

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ABSTRACT

The principle of commercial certainty has long been heralded as a cornerstone of modern contract law, enabling parties to allocate risk, plan transactions, and enforce obligations with predictable outcomes. Yet, the volatile realities of the 21st century, manifested through pandemics, climate crises, cyber disruptions, and geopolitical instability, have exposed the fragility of this ideal. Force majeure clauses, traditionally conceived as exceptional safeguards against truly unforeseeable and uncontrollable events, have become pivotal battlegrounds where the boundaries of contractual certainty are now vigorously contested. This research offers a critical appraisal of the evolving function of force majeure clauses, interrogating whether their proliferation and judicial reinterpretation enhance or undermine the stability of commercial relations. It examines the historical underpinnings of these clauses, their doctrinal divergence across jurisdictions, and their increasing entanglement with broader doctrines such as frustration, hardship, and impossibility. Through a close analysis of judicial perspectives, the research exposes the tension between the demand for flexibility in contractual performance and the imperative of legal predictability. Particular attention is paid to the drafting deficiencies and interpretative ambiguities that have surfaced in high-stakes litigation, which threaten to erode commercial trust. The research argues for a recalibration of force majeure practice, one that embraces adaptive legal design while safeguarding core principles of certainty and fairness. In so doing, it contributes to an emerging discourse on how contract law must evolve to meet the complex demands of a world increasingly defined by systemic risk and disruption.

Keywords: Force Majeure, Commercial Certainty, Contract Law, Risk Allocation, Pandemic Litigation, Contractual Flexibility, Legal Predictability

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INTRODUCTION

In the edifice of contract law, commercial certainty manifests as the cornerstone upon which parties rely to allocate risk, fix obligations, and predict outcomes. Traditionally, this certainty has been valorized through definitive terms, firm obligations, and the implicit bargain that agreed performances will ensue unless an unforeseeable intervention occurs. Underpinning this doctrine is the notion that contractual autonomy and stability yield efficient commerce, enabling forecasting, investment, and orderly trade. Force majeure clauses occupy a pivotal role in this landscape, they carve out exceptions to the norm of absolute performance, permitting suspension or discharge where specified external events (e.g., "acts of God," wars, epidemics) render performance impossible or commercially futile. These clauses, when drafted with precision, anchor commercial certainty by delineating the parameters of excusable non-performance and by approximating the contours of legal risk (Bradeley et. al., 2021).

Yet, force majeure is no mere theoretical construct. It functions as an executable mechanism for risk-allocation, a contractual valve that regulates liabilities when disruptive occurrences transcend the control of contracting parties. By stipulating a force majeure clause, parties predefine those contingencies that will excuse or suspend contractual duties, thereby diluting uncertainty and obviating ad hoc judicial intervention. In so doing, such clauses embolden parties to proceed with high-stakes transactions, be it cross-border trade, supply-chain arrangements, or EPC contracts, without being perpetually vulnerable to unforeseeable disruptions. Nonetheless, this reassurance hinges critically on clarity in drafting, specificity in event listing, and the formalisation of notice and mitigation obligations (Matthew, 2020).

The salience of force majeure jurisprudence has soared in recent years, driven by a confluence of global systemic shocks. The COVID-19 pandemic, in particular, brought this doctrinal tool into stark relief, UNCTAD estimated a one-trillion-dollar loss to global economic activity in 2020, with exports contracting by 7 % and business revenues declining by approximately 25 % in contact-intensive sectors. In India alone, nearly 140 million people lost employment by April 2020, with GDP falling 23.9 % in Q1 of fiscal 2020-21, as delineated under Graph 1 hereinbelow. The Government of India responded by formally classifying COVID-19 as a "natural calamity" through an Office Memorandum dated February 19, 2020, thereby facilitating invocation of force majeure under central procurement contract. Parallel resolutions by other governmental bodies followed, the Ministry of Road Transport and Highways (May 18, 2020) and MNRE (March 20, 2020) similarly recognized COVID-19 as a force majeure event (Zheng, 2025).

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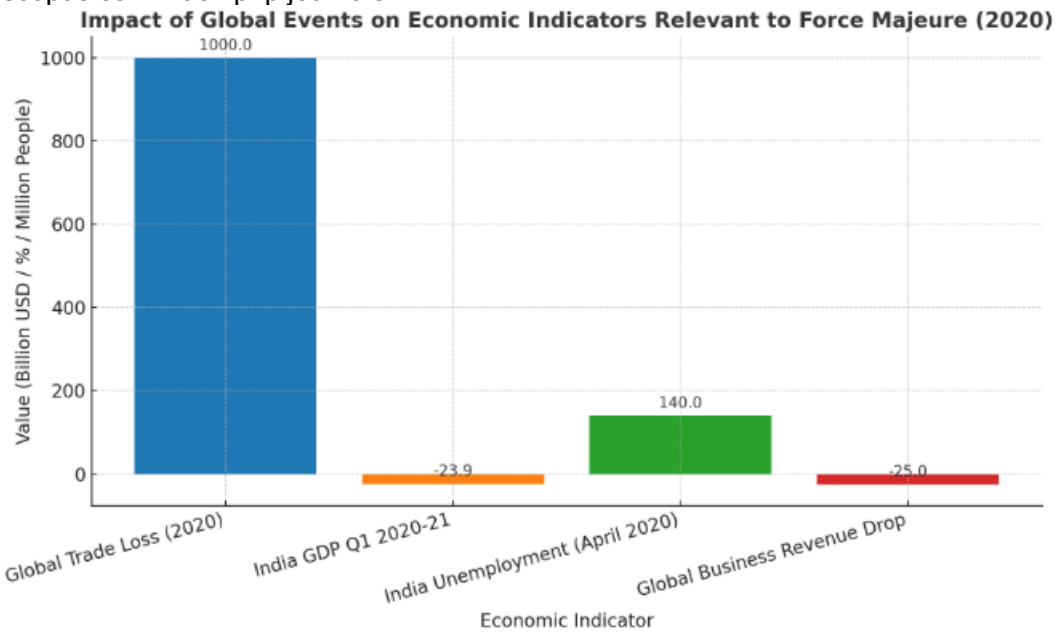

Graph 1

Concurrently, the complexity of international commerce has proliferated, straining traditional contract structures. Global supply chains no longer hinge merely on bilateral trade, but on multijurisdictional sourcing, digital workflows, just-in-time logistics, and geopolitical volatility. Middle-market companies routinely rely on overseas suppliers, pharmaceutical ingredients, green-energy components, electronics, whose disruptions ripple across continents. For instance, in India numerous firms, from renewable-energy project operators to biotech companies, invoked force majeure notices against Chinese counterparts amidst lockdown-induced delivery failures. These phenomena illuminate a broader trend, force majeure clauses are being repurposed as instruments not only of contingency planning, but of commercial strategy and risk-management in an interconnected global economy (OUP n.d.).

CONCEPTUAL FOUNDATIONS

Force majeure clauses occupy a complex and dynamic space in modern contract law, rooted in both ancient legal principles and contemporary commercial practice. Their conceptual origins can be traced to Roman law, particularly the doctrine of *vis maior* (superior force), which excused performance where an obligation became impossible due to extraordinary external events beyond a party's control. Civil law systems codified these principles within the broader framework of *force majeure*, often defined in civil codes (e.g., Article 1218 of the French Civil Code). In contrast, common law jurisdictions traditionally eschewed such explicit doctrines, relying instead on the narrower, judicially developed doctrine of frustration. It was only through the increasing incorporation of force majeure clauses in contractual drafting, particularly in international trade and cross-

border transactions, that common law systems gradually embraced their utility as a contractual risk allocation tool. This evolution underscores the inherently hybrid nature of force majeure clauses, which straddle statutory, judicial, and private ordering traditions (Science Direct Team, 2025).

In terms of drafting and construction, force majeure clauses typically follow a patterned structure, though their content varies considerably in practice. Core elements include a definition of force majeure events, which may be exhaustive (closed list) or illustrative (open-ended), and causation requirements, usually stipulating that the event must render performance impossible or substantially more onerous. Further, clauses often specify procedural requirements such as notice obligations and mitigation duties, compelling affected parties to take reasonable steps to minimize the impact of the triggering event. Critically, the burden of proof generally rests with the party seeking to invoke the clause. The drafting choices around these components are neither neutral nor merely technical; they reflect deeper commercial assumptions about risk and responsibility. Moreover, judicial interpretation of these clauses tends to be highly textualist, reinforcing the importance of precise drafting to achieve predictable outcomes (Natarajan, 2022).

The broader principle of commercial certainty constitutes both the normative justification for, and the practical challenge to, the effective operation of force majeure clauses. At its core, commercial certainty entails predictable and reliable legal outcomes, enabling parties to plan and execute complex transactions with confidence. This principle is indispensable in a market economy where credit, investment, and cross-border trade rely upon enforceable promises. Force majeure clauses serve to balance certainty with flexibility, providing a predefined mechanism for adjusting obligations in the face of exceptional disruptions. Yet paradoxically, their invocation often introduces uncertainty, particularly where vague drafting, novel fact patterns, or evolving judicial interpretations leave outcomes unpredictable. Thus, force majeure clauses operate within a persistent tension between certainty ex ante and equitable adjustment ex post.

The relationship between force majeure and contractual risk allocation is equally foundational. By delineating which risks remain with each party and which trigger an exemption from performance, force majeure clauses help to allocate transactional risks *ex ante* in a manner reflective of the parties' commercial expectations. This function is particularly critical in international contracts, where parties must navigate diverse legal systems and unforeseeable contingencies. The enforceability of obligations under such clauses depends on this clear allocation, absent clarity, courts may revert to default doctrines (such as frustration), thus reintroducing judicial discretion in place of party autonomy. In this light, force majeure clauses can be viewed as private law instruments for fine-tuning the default risk rules of contract law, underscoring the dynamic interplay between public legal frameworks and private ordering (Lee and Han, 2022).

A key point of doctrinal clarity arises in distinguishing force majeure from related common law and international doctrines. Under common law, the doctrine of frustration operates to discharge a contract where an unforeseen event renders performance radically different from that originally contemplated. However, frustration is an inflexible doctrine, rarely applied, and offers no partial relief or adjustment; it terminates obligations entirely. In contrast, force majeure clauses can provide nuanced contractual responses, such as suspension of obligations, extensions of time, or partial discharge. Under the UCC and CISG, doctrines of impossibility or impracticability similarly excuse performance, but again are subject to restrictive judicial thresholds and variable interpretation. Force majeure clauses allow parties to circumvent these limitations by contractually defining thresholds of disruption and remedies (Fonotova and Ukolova, 2022).

Force majeure must also be distinguished from hardship clauses, prevalent particularly in civil law and international commercial practice. Whereas force majeure typically addresses events rendering performance impossible, hardship clauses are designed to address events that make performance excessively onerous but not impossible. Hardship clauses enable renegotiation or judicial adaptation of the contract to restore equilibrium, reflecting a more relational and flexible conception of contractual justice. This distinction is particularly salient in long-term relational contracts, such as joint ventures or supply agreements, where parties may prefer mechanisms for contractual adjustment over outright excuse from performance. The conceptual and practical interplay between force majeure and hardship clauses thus underscores the broader shift in modern contract law from rigid formalism toward adaptive contractual governance, albeit at the continuing cost of greater legal and commercial complexity (Nita, 2020).

EVOLUTION OF FORCE MAJEURE CLAUSES IN MODERN CONTRACT LAW

The treatment of force majeure clauses has undergone a marked evolution, oscillating between judicial conservatism and commercial pragmatism. Traditionally, courts adopted a strict constructionist approach, treating force majeure provisions as exceptions to the fundamental principle of *pacta sunt servanda*. Judicial reasoning typically stressed the sanctity of contractual obligations and construed such clauses narrowly, requiring clear and unequivocal language to displace performance obligations. The courts' insistence on identifying precise, external events, beyond the reasonable control of the obligor, as triggers for invoking force majeure rendered these clauses of limited practical utility. For intance, in *Tennants (Lancashire) Ltd v. G.S. Wilson & Co Ltd.* ([1917] AC 495), the House of Lords underscored the necessity of clear drafting, holding that commercial hardship alone did not suffice absent specific contractual language. Similarly, US jurisprudence, such as *Northern Indiana Public Service Co v. Carbon County Coal Co*, (799 F.2d 265 (7th Cir. 1986)), emphasised the need for objective impossibility and rejected reliance on economic impracticability unless expressly stipulated.

However, the global pandemic catalysed a significant shift in judicial and commercial attitudes towards force majeure. Courts worldwide were compelled to grapple with an unprecedented wave of litigation seeking relief from contractual obligations disrupted by COVID-19. Recent judicial trends reflect a greater willingness to accommodate commercial realities, although this accommodation remains bounded by contractual language and the overarching principle of foreseeability. English courts, as seen in *European Professional Club Rugby v. RDA Television LLP* ([2022] EWHC 50 (Comm)), demonstrated a nuanced approach, scrutinising the causal nexus between the pandemic and the failure of performance. Simultaneously, the scope of force majeure has expanded beyond traditional natural disasters and wars, encompassing modern contingencies such as supply chain disruptions, cyberattacks, and environmental crises. Yet this expansion has also heightened tensions between bespoke and boilerplate drafting. The latter often fails to adequately address new categories of risk, leading to interpretative uncertainty and litigation. Consequently, there is an emerging recognition of the need for tailored clauses capable of addressing the complexities of contemporary commerce.

Comparative legal analysis reveals divergent approaches rooted in distinct legal traditions. Civil law jurisdictions typically embed force majeure within statutory frameworks, offering a more predictable doctrine of excuse. French law, under Article 1218 of the *Code civil*, codifies force majeure and provides for automatic relief where an unforeseeable and irresistible event renders performance impossible. This contrasts with the common law's reliance on party autonomy and contractual drafting, where absent clear stipulation, the doctrine of frustration applies, albeit under stringent conditions. The case of *Canary Wharf (BP4) T1 Ltd v. European Medicines Agency* ([2019] EWHC 335 (Ch)) illustrates the reluctance of English courts to lightly invoke frustration or to stretch the scope of force majeure beyond its textual bounds. Meanwhile, international instruments such as Article 79 of the CISG & UNIDROIT Principles of International Commercial Contracts (Articles 7.1.7 and 6.2.2) have sought to harmonise standards of non-performance due to supervening events, promoting a functional balance between certainty and flexibility. Judicial interpretation of Article 79, as evidenced in decisions by tribunals such as the China International Economic and Trade Arbitration Commission (CIETAC), indicates a willingness to engage with broader notions of economic hardship in tandem with traditional force majeure (Ayalew, 2023).

CRITICAL APPRAISAL: FORCE MAJEURE AND COMMERCIAL CERTAINTY

Force majeure clauses occupy a paradoxical position within the architecture of commercial certainty, they are designed to enhance predictability by delineating the bounds of contractual liability under unforeseen circumstances, yet their effectiveness often depends upon their precision, or lack thereof. In theory, a well-drafted force majeure clause should provide parties with a clear framework for managing risk, specifying the precise events that will excuse non-performance and outlining procedural requirements such as notice and

mitigation duties. In practice, however, vague or boilerplate clauses frequently undermine certainty by leaving key questions, such as causation, foreseeability, and proportionality, open to contestation. Judicial decisions across jurisdictions have highlighted the inherent difficulties in interpreting such clauses when parties fail to define triggering events with sufficient specificity, thereby inviting inconsistent outcomes. The consequence is an over-reliance on judicial interpretation, which not only introduces uncertainty but also subverts the parties' original intent by shifting the locus of risk allocation from contract to court (Sowmya, 2022).

This tension is further complicated by the broader normative debate concerning the appropriate balance between contractual flexibility and legal certainty. Force majeure clauses necessarily operate at the intersection of party autonomy and judicial discretion, inviting courts to exercise equitable judgment in exceptional circumstances. While this discretion is arguably necessary to achieve fairness in extreme cases, particularly where literal enforcement would yield commercially untenable results, it can also erode the predictability that underpins contractual relations. Judicial willingness to read force majeure clauses expansively, or conversely to apply doctrines such as frustration in lieu of explicit clauses, risks creating a jurisprudence that is both fact-intensive and difficult to reconcile with the ex-ante expectations of commercial actors. The challenge, therefore, lies in crafting legal and interpretive standards that respect both the sanctity of the contractual bargain and the practical need for flexibility in an increasingly volatile global environment (Kang et. al., 2021).

The practical impact of this doctrinal ambivalence is vividly reflected in evolving market perceptions of legal risk. In the wake of global crises, most notably the COVID-19 pandemic, business actors have become acutely aware of the deficiencies in conventional force majeure drafting. The pandemic exposed the inadequacy of many clauses that failed to contemplate public health emergencies, government-imposed lockdowns, or cascading supply chain disruptions. This has led to a marked shift in contract negotiation practices, with parties now placing greater emphasis on bespoke drafting and the explicit enumeration of potential force majeure events. Moreover, there is a growing trend towards integrating more detailed procedural obligations, such as notification timelines, mitigation duties, and evidentiary thresholds, in an effort to restore commercial certainty and reduce dependence on judicial exegesis.

Yet this recalibration of drafting practice also underscores the broader systemic challenge of sustaining commercial certainty in a world marked by systemic risk and deep uncertainty. As force majeure clauses evolve to accommodate an expanding array of contingencies, from climate change to cyber-attacks, they risk becoming unwieldy and potentially over-inclusive, thereby diluting their practical utility. The future of force majeure jurisprudence thus hinges on the development of doctrinal tools and interpretive principles that can reconcile these competing imperatives, fostering clarity and predictability where possible, while preserving a principled measure of flexibility to address the exigencies of an ever-more complex commercial landscape. In

this regard, the evolving interplay between contract drafting, judicial interpretation, and market practice will remain a critical site of contestation in the ongoing effort to delineate the shifting boundaries of commercial certainty (Kiraz and Ustun, 2022).

DRAFTING AND INTERPRETATION CHALLENGES

The drafting of force majeure clauses has traditionally been fraught with ambiguities, a problem that has only been exacerbated by the increasingly complex and volatile commercial environment. One recurrent drafting pitfall lies in the failure to precisely delineate the scope and coverage of the clause. Drafters often rely on generalized formulations such as "events beyond the reasonable control of the parties," coupled with illustrative but non-exhaustive lists of force majeure events. Such indeterminacy invites judicial discretion and inconsistent outcomes, thereby undermining the predictability that commercial parties seek. Moreover, lists of events frequently omit or ambiguously reference contemporary risks, cyber-attacks, pandemics, and climate-related disruptions, resulting in legal uncertainty when such events materialize. The insufficient articulation of scope not only jeopardizes the enforceability of the clause but also destabilizes the equilibrium of contractual risk allocation (Casady, 2020).

A further critical deficiency lies in the frequent omission or inadequate articulation of causation and mitigation requirements. Many force majeure clauses fail to specify the requisite causal nexus between the triggering event and the party's non-performance. Without a clear standard, whether direct causation, substantial hindrance, or impossibility, courts are left to interpolate tests ex post facto, often leading to divergent judicial interpretations. Compounding this problem is the neglect of mitigation obligations. Clauses that do not impose express duties to mitigate the effects of force majeure risk being judicially construed narrowly, particularly in common law jurisdictions where notions of reasonableness and good faith implicitly temper contractual obligations. The absence of clear mitigation language may enable opportunistic invocation of force majeure, thereby contravening the broader principles of contractual fairness and efficiency.

Inadequate notice provisions constitute an additional and often overlooked drafting flaw. Notice requirements serve vital functions in the operation of force majeure clauses, they facilitate early communication between contracting parties, promote the mitigation of loss, and enable alternative arrangements. Yet, force majeure clauses frequently either omit notice provisions altogether or include notice mechanisms that are vague or impracticable in urgent contexts. For instance, clauses may fail to specify the time frame within which notice must be given or the acceptable form of notice. In the absence of clear procedural stipulations, parties face the risk of forfeiting the benefit of the force majeure defense on technical grounds or, conversely, allowing the clause to be invoked belatedly, thereby exacerbating commercial uncertainty (Hansen, 2020).

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Judicial interpretation of force majeure clauses has shown a marked evolution in the wake of the COVID-19 pandemic, prompting both caution and reflection in future drafting. Courts, particularly in common law jurisdictions, have demonstrated an increasing willingness to scrutinise the language of force majeure clauses rigorously, applying a textualist approach tempered by commercial reasonableness. In *Seadrill Ghana Operations Ltd v. Tullow Ghana Ltd.,* [2022] EWCA Civ 1643, the English Court of Appeal reaffirmed the principle that force majeure clauses must be construed strictly according to their terms; here, a broad invocation of force majeure was rejected where the causal nexus between the event and non-performance was not adequately established. Similarly, in the US case *JPS Industries, Inc. v. U.S. Underwriters Ins. Co.*, 2019 WL 2417255 (D.S.C. June 10, 2019), the court underscored the importance of demonstrating that the force majeure event directly prevented performance rather than merely made it more difficult or expensive.

COVID-19-related litigation has further exposed interpretive divergences. In *Studio 417, Inc. v. Cincinnati Insurance Co.*, 478 F. Supp. 3d 794 (W.D. Mo. 2020), the US court took a broader view of what constitutes "direct physical loss," contrasting with other jurisdictions where courts have remained conservative in construing pandemic-related force majeure claims. Meanwhile, in *Salam Air SAOC v. Latam Airlines Group SA,* [2020] EWHC 2414 (Comm), the English High Court adopted a balanced approach, recognising that pandemic-related regulatory restrictions could trigger force majeure where the clause explicitly covered such governmental actions.

This emerging jurisprudence underscores the imperative for precise drafting, vague or boilerplate language is now more likely to be construed restrictively, especially in English courts where *Channel Island Ferries Ltd v. Sealink UK Ltd.,* [1988] 1 Lloyd's Rep 323 continues to stand for the principle that force majeure clauses must not be interpreted so broadly as to undermine fundamental contractual obligations. At the same time, there is a discernible judicial movement towards articulating interpretive guidelines aimed at enhancing commercial certainty, favouring interpretations that uphold the contractual risk allocation expressly agreed by the parties. Drafters and litigators alike must remain cognisant of these evolving interpretive standards, ensuring that force majeure clauses are crafted not merely as standard contractual appendages but as bespoke instruments of risk management attuned to both legal and commercial realities.

CONCLUSION

This critical appraisal has underscored that while force majeure clauses are ostensibly designed to enhance commercial certainty by codifying exceptional relief from performance, their operation in practice often exposes the inherent fragility of such certainty in the face of complex and evolving risks. The judicial and contractual treatment of force majeure reflects a broader tension between the imperative of legal predictability

and the need for contextual flexibility, an equilibrium that recent crises such as the COVID-19 pandemic have rendered increasingly elusive. Courts, in seeking to balance party autonomy with considerations of justice and commercial reality, risk fostering doctrinal inconsistency, thereby undermining the very certainty these clauses purport to deliver. Moreover, the proliferation of vague or overbroad drafting, coupled with divergent interpretive approaches across jurisdictions, exacerbates legal uncertainty and complicates cross-border transactions. Moving forward, a more sophisticated and harmonized contractual architecture, anchored in precise drafting, clearer evidentiary thresholds, and principled judicial interpretation, is essential if force majeure clauses are to reconcile their role as instruments of both commercial flexibility and legal certainty.

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