

# Newsletter

A composite background image for the title section. The left side shows a close-up of red, textured spherical objects, possibly coral or sea anemones. The right side shows a blurred interior scene with warm lighting and a door handle.

## COVID 19 & FORCE MAJEURE IN JAPAN – SOME KEY QUESTIONS

The sudden onset of the Covid-19 emergency has caused significant disruption across swathes of the Japanese economy and raised novel and urgent questions for businesses as they seek to handle the challenges they face, whilst balancing the protection of their businesses and their obligations to their customers, suppliers, and banks, etc. This memorandum briefly addresses a number of key issues and questions relating to force majeure under Japanese law.<sup>1</sup>

## COVID-19 State of Emergency

On 7<sup>th</sup> April 2020 the Japanese government declared a state of emergency<sup>2</sup>; the declaration primarily relates to “stay-at-home” advice and employment practices and to date the Japanese government has not taken any mandatory measures regarding the performance or enforcement of private contracts, such as payment deferrals or waivers, or delaying debt enforcement<sup>3</sup>, though regulators, etc. have issued guidance regarding the conduct of certain financial transactions.<sup>4</sup>

**Given the rapidly changing situation surrounding Covid-19 and the possibility of additional measures to contain the outbreak and mitigate its effects, businesses should ensure they have systems in place, such as arrangements with local counsel and other advisers, to monitor updates to relevant guidance, regulations, etc.**

## Q&A

### **Q1. Does Japanese law have a general concept of force majeure? Is it specified by statute?**

"Force majeure" is used as a legal term in the Civil Code, etc., but it is not specifically defined by law. In general, the term is interpreted as meaning external events that cannot be avoided even with reasonable care,<sup>5</sup> such as natural disasters, wars and riots.

Although not a typical force majeure, an order (but not a request, no matter how forceful) of a competent authority might constitute a force majeure depending on the circumstances (see Q3.).

### **Q2. If a contract does not contain a force majeure clause would one be implied?**

Yes, though the concept of force majeure is not necessary in most cases. If a contract does not contain a force majeure clause, a contract party can make a claim (such as for compensation for delay in performance) against a non-performing obligor if the non-performance is attributable to the obligor. If the non-performance is due to force majeure in the general meaning of the term as described in Q1., it would not be attributable to the obligor, therefore the obligor is released from its liability.

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<sup>1</sup> The information in this memorandum is based on data publicly available up to 24<sup>th</sup> April 2020.

<sup>2</sup> Originally covering Tokyo, Osaka and other urban areas, but extended nationwide on 16<sup>th</sup> April.

<sup>3</sup> Article 58 of the New Type Influenza Special Measures Act stipulates that, in a state of emergency due to the new influenza, where there is no time to wait for the convocation of the Diet due to the emergency, the Cabinet may enact a Cabinet Order to take the necessary measures to postpone, etc. the payment of monetary debts.

<sup>4</sup> The Financial Services Agency has issued guidelines encouraging banks to assist borrowers' cashflow by, e.g. making new loans, rescheduling existing loan repayments and changing guarantee terms. The Ministry of Economy, Trade and Industry has requested companies to take special care including (i) refraining from actions delaying supplies to them, (ii) bearing appropriate costs derived from price increases in raw materials and/or extra work of subcontractors, (iii) making payments on their due date, and (iv) refraining from cancelling or changing purchase orders. The Ministry of Land, Infrastructure, Transport and Tourism has requested landlords to accept a deferral of rent payments by tenants who have difficulty paying rent due to the Covid-19 situation.

<sup>5</sup> In the answers below it is assumed the party claiming force majeure has taken reasonable care to avoid its occurrence.

The general meaning of force majeure described in Q1. would apply where there is reference to force majeure in a contract but there is no description of the scope of the term.<sup>6</sup>

### **Q3. Might the Covid-19 situation give rise to a force majeure?**

Each claim of force majeure would have to be examined based on its facts. Typical causes of a force majeure in the COVID 19 situation might include a government order (but not a request) to close a business or measures necessary (not just advisable) to prevent the infection spreading (e.g., closure of a factory). The threshold to prove force majeure is high, though given the nature of the Covid 19 situation we believe the scope for exemption from liability due to force majeure is likely to be interpreted more broadly than would otherwise be the case.

As an example, if a company voluntarily closed a factory to avoid the spread of Covid 19 the key question would be whether the closure was unavoidable even if the company exercised the level of care that would normally be required in operating the factory. Since business operators have an obligation to consider the safety of their employees, if the closure was unavoidable (not just desirable) due to safety concerns, it could be argued that the closure was due to a force majeure event. However, other factors may need to be considered such as whether there were other ways to continue the business while ensuring the safety of the employees, or whether the decision to suspend business operations was excessive.

There has been no legislative or judicial recognition of the Covid 19 pandemic as a force majeure event.

### **Q4. Would a governmental declaration, etc. that an event is force majeure influence how Japanese courts interpret how to apply force majeure to a contract? Is there any power for the government to issue such a declaration?**

No; the Japanese government cannot declare that an event is force majeure in legal terms, as whether an event is a legal force majeure is highly dependent on each situation. The declaration of a state of emergency, and any future governmental statement referring to “force majeure” (in a non-legal meaning) might be a factor that a court would consider when determining whether an event gave rise to force majeure and justifies non-performance of an obligation.

### **Q5. What actions should a contract party take if it believes it cannot perform an obligation due to force majeure?**

The affected party should take all reasonable steps to avoid and mitigate the effects of the force majeure. It should also give reasonable notice to the other party of its inability to meet its obligations.

### **Q6. How would force majeure be proved?**

A contract party<sup>7</sup> seeking to avoid an obligation due to force majeure would generally need to show:

- (i) The nature of the alleged force majeure;

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<sup>6</sup> Where a contractual obligation is referred to below, and unless stated otherwise, it is assumed that the relevant contract does not set out specific rights and obligations which would apply should a party suffer a force majeure event.

<sup>7</sup> In this memorandum the party owing an obligation or in default is referred to as the obligor, and the party owed the obligation is referred to as the obligee.

- (ii) that the party could not reasonably have foreseen the force majeure;
- (iii) that it has taken all reasonable steps to avoid the effect of the force majeure on the obligation in question; and
- (iv) the causal link between the force majeure and the failure to perform the obligation.

**Q7. Is force majeure available for all types of business obligations?**

No; unless provided in the relevant agreement, monetary obligations, e.g., payments for goods or services, loan repayments, rents and salaries (including related interest and penalties) are not excused by force majeure.<sup>8</sup>

**Q8. We are unable to perform all our contractual obligations due to force majeure and propose to perform those most important to us; can we claim force majeure for non-performance of the others?**

No; the non-performance would be a matter of choice.

**Q9. A force majeure in Japan has prevented us from performing an obligation under a foreign law contract but a foreign judgement has been entered against us; can we avoid enforcement in Japan due to the force majeure?**

Very unlikely; in principle, the substance and remedy of force majeure is applied and interpreted in accordance with the governing law chosen by the parties. Therefore, it would not be possible to refute the enforceability of the foreign judgment solely on the grounds that the event would be considered to be force majeure under Japanese law even though it was not force majeure under the governing law of the contract. Although foreign judgements are not enforceable in Japan if contrary to Japanese law or public policy, this defence is very difficult to prove.

**Q10. We cannot meet an obligation due to force majeure; will we be liable to pay compensation?**

No; if an obligee fails to perform as required under a contract, and the non-performance is attributed to that party, the obligor may claim compensation from the obligee. If the non-performance is due to force majeure and the obligation is not a monetary one<sup>9</sup>, there are no grounds for attributing the non-performance to the obligee, and so it is not liable to pay compensation.

**Q11. We have failed to meet an obligation under a contract due to force majeure; can the other party cancel the contract?**

It depends on when the contract was entered into; if the contract was concluded before 1<sup>st</sup> April 2020, it cannot be cancelled due to a breach caused by force majeure as the obligee may only cancel it for a reason attributable to the obligor and a force majeure by its nature is not attributable to the obligor. The requirement for an attributable reason was abolished for contracts entered into on or after 1<sup>st</sup> April 2020 so the obligee can cancel such a contract due a breach caused by force majeure, unless the non-performance is minor having regard to the contract and transactional common sense.<sup>10</sup>

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<sup>8</sup> Article 419, paragraph 3 of the Civil Code; also see footnotes 3. and 4.

<sup>9</sup> See Q7.

<sup>10</sup> Reasonable notice of the termination must be given.

**Q12. Are contracts with consumers subject to different rules?**

Yes; the Consumer Contract Act regulates contracts between business operators and consumers (consumer contracts) and invalidates contract terms which would be disadvantageous to the consumer, such as those that would result in excessive claims for damages or exempt the business operator from certain liabilities for non-performance. Although there are no specific provisions in the Act regarding force majeure, a force majeure clause which unreasonably benefits the business operator, or unreasonably limits the rights of the consumer, could be invalid.

**Q13. Can a contract be cancelled if adversely affected by outside events other than force majeure?**

Yes, though not easily.

As a concept similar to frustration of contract under English and US law, the “principle of change in circumstances” is recognized under Japanese court precedents. This permits the termination or amendment of a contract where:

- (i) the circumstances on which the contract was based at the time of formation have changed;
- (ii) the parties to the contract could not foresee the change of circumstances at the time of formation of the contract;
- (iii) the change occurred due to reasons not attributable to the parties; and
- (iv) as a result of the change of circumstances, it is grossly inappropriate to bind the parties to the contractual obligations originally agreed based on the principle of good faith.

The remedy has rarely been used.

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CONSTITUTE AND SHOULD NOT BE RELIED UPON AS LEGAL ADVICE.**  
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April 2020  
No. A&S (EN)\_011

We will from time-to-time update this memorandum on our website as material developments arise but please do contact one of our team named below or your usual contact at Atsumi & Sakai if you have any queries on the points covered above or on any legal issues relating to Covid19.

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## Atsumi & Sakai

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