

Bird & Bird

COVID-19 & Your Defence & Security Contracts

A Ten Step Guide Under English, French, German, Italian and Polish Law



COVID-19 and the International Defence and Security Sector

The defence & security sector is beginning to feel impacts as COVID-19 disrupts both procurement projects and supply chains. The sector is heavily reliant on both an available specialist workforce to manufacture and maintain equipment and on global supply chains for raw materials and components. The continued supply of defence & security services is very often critical to our national security. Ensuring any closed sites are safe and secure is a fundamental issue.

Examples of the practical impacts COVID-19 is having in the global defence and security sector are:

- **Manufacturing and test facilities closing/reducing output** - countries are adopting differing approaches as to whether or not production must halt. For example, in Italy the new Decree was enacted on 22 March 2020, which orders work stoppage at factories until 3 April 2020, unless the relevant activity is an Excluded Activity or is part of the supply chain of an Excluded Activity. In England, as at 25 March 2020, production can continue on the basis that it can be done safely and in accordance with Government guidance. Even where Governments are not mandating closures, some OEMs are halting production. For example on 23 March Boeing announced that it was temporarily suspending all production operations at its sites in the Seattle Puget Sound area, with the 14-day shutdown commencing on 25 March. The facilities supply the P-8A Poseidon maritime multimission aircraft (MMA) for the UK Royal Air Force (RAF).
- **Imports/Exports stopped** - countries are enacting different measures concerning import of goods and services from COVID-19 high risk countries. The European Commission has allowed each Member State to adopt measures (proportionate and not prejudicial) aimed at safeguarding the health of its citizens and to prevent the spread of the virus COVID-19.
- **Reduced workforce** - employees not coming to their place of work due to self-isolation, sickness or fear of risks. This can cause particular difficulties in this sector where staff are often highly specialist and not easily replaced. There are also instances of customers refusing access to contractors owing to health and safety concerns.
- **Travel bans** - many countries have closed borders and more closures may come. Certain work in the sector (such as specialist installation or operation and maintenance) may require overseas-based specialists who are unable to get to the location of work due to travel restrictions.

Examples of the measures European governments are taking to help suppliers to them cope with the impact of COVID-19 are:

- The UK government has taken a policy decision (set out in a Public Policy Note 02/20¹) which is aimed to help suppliers' cash flow during the pandemic to ensure programmes can continue to run or can be reignited as soon as restrictions are lifted. This relief will be welcome by suppliers, albeit many are now looking to their customers to help them understand whether they will be considered an 'at risk supplier'. They are also still keen to understand their liabilities under their contracts should COVID-19 cause delay, and to work collaboratively to find solutions. Of particular interest is whether relief is available to suppliers and whether this could be passed down the supply chain.
- In the UK, the MOD Permanent Secretary Sir Steven Lovegrove has also written to the defence industry² to outline how the department is applying the new COVID-19 key workers guidance across the relevant programmes and projects the department runs, and how it applies to defence contractors working to support those activities.
- In France, the Government issued an Ordinance No. 2020-319 dated 25 March 2020 (the "Ordinance") to facilitate the performance of public contracts and concessions during the COVID-19 situation. The Ordinance applies to public procurement contract, to concessions and to other public contracts, which are in effect on 12 March 2020 and will be signed up to two months after the end of the COVID-19 state of health emergency (Art. 1 of the Ordinance).
- In Italy, the Government has suspended the deadline for any administrative procedure, including those related to the issuance of the authorizations to import/export military items.

The above all means that customers and suppliers are keen to understand their contractual position under COVID-19, both with regards to force majeure and also what other options are available to them such as suspension, termination or entitlement to increased costs under the change in law clause.

This note looks at how each of English, Italian, French, Polish and German contract law on force majeure and frustration applies to the COVID-19 pandemic, and highlights other contractual hints and tips that both customers and suppliers should be aware of.

UK

France

Germany

Italy

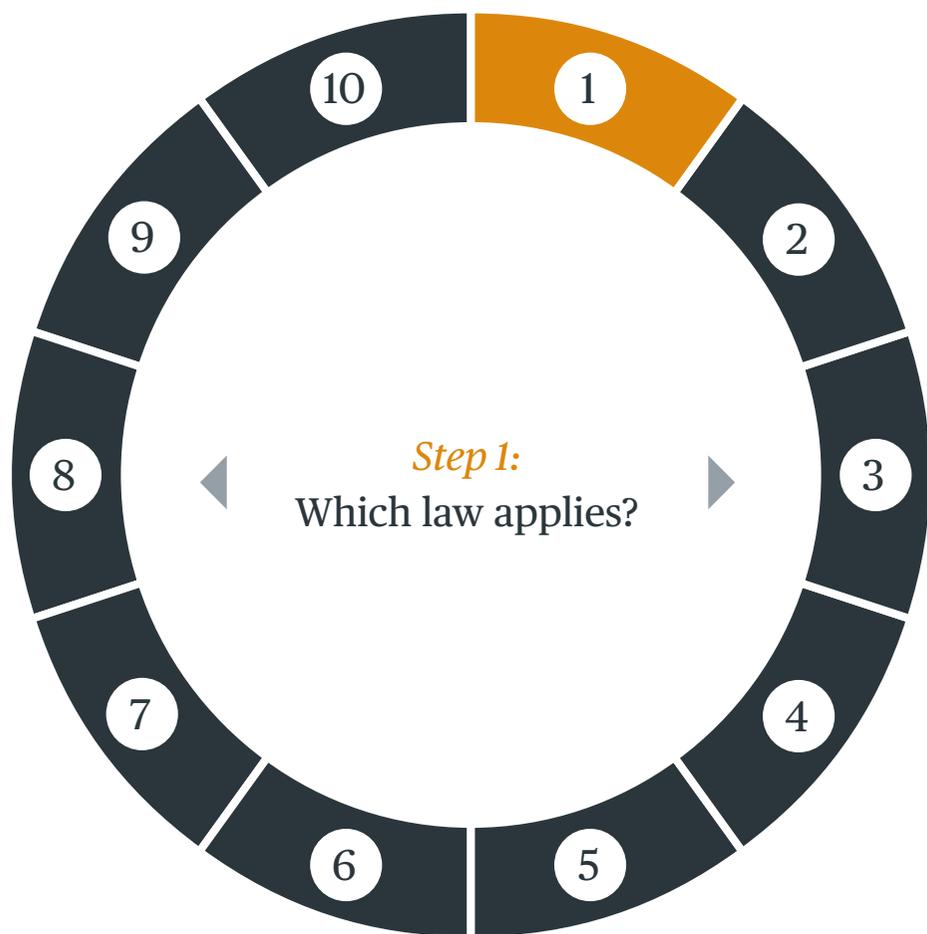
Poland

¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874178/PPN_02_20_Supplier_Relief_due_to_Covid19.pdf

² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876603/20200327-PUS_Covid-19_Guidance_to_Defence_Contractors.pdf



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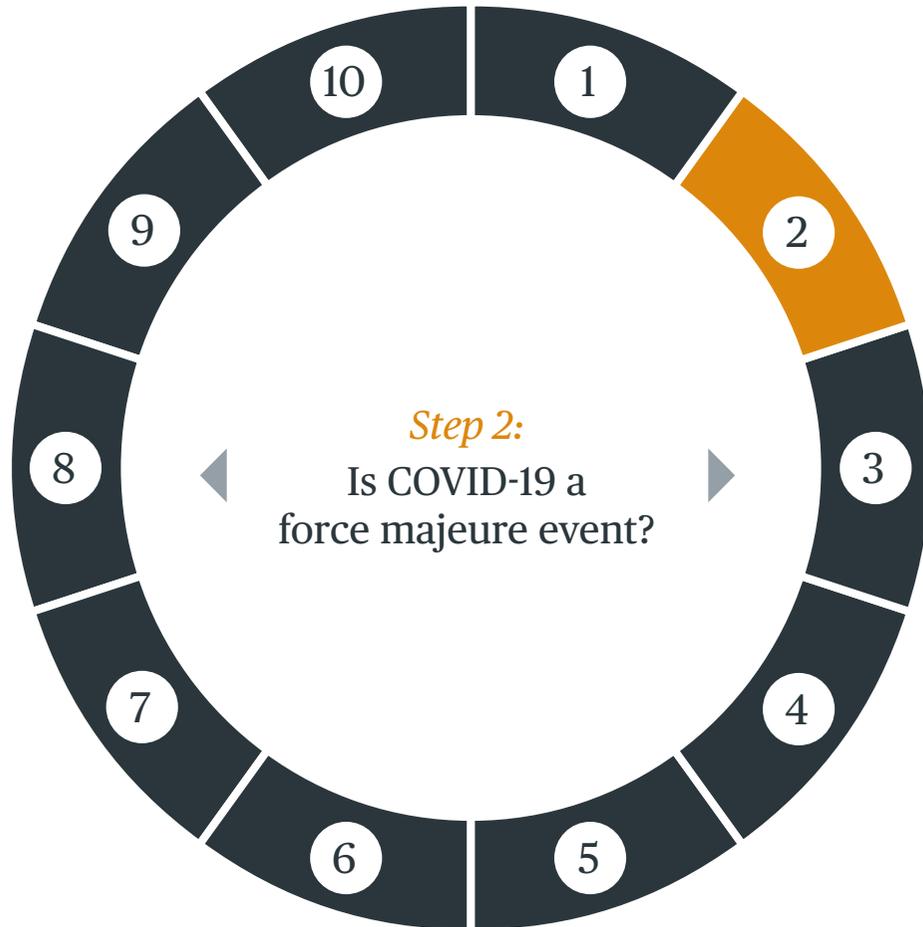
In assessing whether or not a party is entitled to relief from its obligations, it is important to check both:

1. the governing law of the applicable contract; and
2. the laws in the jurisdiction where the obligations are being performed (particularly with regards to any mandatory restrictions in place regarding imports/exports, production and travel bans).

For example, the contract may be governed by English law meaning the language of the contract will be interpreted under English interpretation principles. However, the obligations under the contract may be being physically performed in Italy (for example at a factory or testing site) meaning the Italian law governing whether or not production must be suspended will be relevant to test the impact of the force majeure event (see steps 4 & 5 below).



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Force majeure is a contractual mechanism that is only available if expressly set out in the contract. Unlike civil law jurisdictions, English law has no statutory provisions governing force majeure, nor will force majeure be implied into contracts under English law.

The language of a force majeure provision will be interpreted in line with existing interpretation principles under English law and there is precedent regarding the meaning of particular phrases. The English Courts will focus closely on the contractual language used such that each case will turn on its own facts and the contractual interpretation of the relevant term.

In the absence of any contractual force majeure clause (or other assistance that is provided by the contractual terms), a party would have to rely on frustration to avoid its contractual obligations (see step 9 below).

Force majeure clauses tend to follow two different formats:

- *Option 1* - An exhaustive list of events; or
- *Option 2* - A statement that a force majeure event is any event beyond the reasonable control of the affected party, followed with a non-exhaustive list of events which shall be considered to be force majeure.

If the contract follows option 1 - some exhaustive force majeure clauses will contain specific wording relating to disease or epidemic or pandemic. However, if pandemic is not expressly listed, other events that may be applicable to COVID-19 include:

- “shortage of supplies or raw materials” - where the downstream impact of the COVID-19 is limited availability of supplies/raw materials in the market as a whole, not just from a party’s contractual or preferred supplier;
- “labour shortages” - where workers are unable to man factories because they are off work due to sickness or self-isolation; and
- “Act of Government” - where an order by the Government or a government agency in a country has caused the disruption.

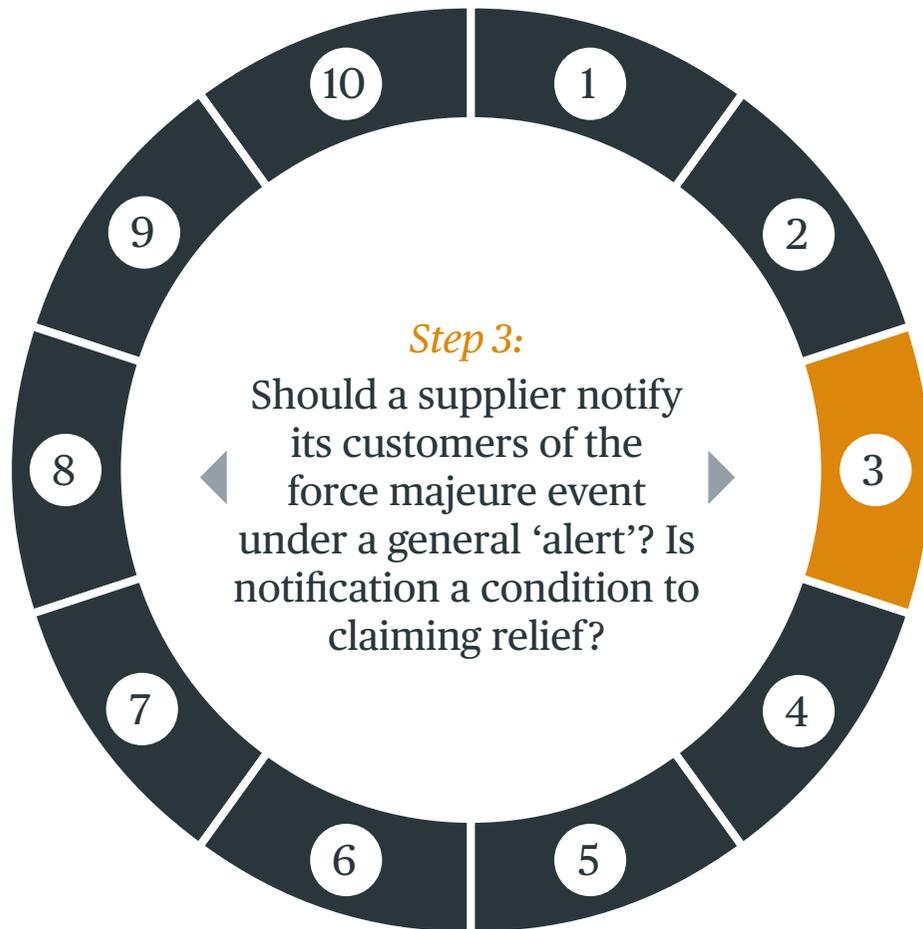
If the contract follows option 2 then, on the face of it COVID-19 is an event beyond the affected party’s reasonable control. In either instance note:

- Even if COVID-19 is on the face of it a force majeure event under the contract, it does not automatically follow that the impact on business is beyond reasonable control and the affected party will still need to comply with the remaining steps below in order to claim relief; and
- Is the affected party claiming COVID-19 as the force majeure event, or another event that may have arisen as a result of COVID-19 (for example factory closure, lack of workforce)? This could be important for when notice obligations are triggered (see step 3 below) and how long the force majeure event is set to continue (COVID-19 may continue for months whereas shortage of supplies may be shorter term).

We note that typically MoD contracts define Force Majeure narrowly. They tend to include a short exhaustive list which does not include epidemic, pandemic or any of the examples listed at option 1 above. MoD usually state it is against their policy to dilute the clear focus on the contractor’s obligations to deliver or perform a contract, particularly as supply of the assets/services is often critical to national security. They flag that if an event occurred that was unforeseen and outside its control a contractor may be able to put in a claim for an extension of time (not money) through the relief event mechanism in the contract (see Step 8 below). For COVID-19 the UK Government do recognise the cashflow impacts for suppliers and have issued a Public Policy Notice (see above).



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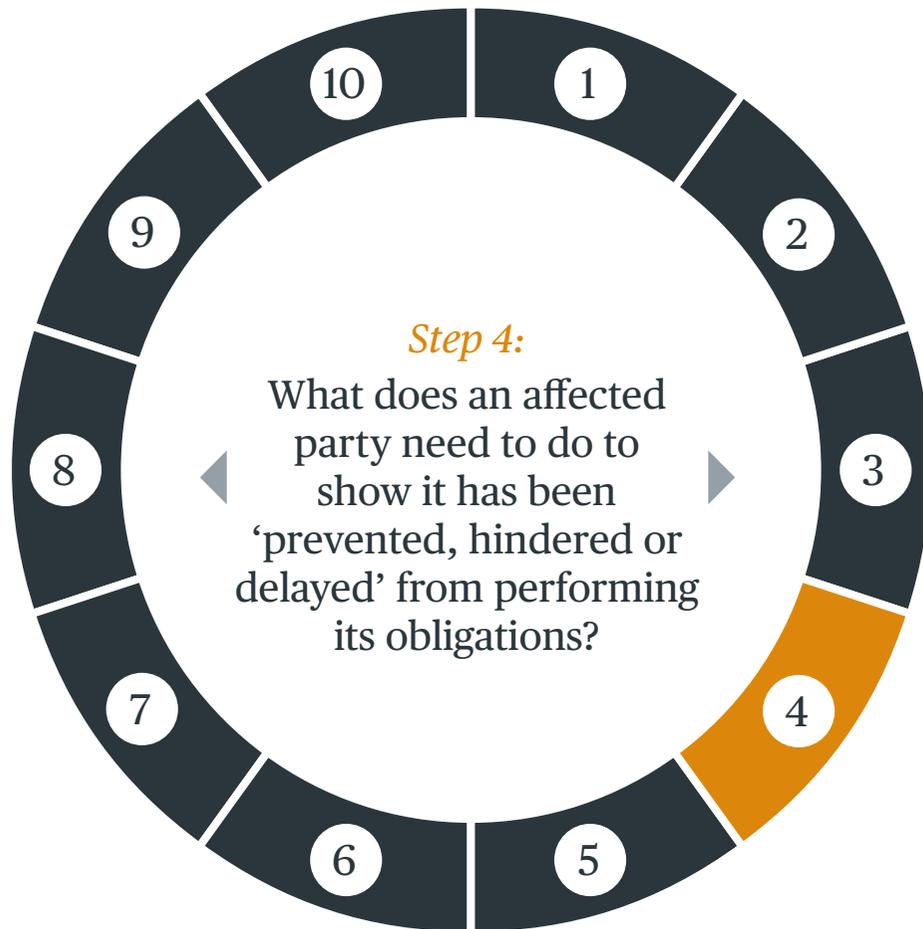
The affected party may feel there are benefits, from a relationship perspective, of flagging up the force majeure event and the delay it has caused. It may wish to serve a general alert or early warning notice to its customers that COVID-19 is causing it delay/disruption and that it is doing whatever it can to mitigate this. Parties affected by COVID-19 sending these notices should be wary that:

- A general 'alert' may not satisfy the force majeure notification requirements in the contract as more factual detail is likely to be required; and
- A general alert may 'set the clock ticking' that the affected party considers the event to be a force majeure event, meaning formal notice should be served under the contract within the specified time period.

The contract is likely to require that the affected party serves notice of the force majeure event within a specified period (sometimes "immediately"). This may be drafted as a contractual obligation to serve notice, or as a condition to claiming relief. Look out for words/phrases such as "provided that" or "conditional upon" - these may indicate that if the affected party fails to serve notice within the required time period it loses its right to claim relief. The affected party must follow the requirements of the notice provision meticulously, including who the notice should be addressed to, how it should be sent and information it needs to contain.



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Once a force majeure event has been established, the steps an affected party has to follow to claim relief will depend on what the contract says. Generally we find the affected party has to show:

1. the occurrence of one of the events referred to in the clause (see step 2); and
2. it has been prevented, hindered or delayed from performing the contract by reason of that event.

Prevent - Preventing performance means that it must have become physically or legally impossible, not merely difficult. For example, a supplier would have to show that the government in the applicable jurisdiction has mandated its factory ceases operation (through legislation or binding guidance). So far, governments are not generally mandating that manufacturing should stop. The affected party must also show that it was "ready, willing and able" to perform its obligations under the contract and it was the FM event which impacted performance.

Delay - Delay has a wider scope and may be easier for an affected party to establish. The supplier will still need to establish that as a result of the force majeure event, performance of its obligations is taking longer (or finishing later) than planned. The clause may require the delay to be the direct result and the affected party will still need to comply with the remaining steps below in order to claim relief.

Hinder - similarly to delay, this has a wider scope and may be easier for an affected party to establish. Hindrance may not be merely financial, case law makes clear "the fact a contract has become expensive to perform, even dramatically more expensive, is not a ground to relieve a party on the grounds of force majeure"³, unless the contract specifically addresses this. The clause may require the hindrance to be the direct result and the affected party will still need to comply with the remaining steps below in order to claim relief.

³ Thames Valley v Total Gas, High Court, 2005



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The affected party must show it has taken “all reasonable steps” to avoid the operation of the force majeure clause or to mitigate its consequences⁴. This is an implied duty which applies, in all apart from exceptional situations, even if the contract contains no express clause requiring the affected party to mitigate the impact of the force majeure event.

It will be a question of fact as to whether an affected party has taken steps to mitigate the impact, but relevant factors could be:

- Assuming the stop in production has not been mandated by law in the applicable jurisdiction, what could the affected party have done to keep producing during COVID-19 (e.g. protective measures, redeploying staff, recruiting additional staff)?
- Could the affected party have conceivably switched suppliers - e.g. used an alternative shipping company that was still running?

The fact that the above measures may be more expensive does not matter. “A mere difficulty or additional expense is not a sufficient ground” for the force majeure provisions to be invoked⁵, and the English courts are particularly alive to attempts to use force majeure provisions to avoid performance for economic reasons. Therefore, just because a contract has become more expensive as a result of COVID-19, or even uneconomic, to perform, that will not always constitute a force majeure event.

⁴ Channel Island Ferries v Sealink 1988 1 Lloyd's Rep 323.

⁵ B&S Contracts v Victor Green 1984 ICR 419, (427(D)).



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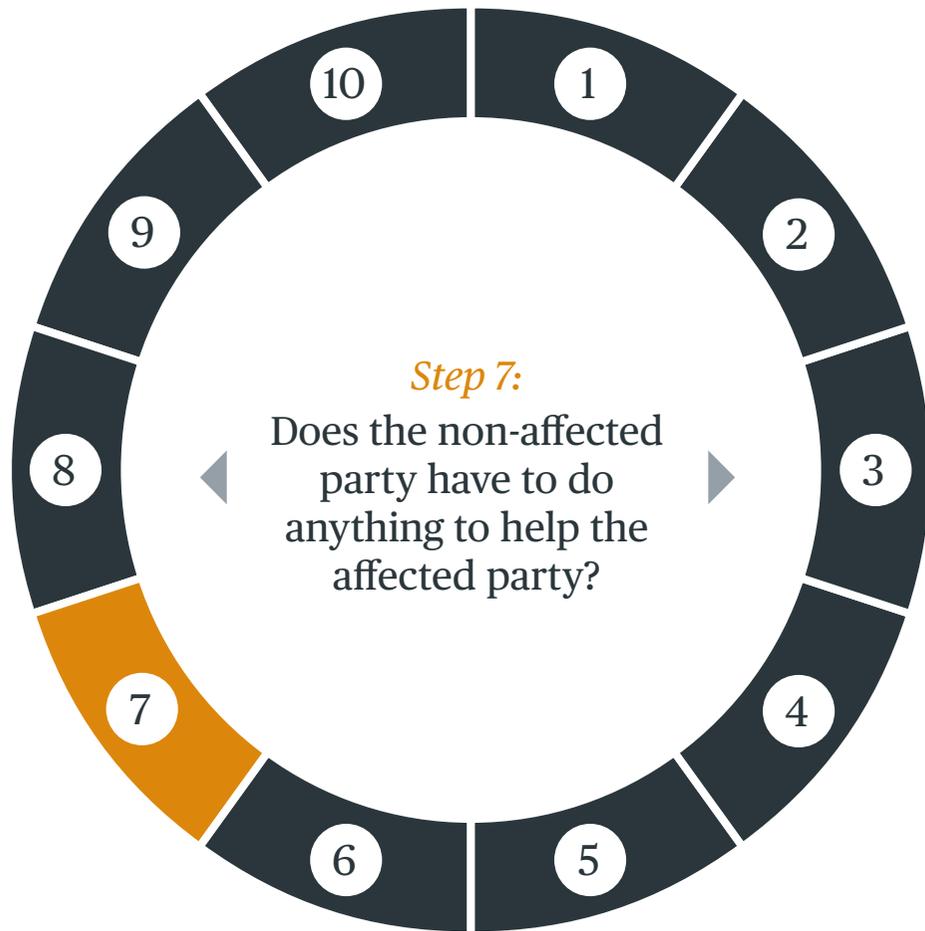
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An entitlement to force majeure relief generally means (1) that the affected party is excused from contractual liability, including damages, in relation to its non-performance (or delay); and (2) either party may terminate the contract where the force majeure event continues for a defined period (usually 3 months plus). Relief could include:

1. relief from liability for liquidated damages with an extension of time to delivery dates;
2. relief from breach of contract claims for non-performance; and
3. relief from termination for default.



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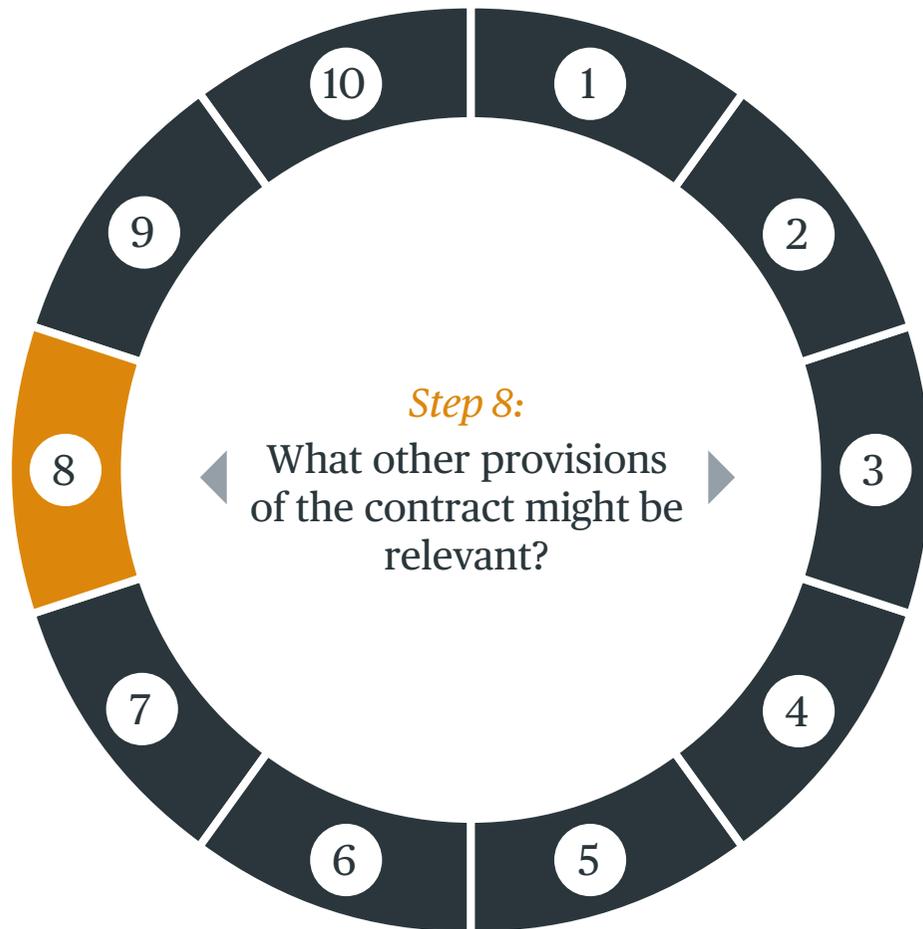
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This will depend on the contract. The non-affected party may have a contractual obligation to help the affected party to mitigate the impact of the force majeure event.



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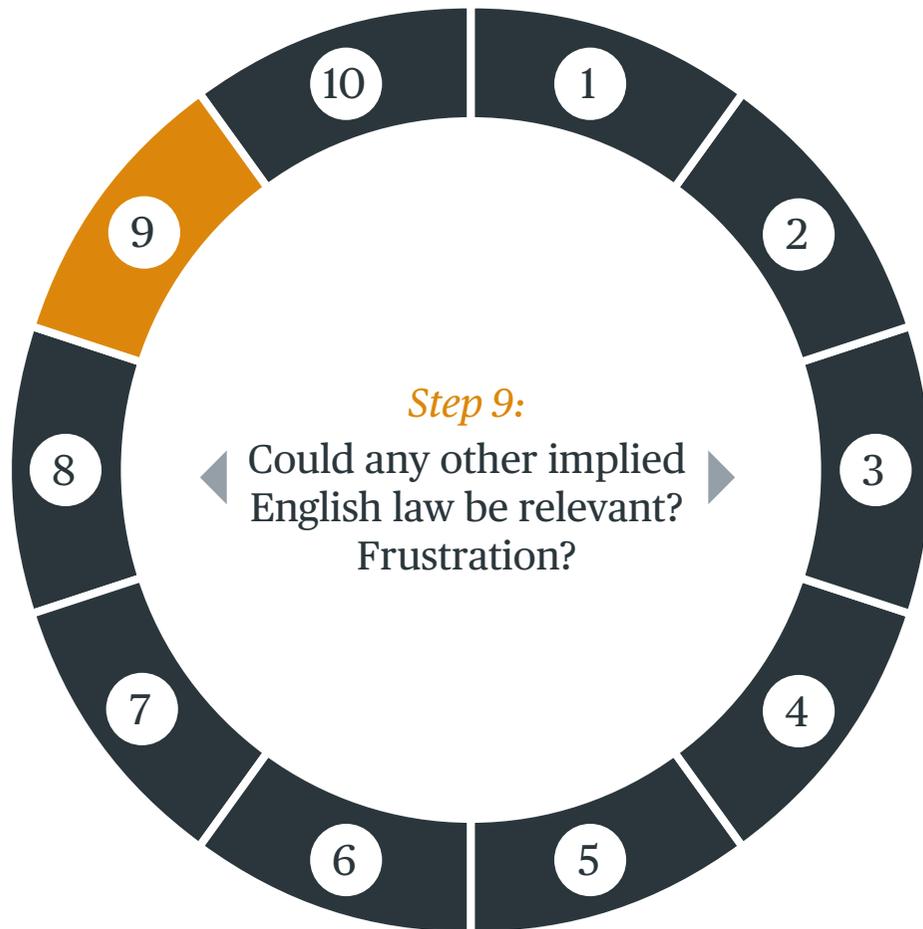
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We suggest taking a holistic view of the entire contract. The following clauses may be particularly relevant -

- **Payment** - any rights for the customer to withhold payments if obligations are not performed (even if due to force majeure)? See below regarding take or pay/availability contracts.
- **Suspension/hardship** - any rights for the affected party to suspend its performance (for example due to economic change or under an express 'hardship' clause)?
- **Termination** - any compensation payable for termination for force majeure?
- **Change in Law** - many countries are introducing new laws to deal with COVID-19 which could make performance of obligations more expensive. How is this risk dealt with? How is "applicable law" defined in the change in law clause and does this cover guidance and legislation? For example, if factory is in Italy and Italian law impacts costs of performance, does this still trigger a change in law price adjustment if the contract is governed by English law?
- **Relief events** - check whether these entitle you to any relief (usually an extension of time not monetary compensation). Relief event definition may include events such as blockades/embargoes. The common definition of "blockade" is to seal off a place to prevent goods or people from entering or leaving. This could become more and more relevant as the response to the Covid-19 outbreak continues.
- **Compensation events** - check whether these entitle you to any relief (usually an extension of time and monetary compensation). Compensation event definition may include breach by the customer, which could include a failure to supply access to a site or dependencies.
- **Availability/take or pay service credits** - do service credits still apply even if the reason the supplier has not supplied is force majeure?
- **Material adverse effect** - are there any clauses entitling a party to terminate the contract if there is an event that has material adverse consequences or means that the contract would be loss making?
- **Health & safety** - can the supplier still comply with health & safety regulations and guidance that it may be contractually bound to comply with?
- **Key personnel** - are specified people earmarked for particular obligations?
- **Notice clause** - ensure compliance in order to ensure that notices are valid and can be relied upon.
- **Variations** - any amendments agreed due to COVID-19 will need to be made in accordance with any variations clause (which may require variations to be in writing).
- **No waiver** - a no waiver clause does not necessarily protect a party from post-breach inaction. A non-breaching party should still reserve its rights and remedies and notify the party in breach by formal contractual notice.
- Dispute resolution which may include an escalation clause which includes parties' agreement to resolve any dispute on a staged basis.



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English law recognises the common law doctrine of frustration. However, if a contract includes a force majeure clause, the common law rules on frustration are ordinarily displaced in relation to that same event⁶⁷ so that frustration cannot be relied on as an alternative.

This means that if a party has a legitimate claim for force majeure, but fails for example to invoke a contractual procedure under the relevant clause, it is very likely that it could not argue frustration in relation to the same event, because the frustration remedy has been inadvertently lost by not complying with the specific provisions of the contract.

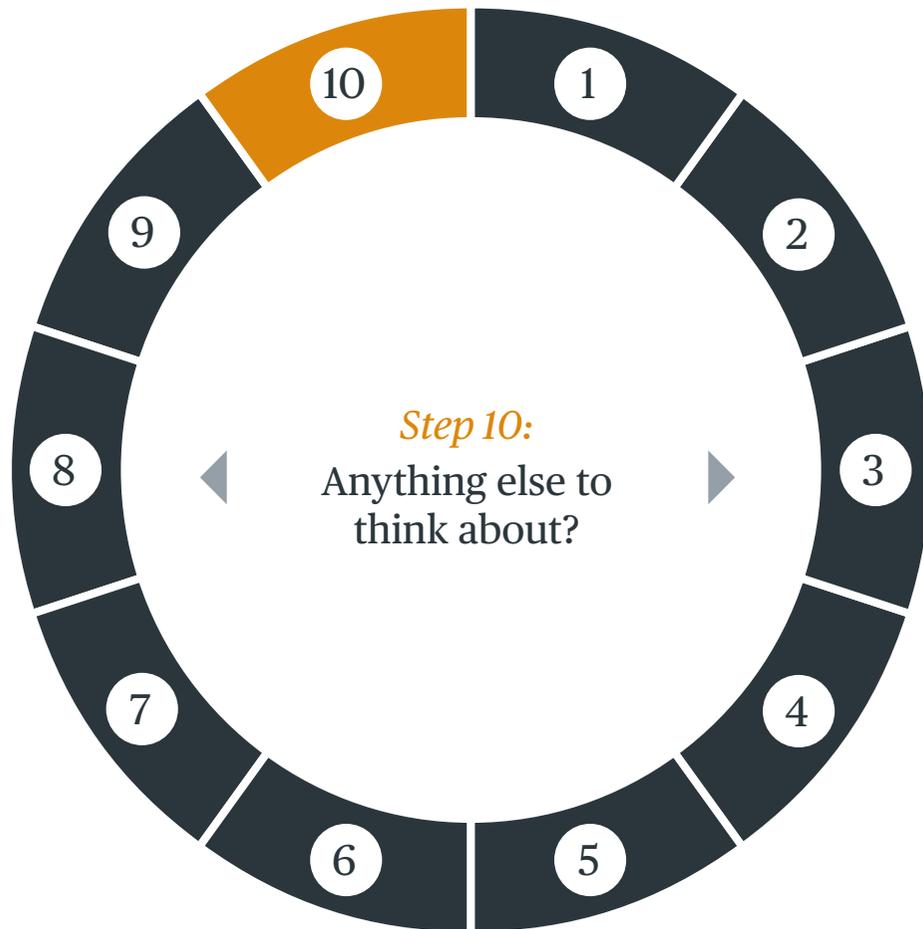
If there is no force majeure clause, frustration may enable a party to avoid its contractual duties. However it will need to show:

1. the event was unexpected and beyond the control of the parties; and
2. the event renders it physically or legally impossible to fulfil the contract, or transforms the obligation to perform into a radically different obligation from that undertaken when the contract was agreed.

⁶⁷ Jackson v United Maritime Insurance [1874] LR10 CP 125



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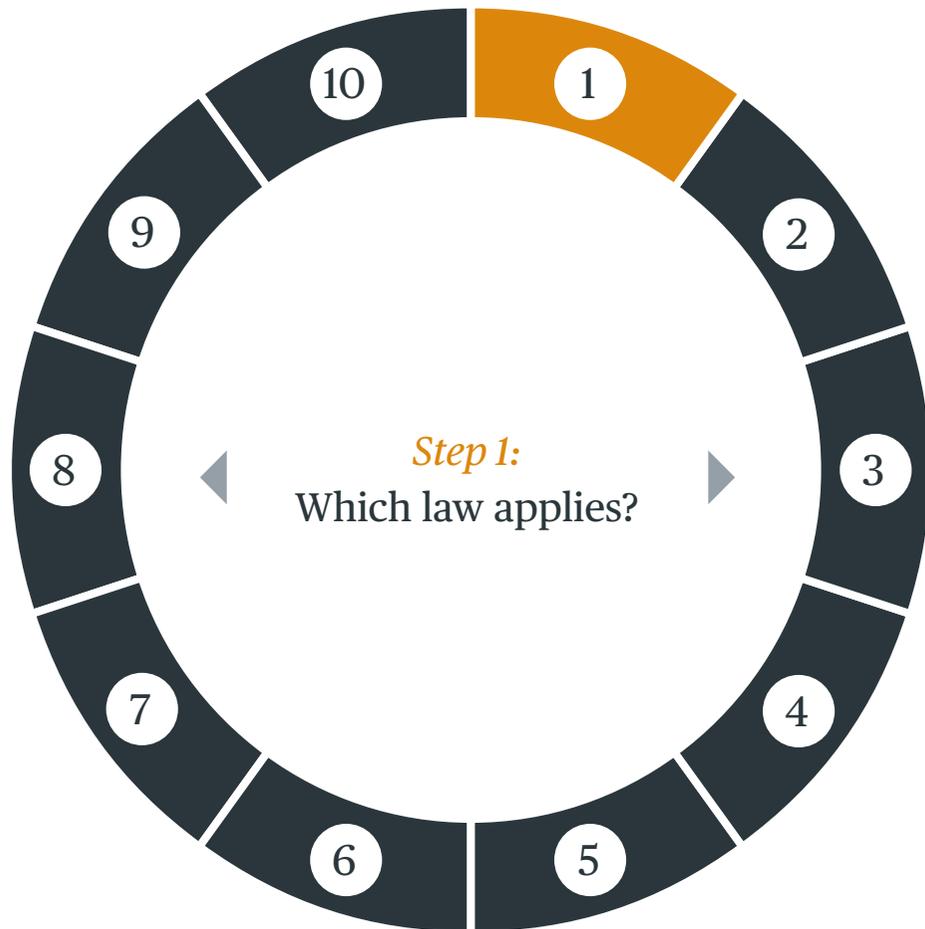
1. Follow the contractual process for notification meticulously.
2. Take a holistic view of the contract analysis - consider what clauses may help/hinder and don't forget to look at the boilerplate.
3. Retain documented evidence of steps you are taking, the reasons surrounding those steps and steps taken to mitigate (and also steps counterparties may be taking if they are the ones invoking force majeure). This could include credible records - including trustworthy public domain information where available - which set out the factual context for the decision in question. It is important to document the alternative options available at the time of performance (or lack of them!).
4. Consider whether you wish to adopt a collaborative/non-adversarial approach to resolve the issue. Early engagement with contract counterparties and a collaborative resolution of issues may be preferable to an adversarial approach.
5. Re-source supply wholly or partially - risks can be reduced or removed if you have a viable alternative which can be implemented quickly. Consideration should be given to the lead times for re-supply and how these fit with existing inventory. Be careful as re-sourcing may be in breach of existing supply contracts.
6. Recover assets - you may have supplied tools or certain assets may be used under licence. Equally, there may be stock or other materials on site which belong to you. The terms of any applicable contract will strongly influence your ability to recover these items.
7. Ensure you make all required third party notifications in timely fashion (including insurance, industry regulators, etc.).

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Defence and sensitive security equipment procurement transactions are subject to French public procurement rules which are governed by the Public Procurement Code (the “PPC”).

Other laws, regulations and policies are applicable to defence contracts, most notably:

1. the Standard administrative clauses (“CAC”) which are specific to the French Defence Procurement Agency (DGA). This document (CAC Armement) is part of the procurement contract and is common to all defence assets and services procurement.
2. the technical note of the Legal Affairs Department (DAJ) of the Ministry of Finance dated 1st August 2019.

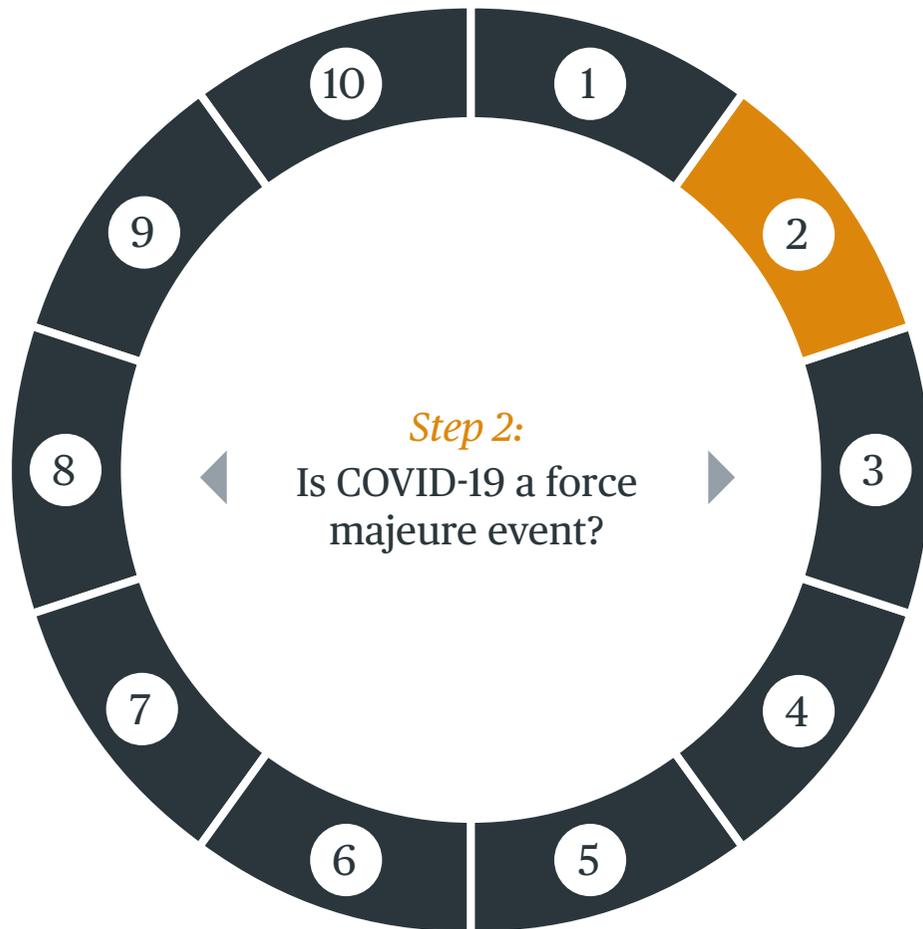
However, due to the strategic nature of defence procurement, many tenders are subject to classification measures in accordance with the regulations governing the protection of secrecy (arising in particular from the Criminal Code and the Defence Code). Such contracts are, as a result, excluded from the public procurement rules.

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In administrative matters, force majeure has been qualified as an event outside the will of the parties, unpredictable at the time of the conclusion of the contract and irresistible in view of the means available to the debtor for the performance of his obligation. A case of force majeure is an exonerating cause of liability.

About epidemics, the study of judicial case law shows an almost regular rejection of the notion of force majeure to qualify these events. This is notably the case for:

- the plague bacillus,
- the dengue virus,
- the H1N1 flu,
- the Ebola virus,
- the Chikungunya virus.

Very recently, the judicial judge has recognized the characterisation of force majeure for events arising from the COVID-19 virus in several decisions. In particular, the Colmar Court of Appeal considered that it should be noted that “in view of the pandemic, COVID-19 in progress and the containment measures taken by the public authority, characterised by a significant degree of contagion and sufficiently serious risks, the circumstances referred to above characterise a case of force majeure” (*Colmar Court of Appeal, 23 March 2020, No. 20/01206*).

However, the administrative judge has never yet had to rule on the application of force majeure in the event of an epidemic. He has only admitted the application of this theory in the event of natural events of exceptional gravity (bad weather, tidal wave) as well as in the event of a strike that the co-contractor could not prevent from occurring.

The classification of the COVID-19 pandemic as force majeure is not automatic and will be assessed by the judge according to the circumstances of the case. Nevertheless, the unprecedented scale of the COVID-19 virus, qualified as a pandemic by the OMS (*Organisation Mondiale de la Santé*), as well as the government restriction measures defined by the decree of 14th March 2020 (confinement of the population, bans on gatherings, travel bans issued by companies), could constitute arguments for maintaining that this pandemic constitutes an event of force majeure.

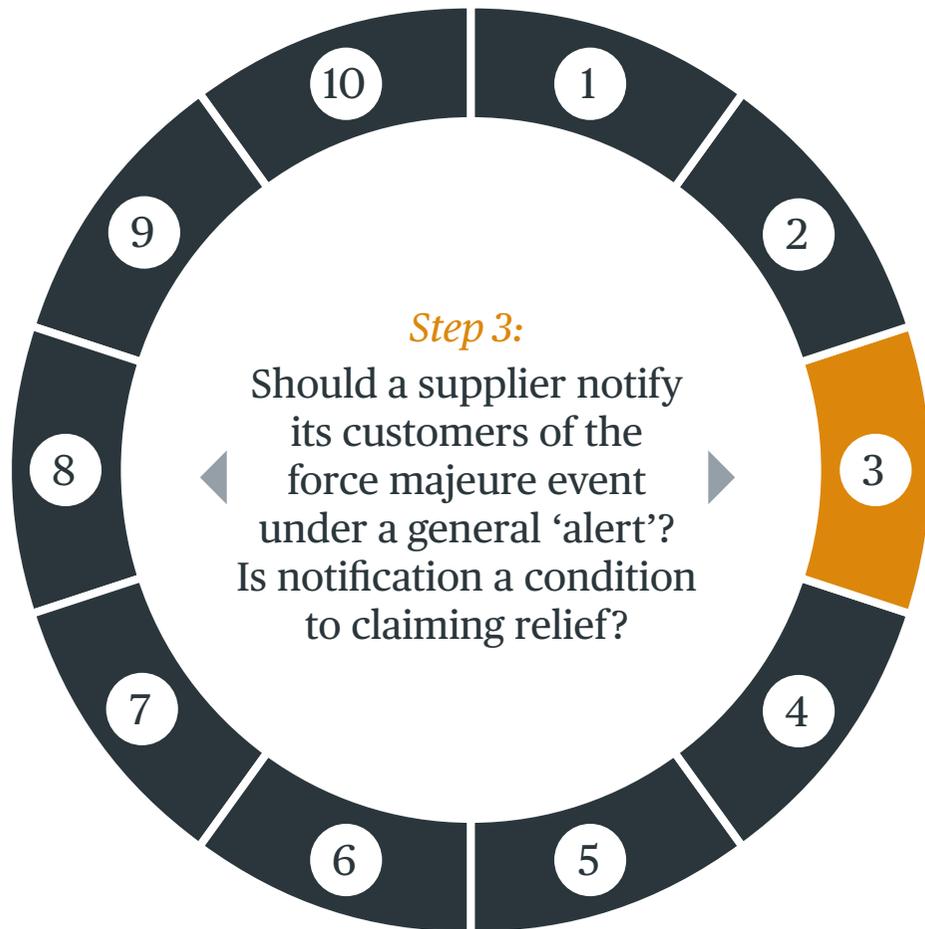
In any event, and in the case that this force majeure is recognised by the public purchaser, the latter may neither take sanctions for non-performance by the other party to the contract, nor apply penalties for delay.

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Under French law, force majeure is recognised as a ground for exemption from liability for non-performance of the public contracts. In most cases, it is the defaulting contracting party that will invoke force majeure to justify the non-performance of his obligations.

The French administrative courts expressly refer to the Civil Code (i.e. Article 1218) to admit force majeure, even in the absence of force majeure clauses in the contracts.

In any event, even if the contract does not contain any provision regarding force majeure, all standard administrative clauses applicable to public procurement contracts usually provide for the possibility for the contractor to be compensated for the damage suffered, on condition, however, that he immediately notifies the public entity in writing of the occurrence of this event.

In particular, Article 40.8 of the CAC Armement states that “when the defence operator justifies that he is unable to perform his contract due to force majeure, he may request its termination”. The Defence contractor shall therefore notify this event as soon as possible to the public contracting party by characterising precisely the practical impact of the Covid-19 event on contract performance, and prior to the suspension of its obligations.

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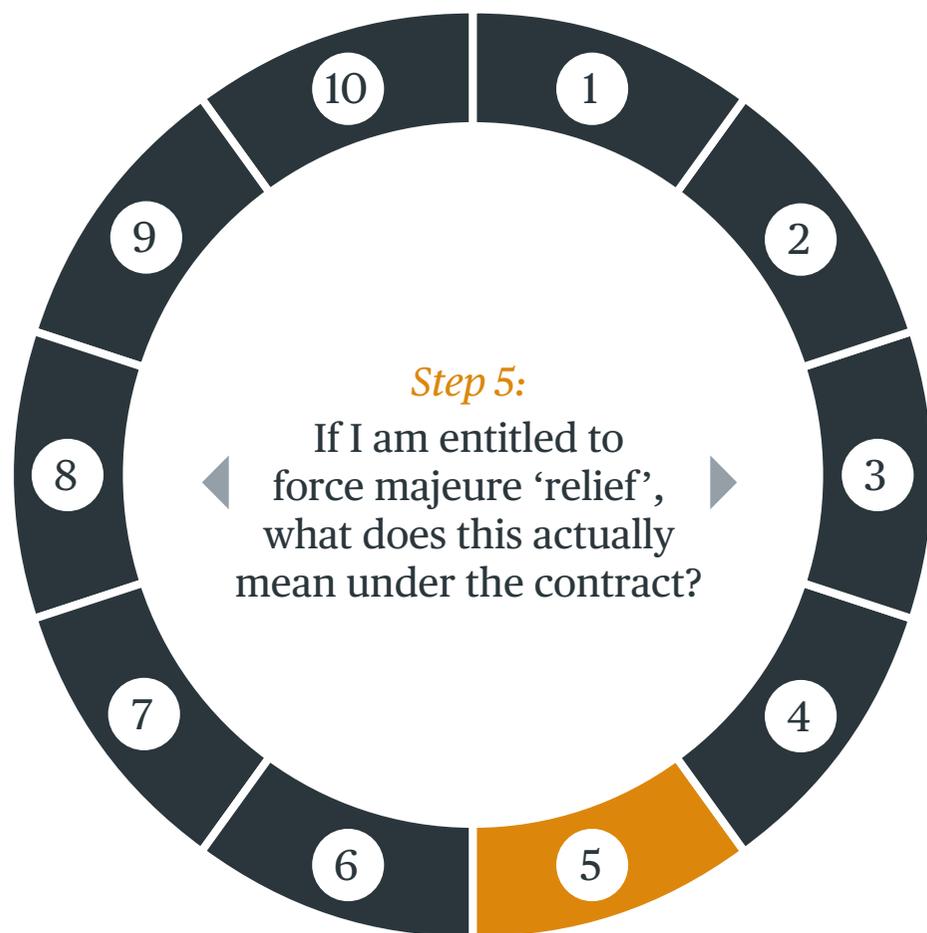
Once a force majeure event has been established, the steps an affected party has to follow to claim relief will depend on the provisions of the contract.

Under the general principle of good faith and fair dealing in contractual relations under French administrative law, the affected party must show it has taken all reasonable steps to avoid the implementation of the force majeure clause and/or to mitigate its consequences.

Taking into account the need to protect public funds, standard administrative clauses applicable to public procurement contracts provide that in the event of force majeure, the contractor shall be compensated for the damage suffered, subject to the fact that he has taken all the necessary measures to mitigate the impact of this event (see for example article 18.2 of the General Administrative clauses for private works, "CCAG Travaux").

This duty applies, in all apart from exceptional situations, even if the contract contains no express clause requiring the affected party to mitigate the impact of the force majeure event.

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Is it possible to extend the term of a public contract?

YES, but several conditions must be met. The contract must expire during the period of the health emergency period covered by the Ordinance. Then, this extension must be made by way of an amendment when a new call for tenders cannot be made before the end of the relevant contract.

Finally, the extension may not exceed the period of the health emergency period plus two months, to which must be added the time required to conclude a new public contract (Art. 4 of the Ordinance). The total duration of the contracts, as a result of this extension, may be longer than the maximum durations provided for certain contracts by the Public Procurement Code.

Does an economic operator have the possibility to request an extension of the time for performance of the public contract?

YES, a private operator who is unable to meet the execution deadlines provided for in the contract or who is forced to mobilise means that would excessively increase its costs, may request an extension of the deadline by a period equivalent to the period of health emergency defined by the Ordinance. This request must, however, be made before the end of the contract by means of an amendment (Article 6 1° of the Ordinance).

In practice, containment measures decided by the French Government will compel some public purchasers to extend the duration of their contracts. Such time extension shall be anticipated and formalized by means of amendments.

Can a private operator be sanctioned for being unable to perform the contract?

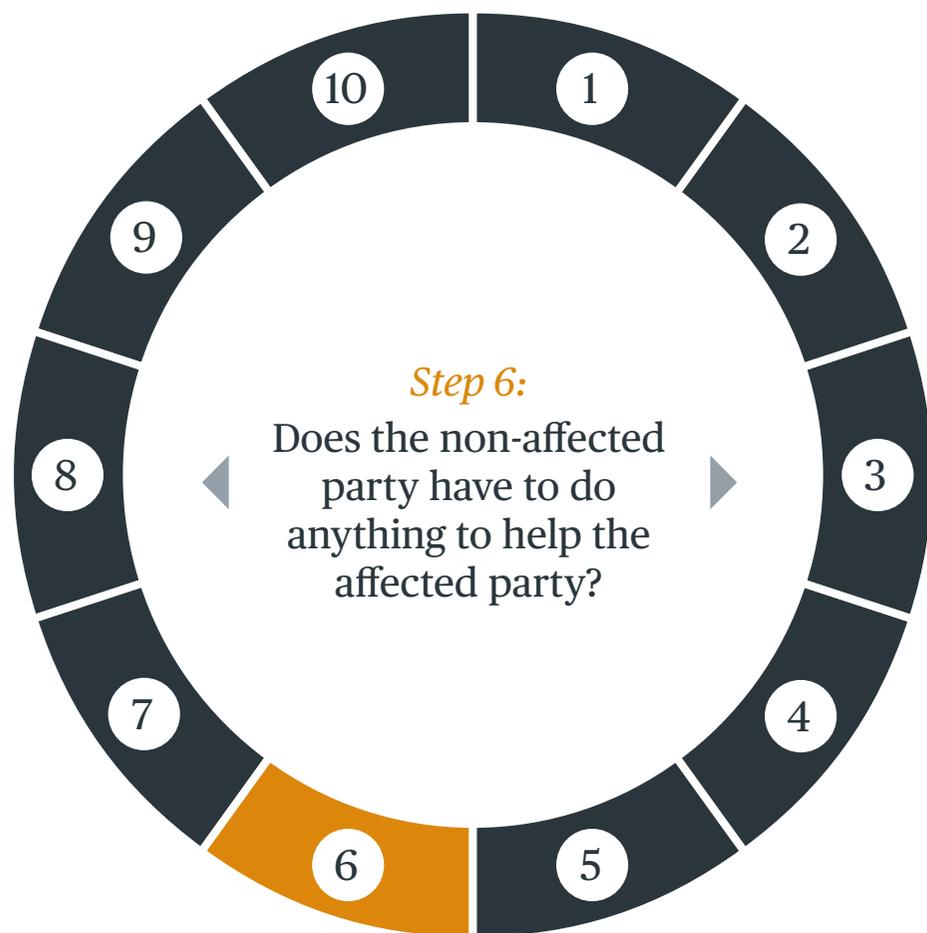
NO, in the event of impossibility of execution of all or part of the contract, a public purchaser cannot take any sanctions against his co-contractor (penalties or claim for compensation).

A defence actor participating in a public tender procedure may face various difficulties in the execution of contracts due to containment and the impossibility of carrying out certain activities deemed non-essential.

For many defence contracts, public purchasers may be faced with situations in which the co-contractor will be unable to perform all or part of the contract. In such cases, a modification of the initial contract without a new procurement procedure may be justified. The public purchaser may award a substitute contract for the performance of the services without waiting for the end of the health emergency and without its former co-contractor being able to incur liability (Art. 6 2° of the Ordinance).

In practice, the private operator must demonstrate that it was genuinely impossible for him to perform his contract (e.g. no teleworking possible). As for the public purchaser, he cannot take any sanctions against his co-contractor (no penalty, no performance at the expense and risk or claim for compensation under contractual liability).

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Does the Covid-19 pandemic have consequences on the payment terms of public purchasers?

NO, the Ordinance specifies that for lump-sum contracts suspended due to a health emergency, the private operator has the right to receive, without delay, the amount provided for in the contract within the legal time limits for payment (Article 6 4° of the Ordinance).

In the event of late payment, the private operator may also claim default interest.

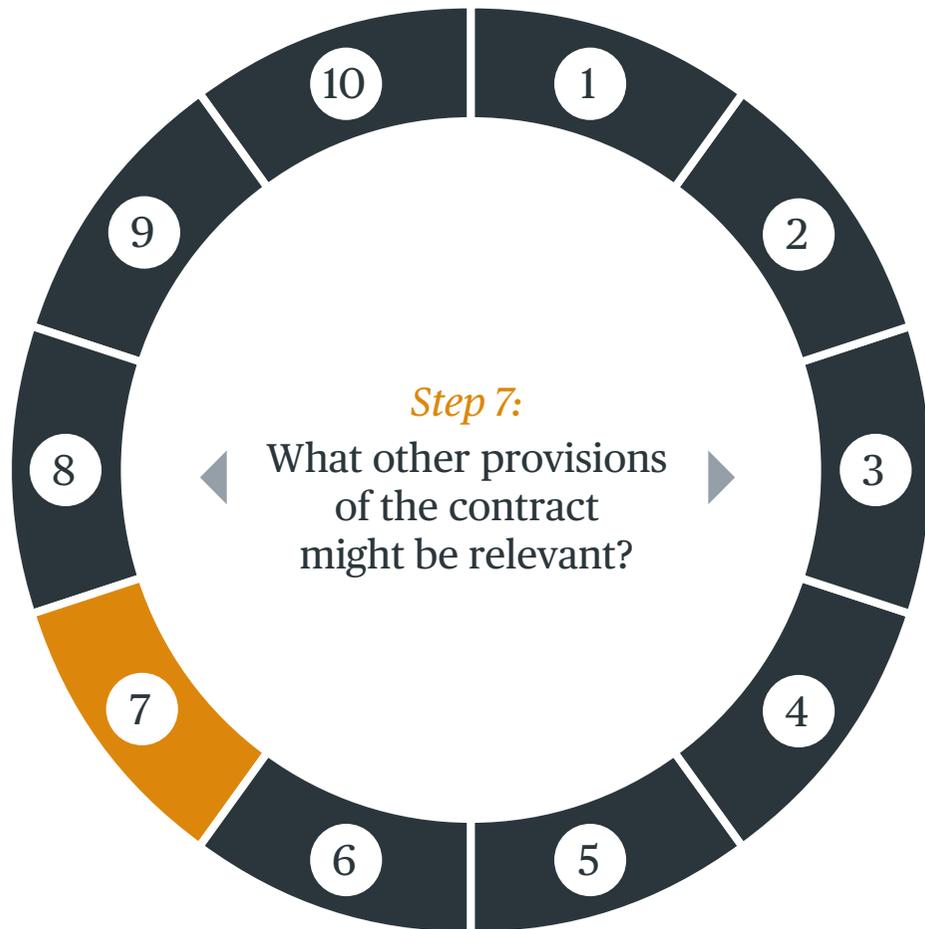
May a private operator request financial help measures from the public purchaser?

YES, Article 5 of the Ordinance allows a public purchaser to grant by way of an amendment an advance payment that may exceed 60% of the contract amount or the purchase order concerned without being obliged to provide a guarantee on first demand for advance payments exceeding 30% of the contract amount.

If the public purchaser cancels an order or terminates a contract during the period of health emergency, the private operator has the right to be compensated for expenses incurred that are directly related to the cancelled order or terminated contract (Article 6 3° of the Ordinance).



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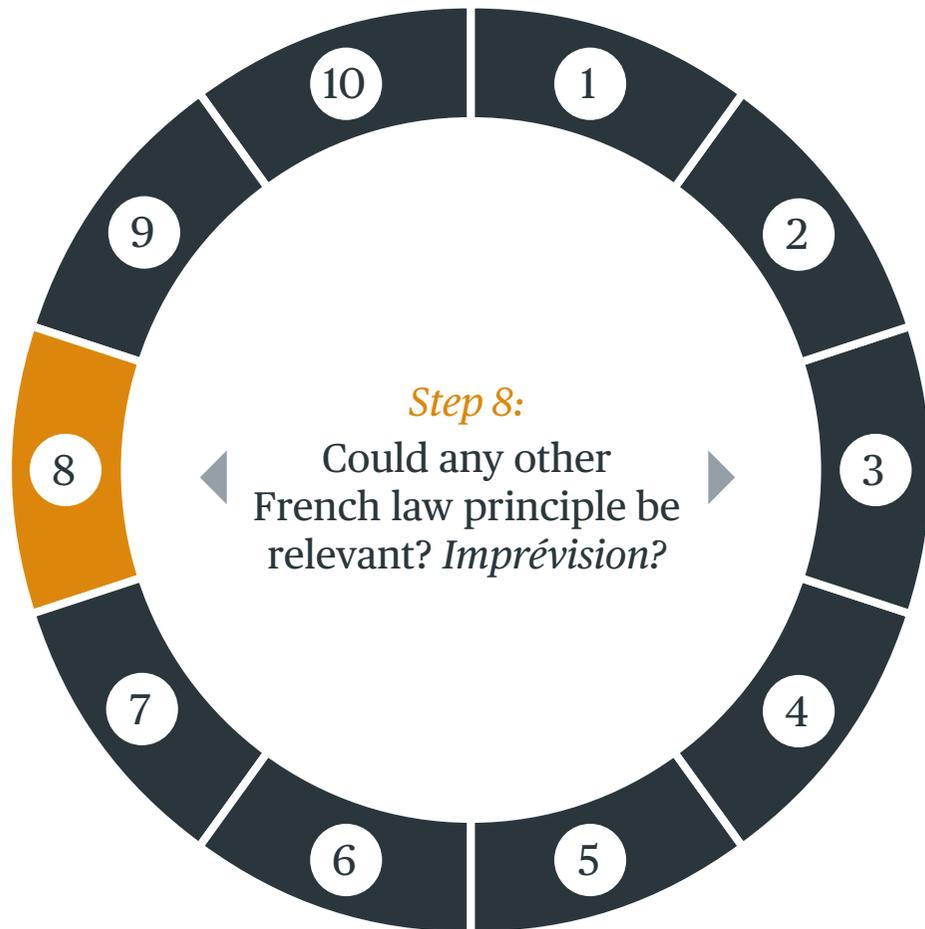
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- **Notice clause** - ensure compliance in order to ensure that notices are valid and can be relied upon.
- **Variations** - any amendments agreed due to COVID-19 will need to be made in accordance with any variations clause (which may require variations to be in writing).
- **No waiver** - a no waiver clause does not necessarily protect a party from post-breach inaction. A non-breaching party should still reserve its rights and remedies and notify the party in breach by formal contractual notice.
- Dispute resolution which may include an escalation clause which includes parties' agreement to resolve any dispute on a staged basis.

French law 10 steps



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The “*unpredictability or contingency theory*” (*théorie de l'imprévision*) provides an essential guarantee for the contractor against the risk of economic disruption of the contract.

It provides that if certain conditions are met (i.e. in the case of an unpredictable event, independent from the will of the parties and that leads to the economic disruption of the public contract), the operator is obliged to continue to perform the contract.

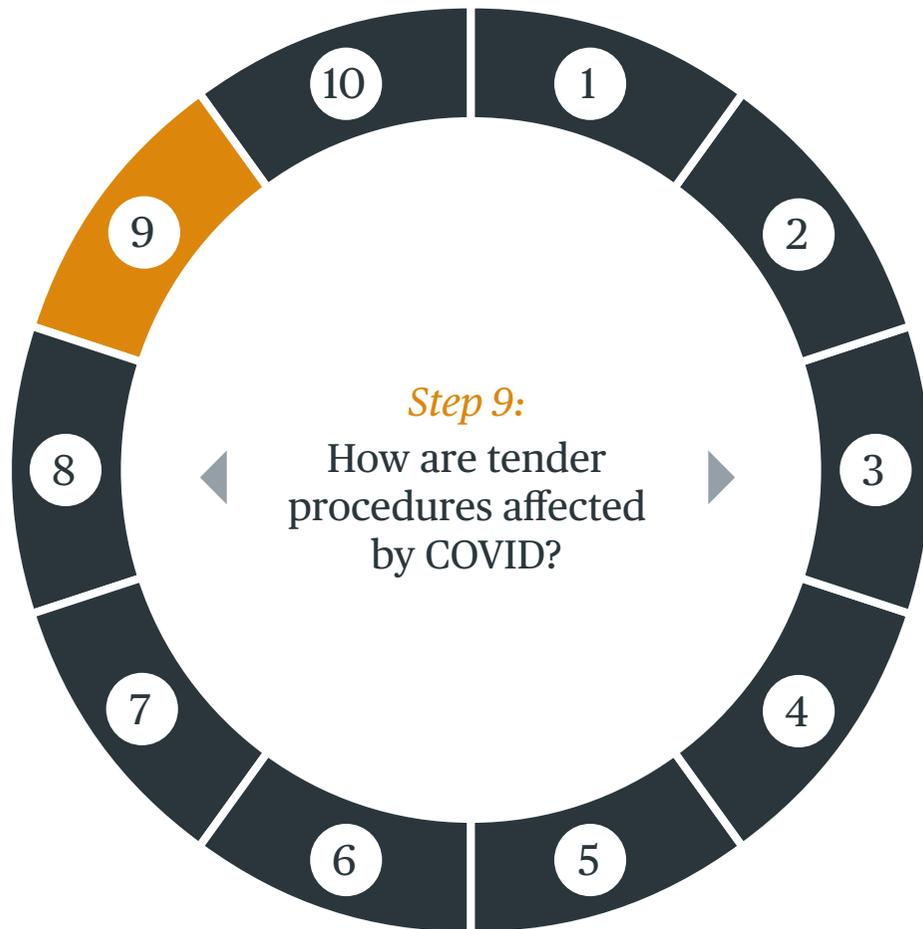
However, the Government is required to pay an indemnity to the operator for any increased performance cost.

This indemnity is calculated taking into account, where applicable, the other factors that contributed to the disruption of the economy of the contract.

Although this has been enshrined in the PPC, case law on the subject remains rare. However, in general, French administrative jurisprudence has set this percentage at 90% of the losses caused by the unforeseen event.



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In the COVID-19 epidemic context, defence transactions shall be subject to flexible rules.

The DGA has several possibilities:

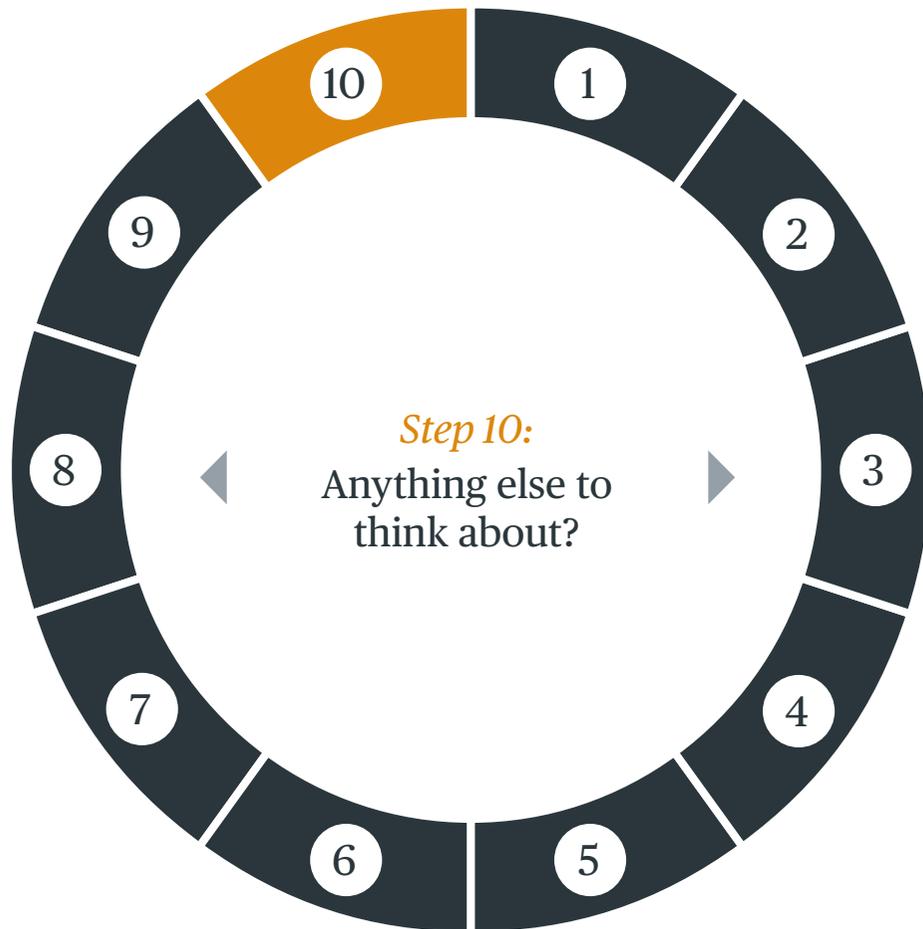
- It may decide to sign a public procurement contract without launching any tender procedure (Article 2515-1 of the PPC).
- It may also decide to apply the negotiated procedure without prior publication or competition (*procédure négociée sans publicité ni mise en concurrence* (Articles R. 2322-1 to R. 2322-14 of the PPC).
- It may finally opt for an adapted procedure (*procédure adaptée*) which enables the DGA to award its contracts according to a transparent competitive tendering procedure freely determined according to the subject matter and special features of the contract.

More specifically, the DGA may order health care equipment or call on service providers because of “*an imperative urgency resulting from external circumstances*” which could not have been foreseen and prevent it to comply with the normal tender procedure timeframe (Article R. 2122-1 of the PPC).

The Ordinance n°2020-319 of 25 March 2020 (hereinafter the Ordinance) reinforces the use of these procedures to meet the needs of the contracting authorities while specifying that these orders shall be limited in time and amount strictly necessary to meet urgent needs, particularly health ones. Indeed, force majeure is not presumed by this new text and must therefore be assessed on a case-by-case basis by the contracting authorities in accordance with the principles set out in point 4 below.



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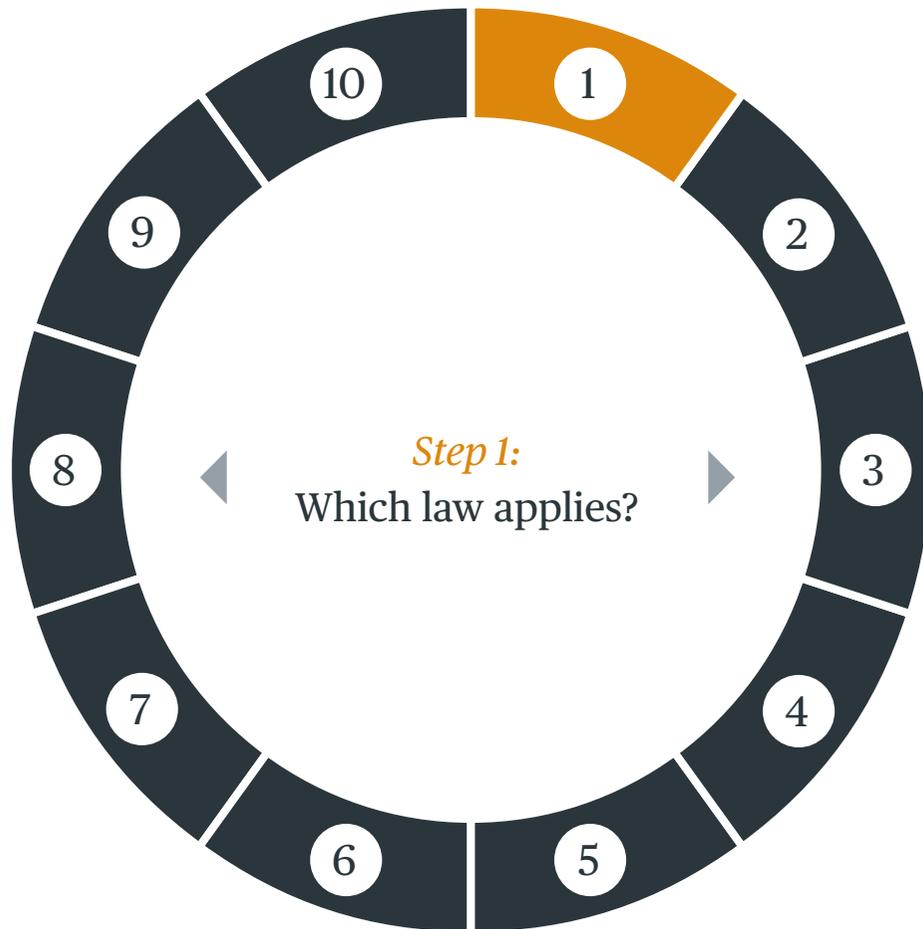
1. Follow the contractual process for notification meticulously.
2. Take a holistic view of the contract analysis - consider what clauses may help/hinder and don't forget to look at the boilerplate.
3. Retain documented evidence of steps you are taking, the reasons surrounding those steps and steps taken to mitigate (and also steps counterparties may be taking if they are the ones invoking force majeure). This could include credible records - including trustworthy public domain information where available - which set out the factual context for the decision in question. It is important to document the alternative options available at the time of performance (or lack of them!).
4. Consider whether you wish to adopt a collaborative/non-adversarial approach to resolve the issue. Early engagement with contract counterparties and a collaborative resolution of issues may be preferable to an adversarial approach.
5. Re-source supply wholly or partially - risks can be reduced or removed if you have a viable alternative which can be implemented quickly. Consideration should be given to the lead times for re-supply and how these fit with existing inventory. Be careful as re-sourcing may be in breach of existing supply contracts.
6. Recover assets - you may have supplied tools or certain assets may be used under licence. Equally, there may be stock or other materials on site which belong to you. The terms of any applicable contract will strongly influence your ability to recover these items.
7. Ensure you make all required third party notifications in timely fashion (including insurance, industry regulators, etc.).

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In assessing whether or not a party is entitled to relief from its obligations, it is important to check both:

1. the governing law of the applicable contract and
2. the laws in the jurisdiction where the obligations are being performed (particularly with regards to any mandatory restrictions in place regarding imports/exports, production and travel bans).

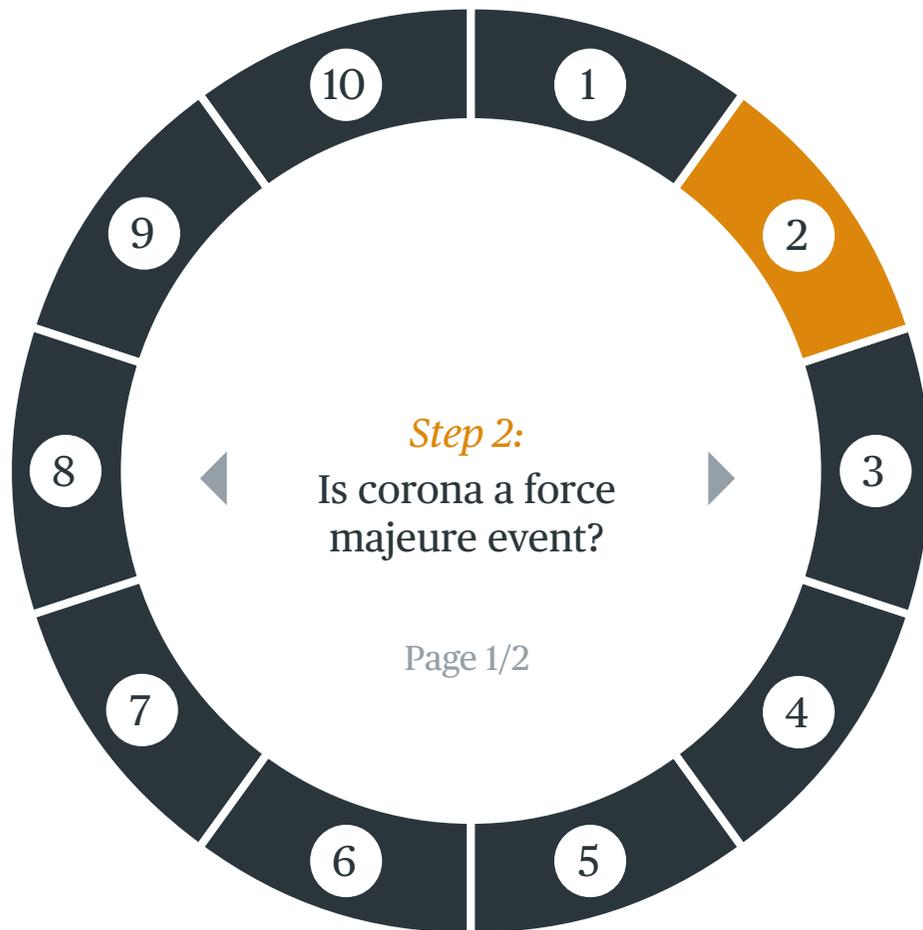
For example, the contract may be governed by German law, meaning the wording of the contract will be interpreted under German law interpretation principles. If the contracting parties have agreed on “German law” for an international contract, then the UN Convention on Contracts for the International Sale of Goods (CISG) and additionally German law shall apply - unless the applicability of UN sales law has been expressly excluded. However, the obligations under the contract may be being physically performed elsewhere, such as Italy (e.g., at a factory or testing site), meaning Italian law governing whether or not production must be suspended will be relevant to test the impact of the force majeure event (see Steps 4 & 5 below).

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The Federal Court of Justice (BGH) describes force majeure as an external act that has no access to the business and cannot be averted even by exercising the most diligent care which can reasonably be expected; BGH, decision of 16.05.2017 - ZR 142/15.

Force majeure in the contract

It should first be checked whether the specific contract contains provisions on force majeure that must be interpreted in accordance with the applicable law.

If the contractual content provides for a case of force majeure in the event of epidemics, pandemics, diseases or quarantine, there is a good chance that the party to the contract who does not deliver or only delivers with a delay as a result of the coronavirus can invoke force majeure. The same applies if a force majeure clause covers official orders and warnings. In addition, a company based in China can present a force majeure certificate, which will be provided by the China Council for the Promotion of International Trade (CCPIT) upon request. This paper constitutes evidence for the existence of the event, i.e. the background of the omitted or delayed delivery, but not for the fact that a case of force majeure exists.

However, if pandemic is not expressly listed, other events that may be applied to corona include:

- shortage of supplies or raw materials - where the downstream impact of corona is limited availability of supplies/raw materials in the market as a whole, not just from a party's contractual or preferred supplier;
- labour shortages - where workers are unable to man factories because they are off work due to sickness or self-isolation and
- acts of the authorities (e.g., government) - where an act by the authorities in a country has caused the disruption.

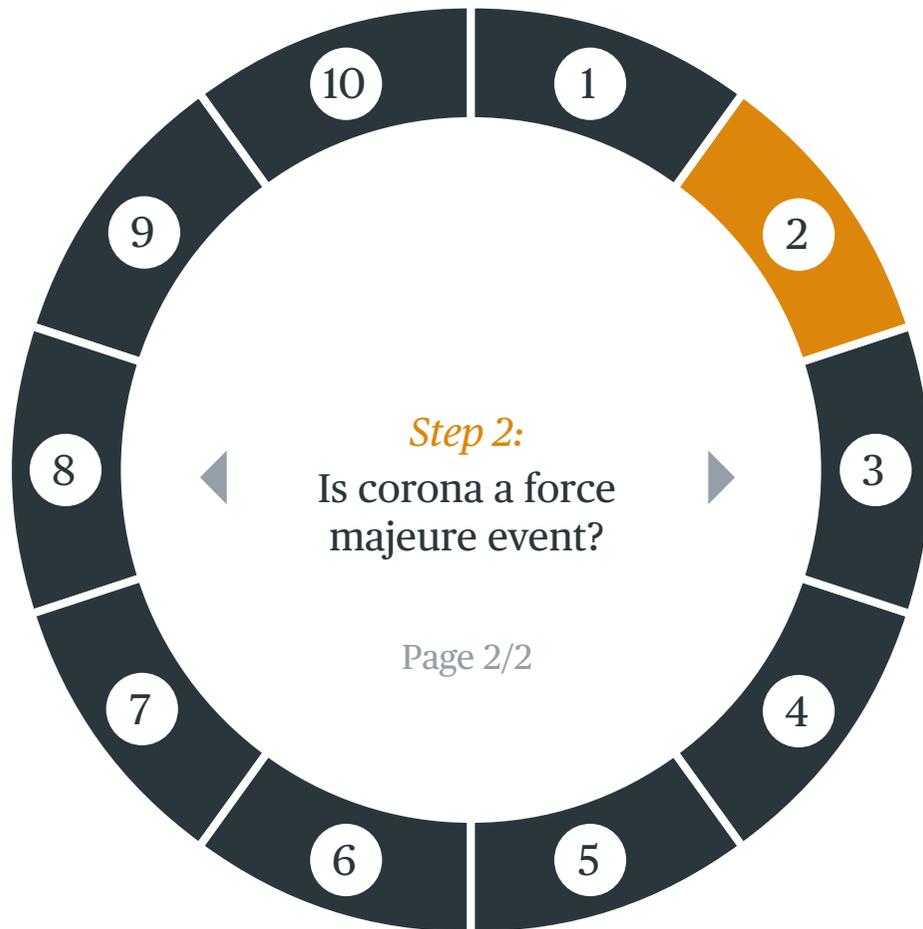
If there is a statement that any event beyond the reasonable control of the affected party fulfils the circumstances of force majeure, the following aspects should be considered:

- Even if corona appears as a force majeure event under the contract, it does not automatically follow that the impact on business is beyond reasonable control, and the affected party will still need to comply with the remaining steps below in order to claim relief and
- Is the affected party claiming corona as the force majeure event, or another event that may have arisen as a result of corona (e.g., factory closure, lack of workforce)? This could be important for when notice obligations are triggered and how long the force majeure event is set to continue (corona may continue for months, whereas supply shortage may be shorter term).

Continuation of step 2



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Force majeure in German Civil Code:

The most important regulations of the BGB in this context are as follows:

- §§ 280 ff BGB state, that the debtor who fails to (timely) perform his obligation shall be liable for damages, unless he is able to prove that the default or the delay have been caused by events for which he is not responsible, § 280 I 2 BGB.
- § 275 BGB regulates the existence of impossibility

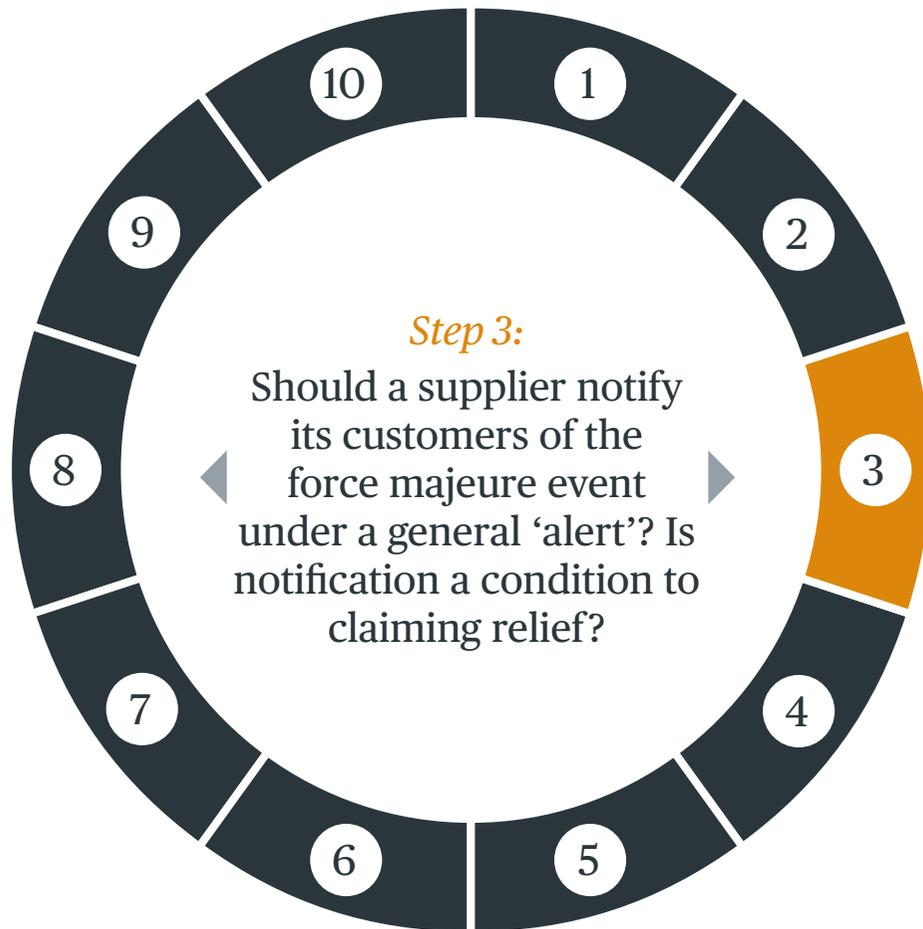
Possible are above all the - temporary - subjective impossibility, i.e. impossibility in the person of the party obliged to deliver according to § 275 I BGB, as well as the right to refuse performance in case of unreasonable efforts according to § 275 II BGB.

The legal consequence is then that the supplier is (temporarily) released from his obligation to deliver and the buyer does not have to pay the price, § 326 I BGB. However, any liability for damages is not affected by this. Thus, the buyer can demand compensation if the non-delivery or the delay in delivery is due to negligence or intent of the supplier.

- If only partial delivery is made, § 441 III BGB applies accordingly and a proportionate reduction will be made.
- § 326 V BGB enables the debtor to withdraw from the contract if the debtor is not required to perform under § 275. Then, according to § 346 I BGB the goods and services which have already been received are to be returned and the benefits which have been derived are to be surrendered.
- In the case of sovereign coercive measures which, for example, prevent production, it is quite conceivable that one party can successfully invoke the subjective impossibility.
- § 313 BGB standardised the loss of the basis of the business transaction and may give rise to a claim for adjustment of the contract or termination. A party may demand that the contract should be modified if continuation of the contract is unreasonable because the circumstances which became the basis of the contract have changed seriously after the contract was concluded and the parties - if they had expected the change - would not have concluded the contract or would have concluded it with a different content. The disruption of the basis of the transaction interferes with the content or existence of the delivery contract, but - just as in the case of impossibility - has no direct effect on the liability for the economic consequences of the delayed or omitted delivery. An adjustment of the delivery contract requires that the disruptive event does not fall within the risk sphere of one of the parties. As a rule, the manufacture and delivery of products is assigned to the supplier's sphere of risk, which is why he usually has no right to demand an adjustment of the contract.



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In order to prevent direct liability based on contractual provisions, these should be checked for specific information requirements.

Even if there are no specific contractual requirements, the affected party may try to prevent any inconsistencies by informing the other party of the circumstances. However, the following principles should be observed:

- a general 'alert' may not satisfy the force majeure notification requirements in the contract as more factual detail is likely to be required;
- a general alert may 'set the clock ticking' that the affected party considers the event to be a force majeure event, meaning formal notice should be served under the contract within the specified time period; and
- despite any alert (or due to the alert), the client may bring suit on the basis of any default and/or delay and the supplier will bear the burden of proof regarding the fact that reliefs provided under Italian law applied.

As far as force majeure clauses are concerned, they are likely to require that the affected party serves notice of the force majeure event within a specified period. This may be drafted as a contractual obligation to serve notice, or as a condition to claiming relief. Look out for words/phrases such as "provided that" or "conditional upon" - these may indicate that if the affected party fails to serve notice within the required time period it loses its right to claim relief. The affected party must follow the requirements of the notice provision meticulously including who the notice should be addressed to, how it should be sent and information it needs to contain.

In the light of the risk of litigation in the matter, it would be advisable to suggest a case-by-case (or, at least, category of creditors-by-category of creditors) approach: any communication should indeed be carefully tailored to contain sufficient details of the factual circumstances determining the default/delay, indication of whether it is definitive or temporary, complete or just partial, etc.



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Once a force majeure event has been established, the steps an affected party has to follow to claim relief will depend on what the contract says.

Nevertheless, one of the most important things is always to document the concrete facts in detail in order to be able to prove any effects on delivery and production possibilities.

In principle, the company must prove that the event causing the impossibility occurred and that it is precisely this event that makes the contract unfulfillable. So the key is the existence of a causal link between the non-performance of the contract (or improper performance) and this occurrence of force majeure and proving it.

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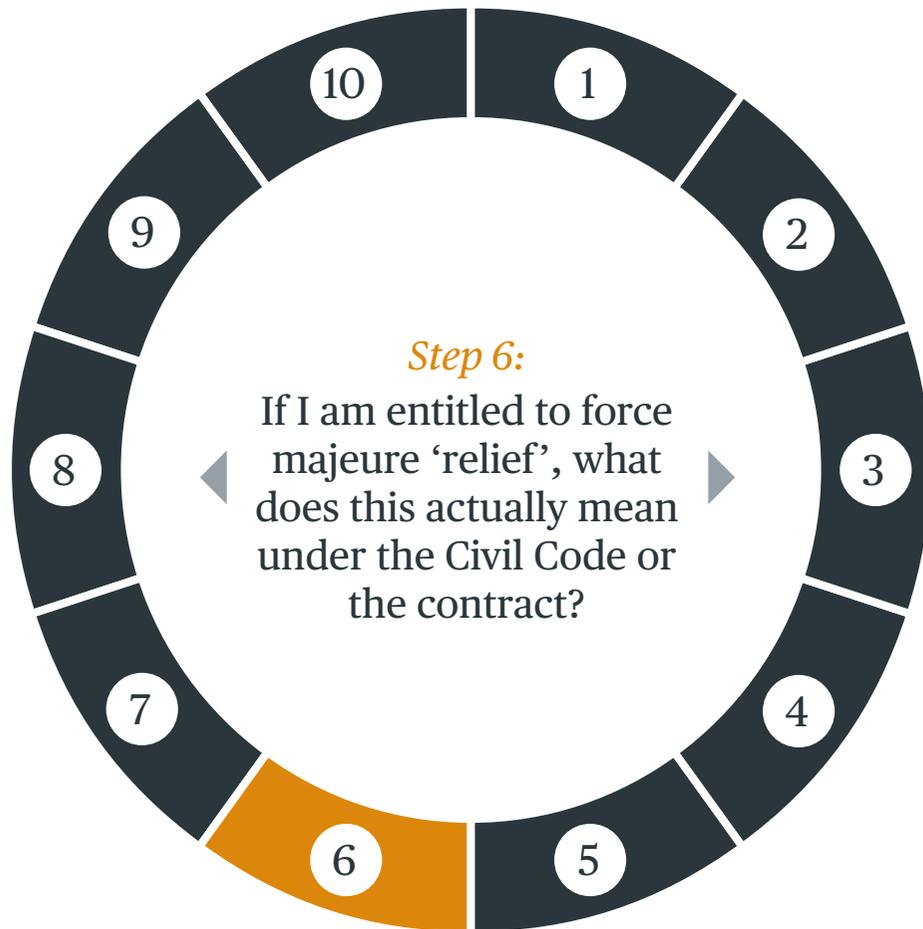
As mentioned above, the affected party needs to exercise “due diligence” when performing its obligations. In other words, if the affected party has caused damage as a result of its own negligence, without exercising due diligence or due to willful misconduct, the damage cannot be considered to have been caused by an unintentional force majeure event.

As a result, the affected party must show it has exercised due diligence to avoid liability for non-performance or improper performance of an obligation. The standard of due diligence is based on the requirements that must be met by a conscientious and level-headed person who is in the specific situation and belongs to the perpetrator’s circle of acquaintances, taking an objective ex-ante view of the situation. One considers a “normal citizen”, that is, a person acting prudently, who, put back into the situation of the perpetrator, should judge how a “normal” person would have behaved in this situation on the basis of general life experience.

For an assessment, all circumstances of the individual case must be taken into account. Only these can ultimately be the decisive factor.



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An entitlement to force majeure relief generally means that the contract is still binding, but the facts of the impossibility of performance (§ 275 BGB) may be fulfilled. Accordingly, the entitlement to the benefit is no longer applicable and the legal consequences mentioned under 2. may arise.

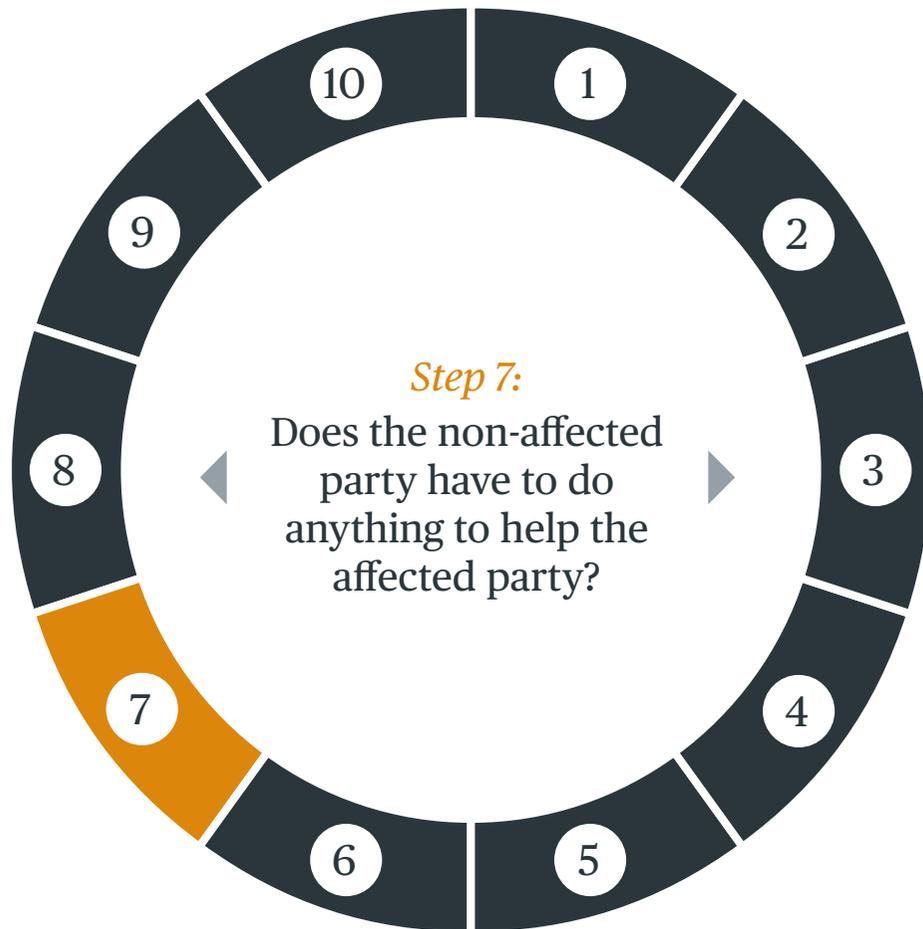
In such a situation is again an important point, that a thorough analysis of the contract will allow to determine and assess the contractual rights (expiration of the contract, termination, withdrawal), the way of proceeding (e.g., the need to notify the other party), or the consequences of the actions taken (e.g., payment of a contractual penalty).

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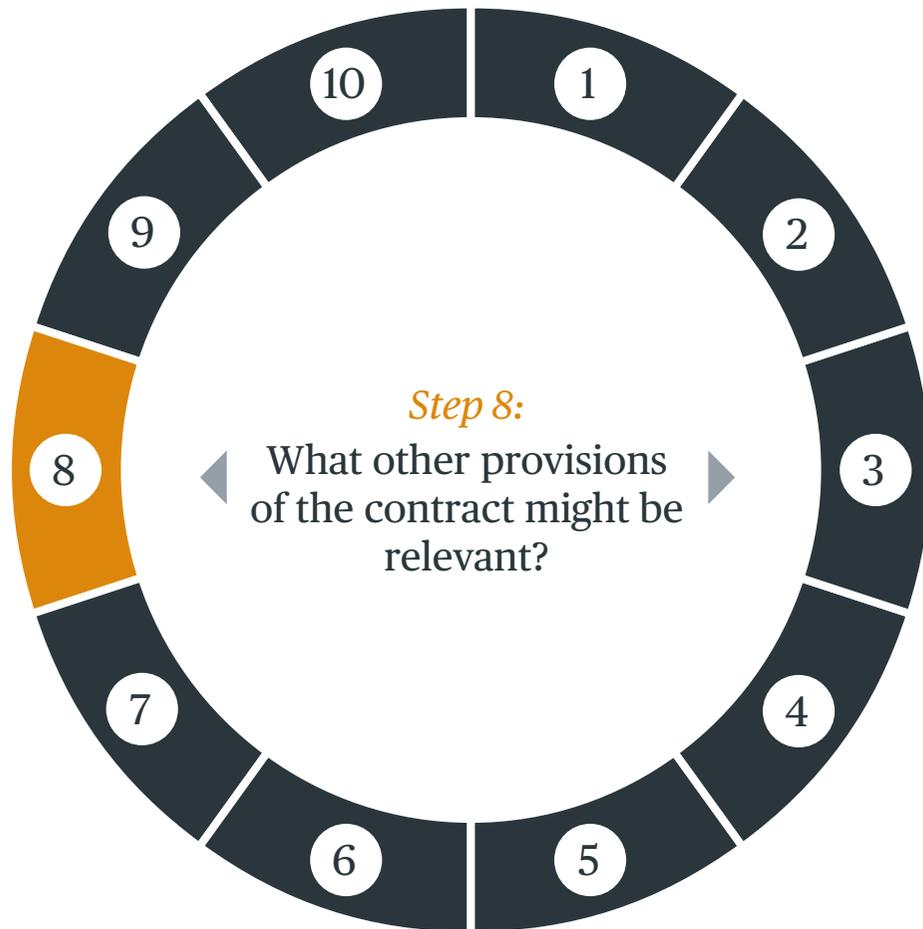
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Specific obligations of each party to the other may arise from the contract.

Possible obligations may arise at the legal level from the principle of good faith according to § 242 BGB.



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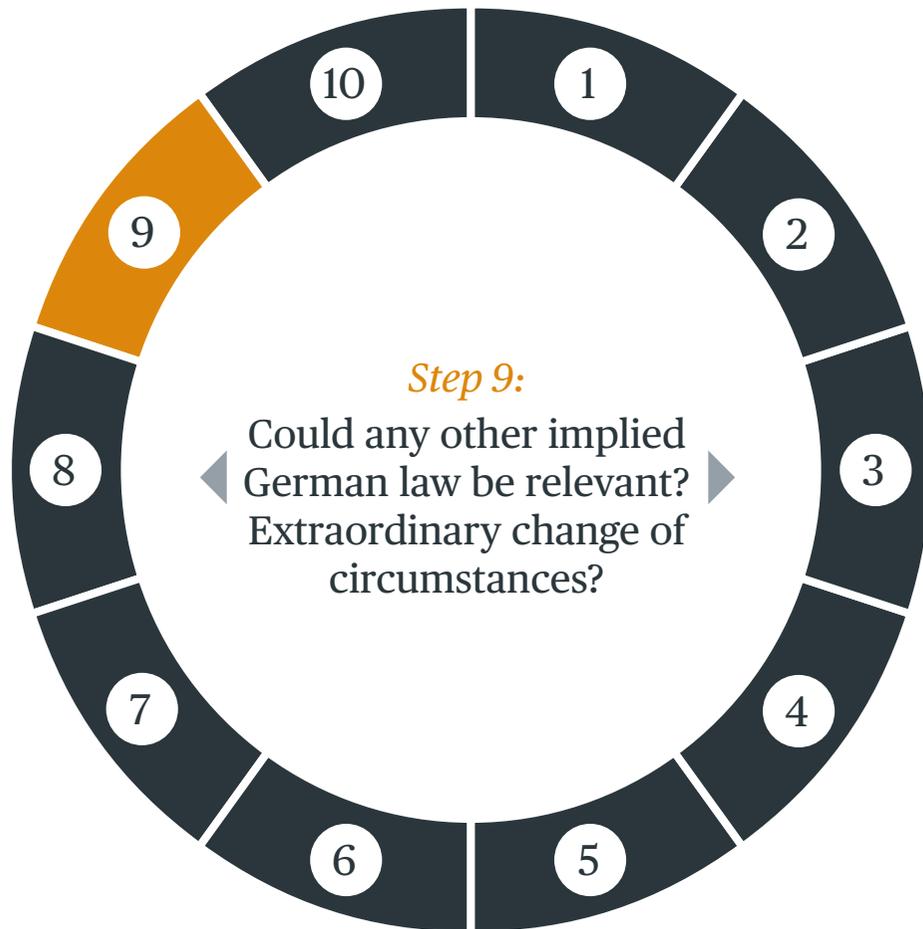
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We suggest taking a holistic view of the entire contract. The following clauses may be particularly relevant:

- **Payment** - the customer may have the right to withhold payments if obligations are not performed (even if due to force majeure)
- **Suspension/hardship** - the affected party may have a specific contractual right to suspend its performance (for example due to economic change or under an express 'hardship' clause)
- **Termination** - There may be a compensation payable for termination for force majeure
- **Change in Law** - many countries are introducing new laws to deal with corona which could make performance of obligations more expensive. How is this risk dealt with? How is "applicable law" defined for the change in law clause and does this cover guidance and legislation? For example, if factory is in France and French law impacts costs of performance, does this still trigger a change in law price adjustment if the contract is governed by German law?
- **Availability/take or pay service credits** - do service credits still apply even if the reason the supplier has not supplied is force majeure?
- **Material adverse effect** - are there any clauses entitling a party to terminate the contract if there is an event that has material adverse consequences or means that the contract would be loss making?
- **Health & safety** - can the supplier still comply with health & safety regulations and guidance that it may be contractually bound to comply with?
- **Key personnel** - are specified people earmarked for particular obligations?
- **Notice clause** - ensure compliance in order to ensure that notices are valid and can be relied upon.
- **Variations** - any amendments agreed due to corona will need to be made in accordance with the "variations clause" (which may require variations to be in writing).
- **No waiver** - a "no waiver clause" does not necessarily protect a party from post-breach inaction. A non-breaching party should still reserve its rights and remedies and notify the party in breach by formal contractual notice.
- Dispute resolution which may include an "escalation clause" which includes parties' agreement to resolve any dispute on a staged basis.



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The possibilities of § 313 BGB, if the circumstances underlying the contract change, have already been listed under 2.

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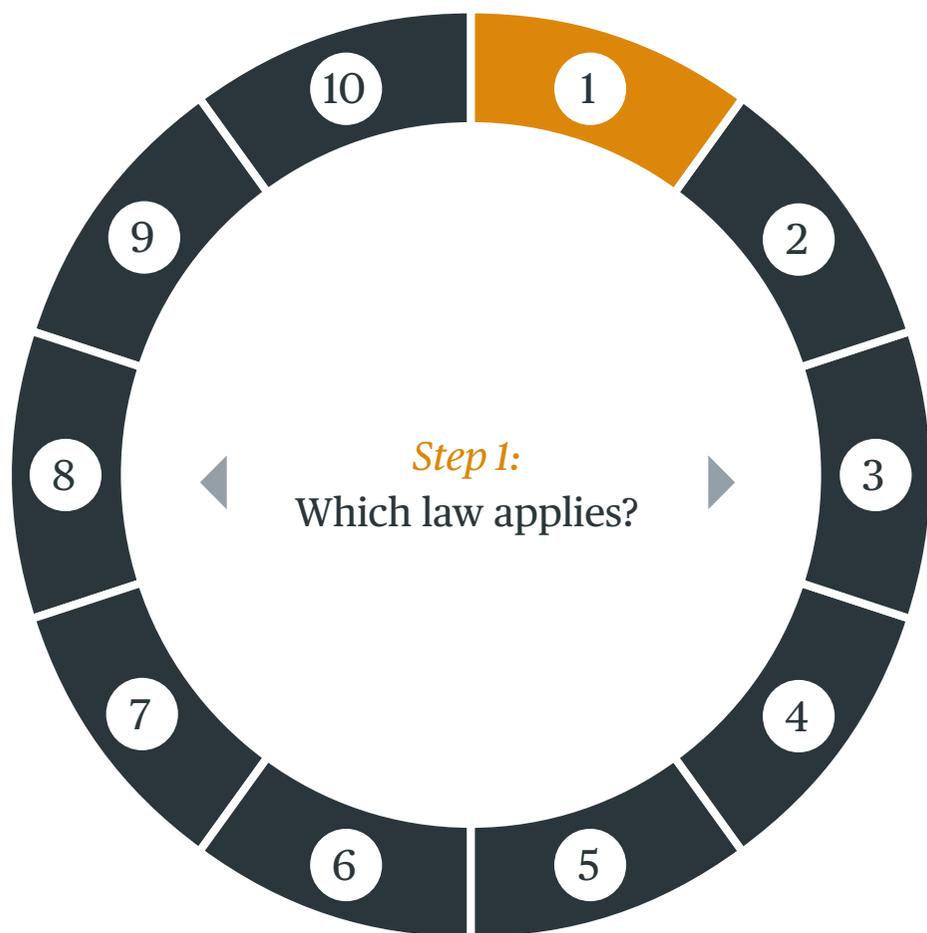


- Please pay attention to new legislation issued from time to time in order to timely undertake any necessary step.
- Take a holistic view of the contract's analysis - consider what clauses may help/hinder and do not forget to look at the boilerplate.
- Retain documented evidence of steps you are taking, the reasons surrounding those steps and steps taken to mitigate (and also steps counterparties may be taking if they are the ones invoking force majeure). This could include credible records - including trustworthy public domain information where available - which set out the factual context for the decision in question. It is important to document the alternative options available at the time of performance (or lack of them!).
- Re-source supply wholly or partially - risks can be reduced or removed if you have a viable alternative which can be implemented quickly. Consideration should be given to the lead times for re-supply and how these fit with existing inventory. Be careful as re-sourcing may be in breach of existing supply contracts.
- Recover assets - you may have supplied tools or certain assets may be used under licence. Equally, there may be stock or other materials on site which belong to you. The terms of any applicable contract will strongly influence your ability to recover these items, however, in case the difficulties the counterparty is undergoing end up by causing the commencement of insolvency proceedings, such recovery might become exponentially more difficult.
- Ensure you make all required third party notifications in timely fashion (including insurance, industry regulators, etc.).

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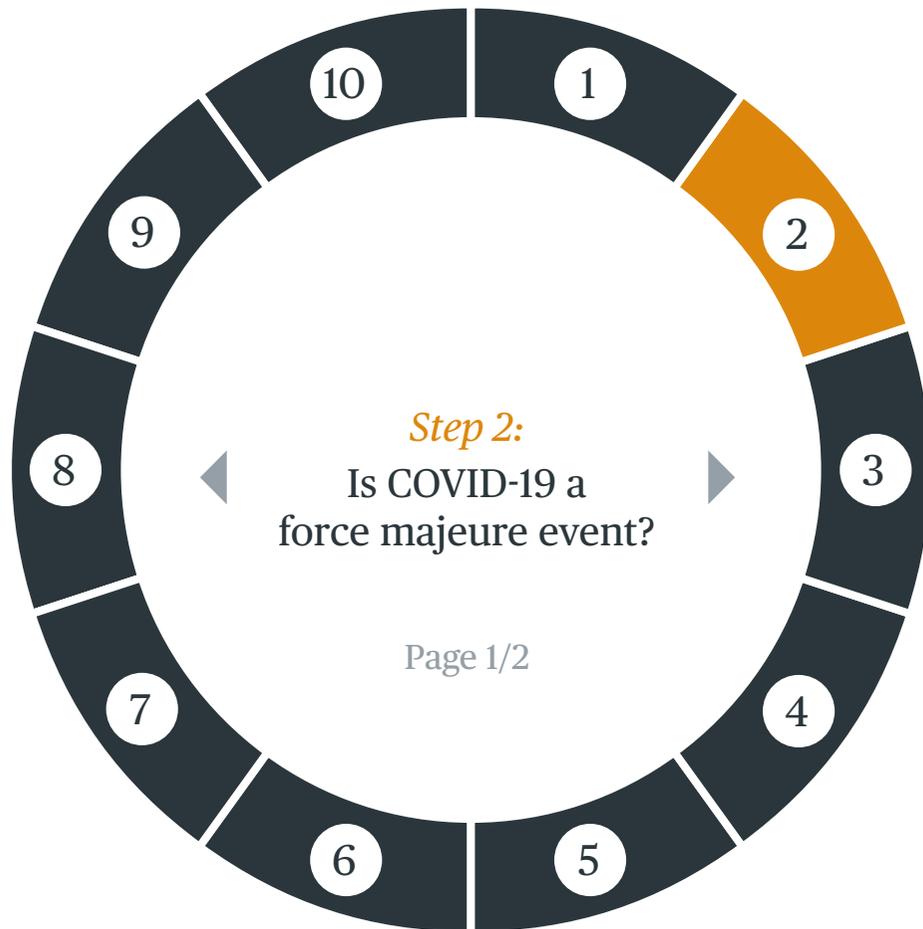
In assessing whether or not a party is entitled to relief from its obligations, it is important to check both:

1. the governing law of the applicable contract; and
2. the laws in the jurisdiction where the obligations are being performed (particularly with regards to any mandatory restrictions in place regarding imports/exports, production and travel bans).

For example, the contract may be governed by Italian law meaning the language of the contract will be interpreted under Italian interpretation principles. However, the obligations under the contract may be being physically performed in France or Spain (for example at a factory or testing site) meaning the French / Spanish law governing whether or not production must be suspended will be relevant to test the impact of the force majeure event (see steps 4 & 5 below).



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Italian law does not provide a specific notion of force majeure applicable to all contracts, but it does regulate several mechanisms aimed at protecting a party from unforeseeable and unavoidable events affecting its ability to perform a contract.

In that respect, key provisions are:

- Art. 1218 of the Italian Civil Code, which provides that the debtor who fails to (timely) perform his obligation shall be liable for damages, unless he is able to prove that the default or the delay have been caused by events not attributable to it. Pursuant to Art. 1256 of the Italian Civil Code;
- Art. 1256, par. 1, of the Italian Civil Code, which provides that the debtor is relieved from his obligations in case their performance becomes impossible due to events not attributable to him;
- Art. 1463 of the Italian Civil Code, which provides that, when an obligation becomes impossible to perform, the debtor (relieved pursuant to Art. 1256, par. 1, of the Italian Civil Code) cannot ask the other party to perform his (counter)obligations and must return any form of consideration if he has already been granted or paid.

Such remedies may be enforced in case COVID-19 renders performance of contractual obligations **definitely impossible**; this has also been explicitly provided for by Art. 3, par. 6-bis, of the Decree Law 23 February 2020, n. 6, as amended by the Decree Law 17 March 2020, n. 18 (the “*Curaitalia Decree*” - *Cure Italy decree*).

On the basis of Italian case law, the same remedies may apply in case COVID-19 does not render the performance of an obligation entirely impossible, but determines the **radical impossibility for such performance to achieve the objective** pursued by the parties with the contract.

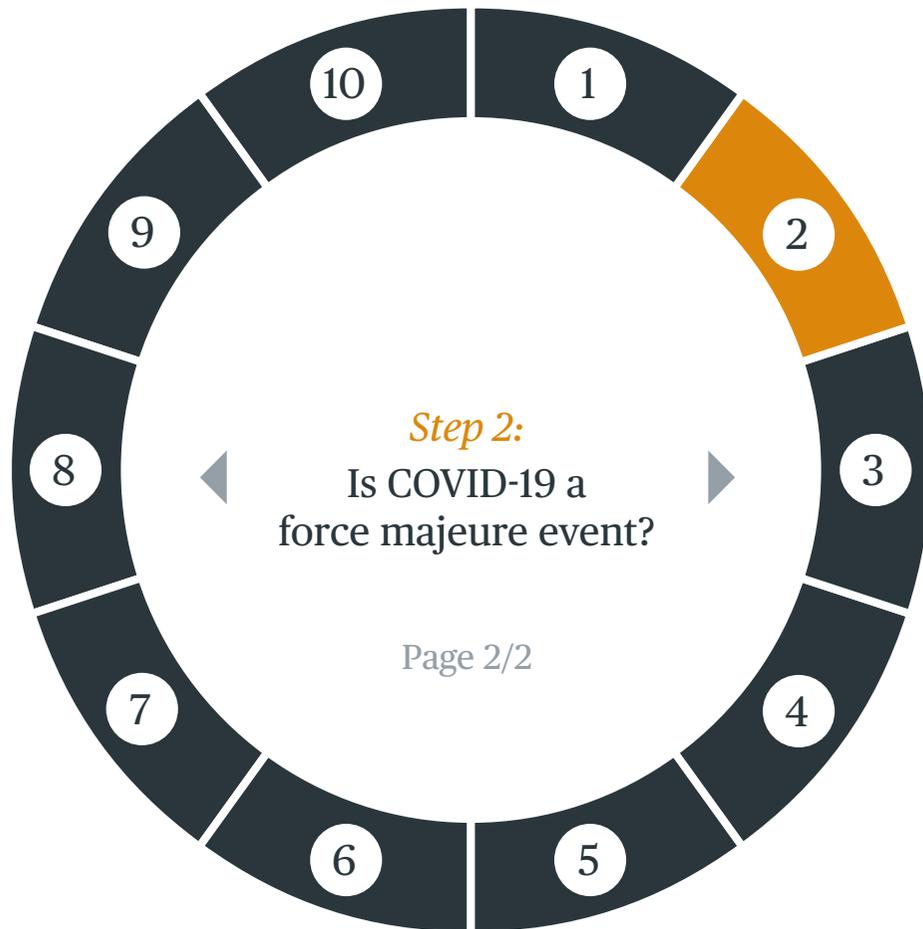
Under Italian Law, further remedies may be available in case COVID-19 only determines a **temporary impossibility to perform** the obligations set forth under a contract. Indeed, under Art. 1256, par. 2, of the Italian Civil Code, the debtor is not liable for the delay in performance as long as such impossibility to perform stands. In bilateral contracts, in such an event, pursuant to Art. 1460 of the Italian Civil Code, for the time during which one of the parties cannot perform its obligation, the other party may legitimately refuse to perform its own obligations.

However, under Art. 1256, par. 2, of the Italian Civil Code, the debtor is also relieved from his obligation if the impossibility persists until the debtor can no longer be considered to be under an obligation to perform, or until the creditor no longer has an interest in achieving performance. Such evaluation should be carried out taking into the title of the obligation and/or the activities which the debtor undertook to carry out under the contract.

Continuation of step 2



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In case **impossibility to perform due to COVID-19 is only partial**, Art. 1464 of the Italian Civil Code provides that the creditor is entitled to a proportional reduction of consideration. The creditor may also have the right to withdraw from the contract if it has no appreciable interest in its partial performance. The debtor whose performance has become partially impossible, however, will remain obliged, in so far as the service is partly possible, to carry out partial performance. This remedy may be particularly useful, for instance, in the context of lease agreements.

That said, it is not unusual to see contracts governed by Italian law and containing **force majeure clauses**. These clauses generally contain a general definition of force majeure, which is then followed by a list of the circumstances that are to be considered as events of force majeure. Depending, therefore, on the specific formulation of the force majeure clause (necessarily to be evaluated on a case-by-case basis), COVID-19 may have a specific relevance and allow the suspension of performance or, more generally, the consequences provided for in the relevant clause.

In this respect, for instance, relevance may be accorded to the declaration of a pandemic by the World Health Organization of Health or to the following events:

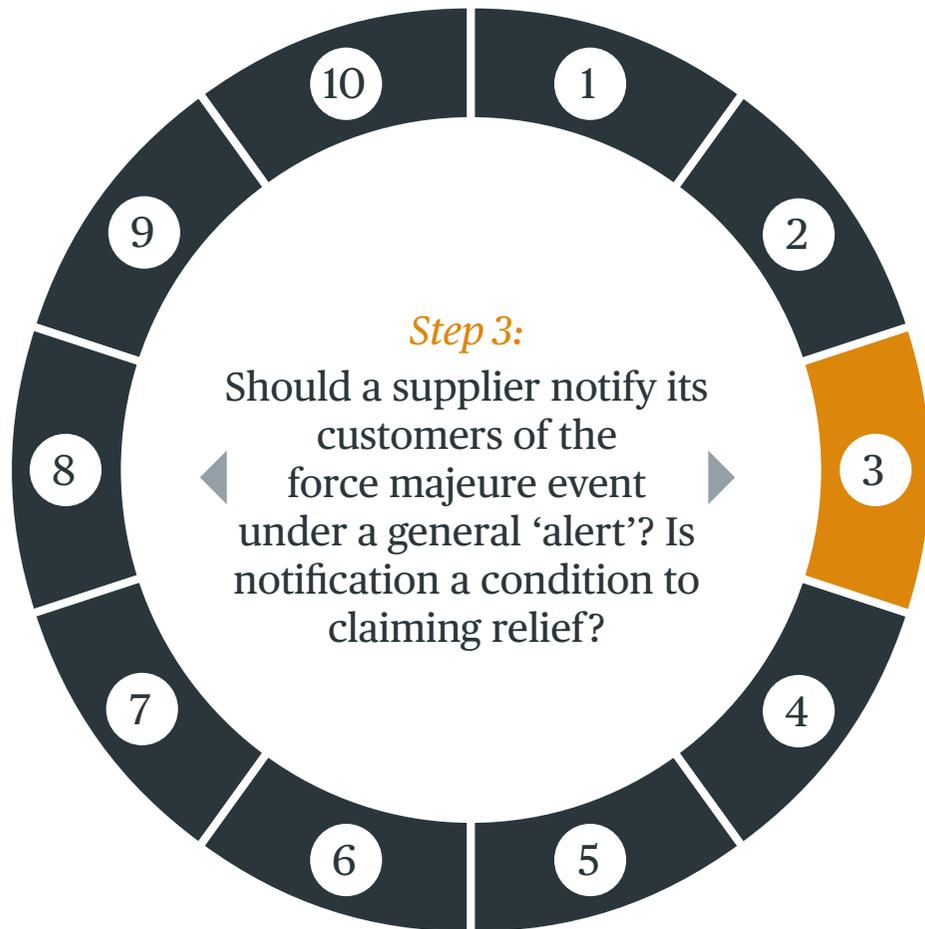
- “shortage of supplies or raw materials” - where the downstream impact of the COVID-19 is limited availability of supplies/raw materials in the market as a whole, not just from a party’s contractual or preferred supplier;
- “labour shortages” - where workers are unable to man factories because they are off work due to sickness or self-isolation; and
- “Act of Government” - where an order by the Government or a government agency in a country has caused the disruption.

Should the contract only specify that a force majeure event is any event beyond the reasonable control of the affected party, on the face if it COVID-19 may qualify as an event beyond the affected party’s reasonable control. However, it should be considered that:

- it does not automatically follow that the impact of COVID-19 on business is beyond reasonable control; and
- the supposedly affected party claiming COVID-19 as the force majeure event should, in any event, clearly elaborate on how COVID-19 negatively impacted his business;
- given that the above described remedies (an force majeure clauses) apply in case of occurrence of unforeseeable and unavoidable circumstances, COVID-19 may qualify as a force majeure event only with reference to contracts already in force at the time in which the pandemic started. For contracts executed, modified or renegotiated after such moment (i.e. during the pandemic), special clauses should be inserted to regulate new developments, difficulties and possible impediments to which the parties - depending on future events - could or may incur in during the execution of the contract.



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The affected party may feel that there it might be beneficial, from a relationship perspective, to communicate a force majeure event and the delay it has caused. It may wish to serve a general alert or early warning notice to its customers that COVID-19 is causing delay/disruption and that it is doing whatever it can to mitigate this.

Parties affected by COVID-19 should consider that, unless provided by the contract, Italian law does not set forth notification requirements as a condition to seek the remedies described under step 1.

However, should the affected party intend to send these notices, it should be wary that:

- a general 'alert' may not satisfy the force majeure notification requirements in the contract as more factual detail is likely to be required;
- a general alert may 'set the clock ticking' that the affected party considers the event to be a force majeure event, meaning formal notice should be served under the contract within the specified time period; and
- despite any alert (or due to the alert), the client may bring suit on the basis of any default and/or delay and the supplier will bear the burden of proof regarding the fact that reliefs provided under Italian law applied.

As far as force majeure clauses are concerned, they are likely to require that the affected party serves notice of the force majeure event within a specified period. This may be drafted as a contractual obligation to serve notice, or as a condition to claiming relief. Look out for words/phrases such as "provided that" or "conditional upon" - these may indicate that if the affected party fails to serve notice within the required time period it loses its right to claim relief. The affected party must follow the requirements of the notice provision meticulously including who the notice should be addressed to, how it should be sent and information it needs to contain.

In the light of the risk of litigation in the matter, it would be advisable to suggest a case-by-case (or, at least, category of creditors-by-category of creditors) approach: any communication should indeed be carefully tailored to contain sufficient details of the factual circumstances determining the default/delay, indication of whether it is definitive or temporary, complete or just partial, etc..



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Once a force majeure event has been established, the steps an affected party has to follow to claim relief will depend on (i) whether the contract provides for a remedy and a procedure to be followed; and (ii) in such event, the specific contractual discipline. Generally we find that the affected party has to show:

1. the occurrence of an event determining the impossibility or the delay to perform its obligation, if the contract not contain any specific clause,; the occurrence of one of the events referred to in the relevant contractual clause, if the contract provides a specific discipline (see step 2); and
2. it has been prevented or delayed from performing the contract by reason of that event.

Prevent - Preventing performance means that it must have become physically or legally impossible, not merely difficult. For example, a supplier would have to show that the government in the applicable jurisdiction has mandated its factory ceases operation (through legislation or binding guidance). A general stop to all activities has been ordered in Italy - with certain limited exceptions - from 23 March to 3 April by the Decree of the Presidency of the Council of Ministries of 22 March 2020. The affected party must also show that it was "ready, willing and able" to perform its obligations under the contract and it was the specific event which impacted performance.

In this respect, the Ministry of Economic Development recently authorized the competent Chambers of Commerce to certify in writing that they received from the applicant a declaration in which, making reference to the restrictions imposed by the government and to the current state of emergency, the applicant states its impossibility to timely fulfil the contractual obligations due to unpredictable reasons beyond the debtor's control. Such certification may be useful in all cases in which the contract requires the party affected by force majeure to present an official document attesting the existence of force majeure.

Delay - Delay has a wider scope and may be easier for an affected party to establish. The supplier will still need to establish that as a result of the specific event, performance of its obligations is taking longer (or finishing later) than planned. The clause may require the delay to be the direct result and the affected party will still need to comply with the remaining steps below in order to claim relief.

Hinder - generally speaking, under Italian law, hinderance (i.e. the fact a contract has become more expensive to perform, even dramatically) does not allow the affected party to claim the reliefs described under step 1, but the different relief (i.e. excessive onerousness) described under step 9.



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Under the general principle of good faith in performing the contract set forth by Art. 1375 of the Italian Civil Code, the affected party must show it has taken all reasonable steps to avoid the operation of the force majeure clause (and/or, more generally, the occurrence of events giving rise to the remedies under step 1) and/or to mitigate its consequences. This is an implied duty which applies, in all apart from exceptional situations, even if the contract contains no express clause requiring the affected party to mitigate the impact of the force majeure event.

It will be a question of fact as to whether an affected party has taken steps to mitigate the impact, but relevant factors could be:

- Assuming the stop in production has not been mandated by law in the applicable jurisdiction, what could the affected party have done to keep producing during COVID-19 (e.g. protective measures, redeploying staff, recruiting additional staff)?
- Could the affected party have conceivably switched suppliers - e.g. used an alternative shipping company that was still running?

The fact that the above measures may be more expensive does not matter. Generally speaking, mere difficulties or additional expenses are not a sufficient ground for the force majeure provisions to be invoked: force majeure provisions (and the reliefs described under step 1 in case the contract does not contain force majeure provisions) are not to be used to avoid performance for economic reasons. Therefore, just because a contract has become more expensive as a result of COVID-19, or even uneconomic to perform, that will not always constitute a force majeure event and/or be invoked to seek the application of the reliefs described under step 1. However, the fact that performance became more expensive may determine the right for the affected part to seek a different relief described under step 9.

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Italian law 10 steps



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Generally speaking, under Italian law, an entitlement to “force majeure” relief means that the affected party is excused from contractual liability, including damages (of any kind), in relation to its non-performance (or delay).

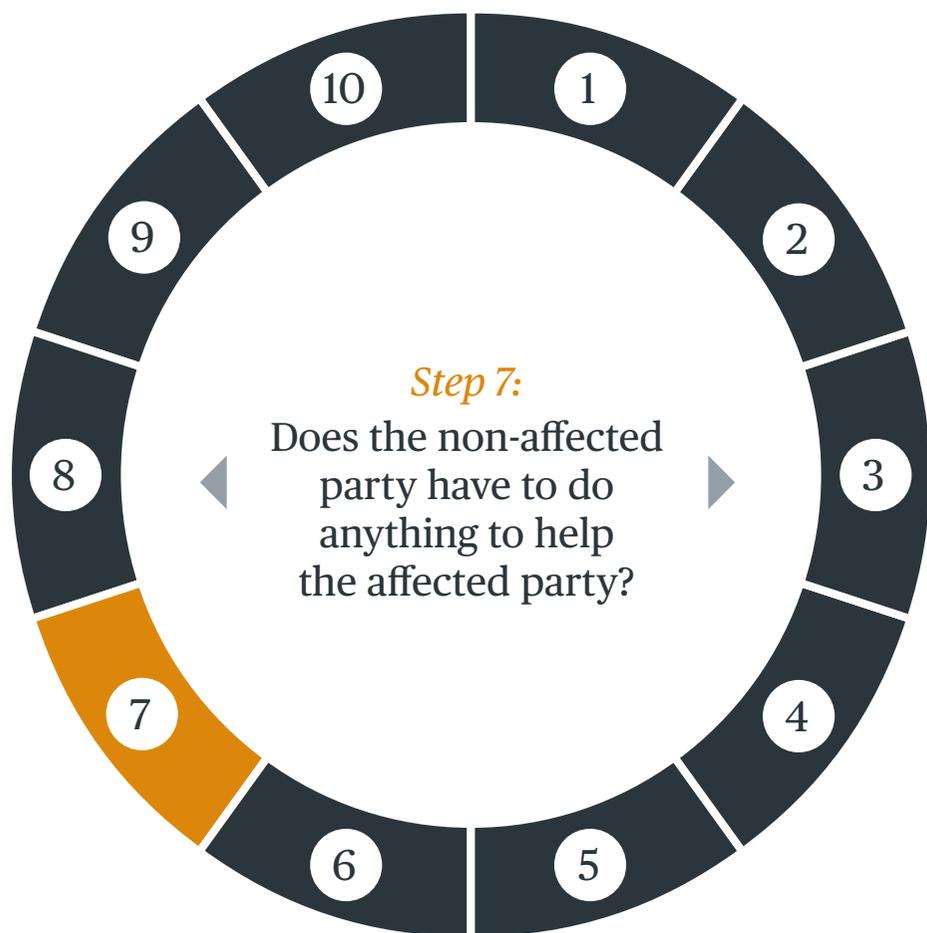
Further reliefs under Italian law include (as described under step 1):

1. the automatic termination of the contract in case the impossibility to perform or the impossibility for the obligation to attain its original scope is definitive;
2. the automatic termination of the contract in case a temporary impossibility to perform persists for a period of time so long that the debtor can no longer be considered to be under such an obligation, or until the creditor no longer has an interest in achieving performance. Such evaluation should be carried out taking into the title of the obligation and/or the activities which the debtor undertook to carry out under the contract.

As described in step 1, in case of partial impossibility to perform, the creditor has the right to proportionally reduce consideration or to withdraw from the contract if it has no appreciable interest in its partial performance.

The contract may provide for further reliefs to be evaluated on a case-by-case basis.

Italian law 10 steps



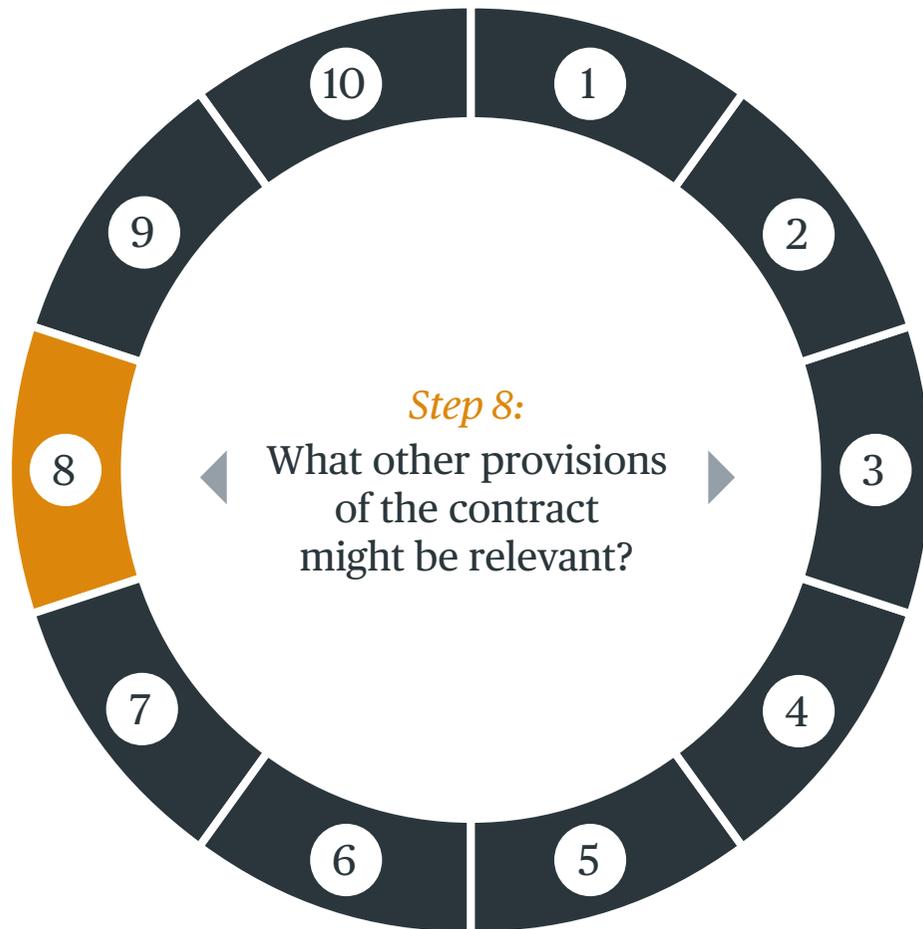
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Under the general principle of good faith in performing of contract set forth by Art. 1375 of the Italian Civil Code, the non-affected party may have an obligation to help (to the extent this is reasonable and possible) the affected party to mitigate the impact of the force majeure event. The contract may provide for further obligations to be evaluated on a case-by-case basis.



Italian law 10 steps



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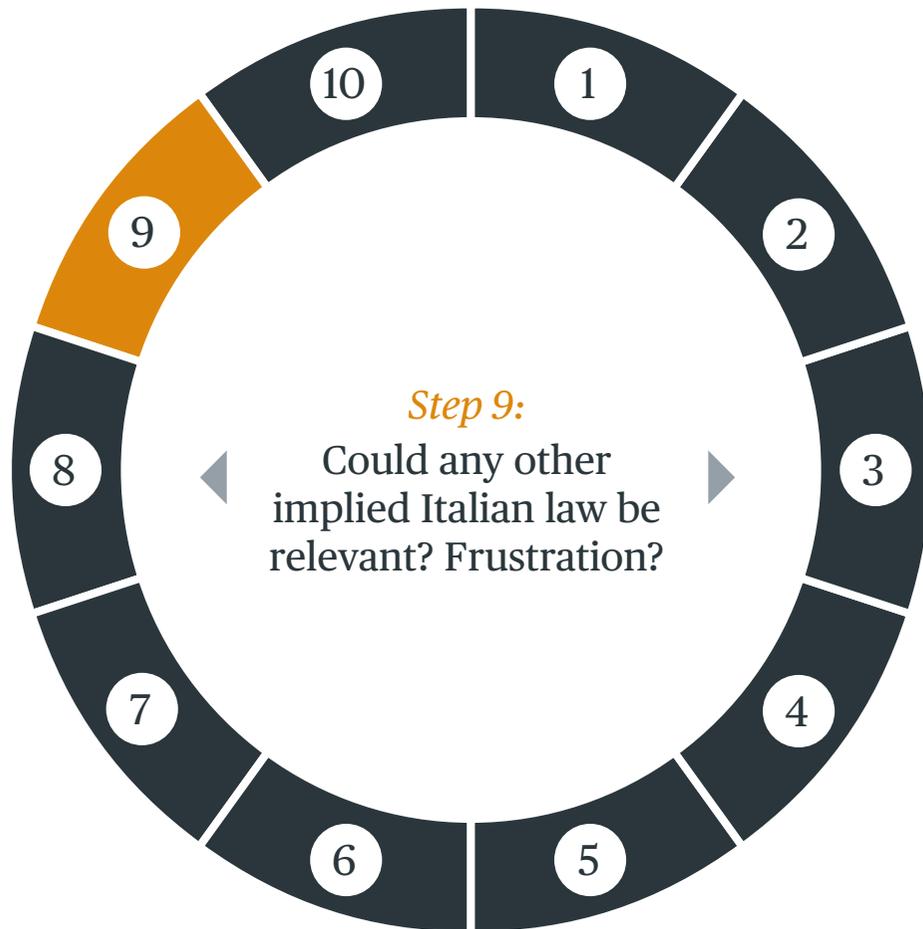
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We suggest taking a holistic view of the entire contract in the light of the general principles described under step 1. The following clauses may be particularly relevant -

- **Payment** - the customer may have the right to withhold payments if obligations are not performed (even if due to force majeure) under the contract and pursuant to Art. 1460 of the Italian Civil Code;
- **Suspension/hardship** - the affected party may have a specific contractual right to suspend its performance (for example due to economic change or under an express 'hardship' clause) or may invoke the relief described under step 9;
- **Termination** - Art. 1256, par. 1 and 1463 of the Italian Civil Code provide for automatic termination of the contract without any compensation and with the obligation of both parties to return all that has been received in performance of the contract. Such rule would apply in case the contract does not contain a specific provision. In the light of such general rule, clauses providing for compensation payable for termination for force majeure may be challenged under Italian law;
- **Change in Law** - many countries are introducing new laws to deal with COVID-19 which could make performance of obligations more expensive. How is this risk dealt with? How is "applicable law" defined for the change in law clause and does this cover guidance and legislation? For example, if factory is in France and French law impacts costs of performance, does this still trigger a change in law price adjustment if the contract is governed by Italian law?
- **Availability/take or pay service credits** - do service credits still apply even if the reason the supplier has not supplied is force majeure?
- **Material adverse effect** - are there any clauses entitling a party to terminate the contract if there is an event that has material adverse consequences or means that the contract would be loss making?
- **Health & safety** - can the supplier still comply with health & safety regulations and guidance that it may be contractually bound to comply with?
- **Key personnel** - are specified people earmarked for particular obligations?
- **Notice clause** - ensure compliance in order to ensure that notices are valid and can be relied upon.
- **Variations** - any amendments agreed due to COVID-19 will need to be made in accordance with the "variations clause" (which may require variations to be in writing).
- **No waiver** - a "no waiver clause" does not necessarily protect a party from post-breach inaction. A non-breaching party should still reserve its rights and remedies and notify the party in breach by formal contractual notice.
- Dispute resolution which may include an "escalation clause" which includes parties' agreement to resolve any dispute on a staged basis.



Italian law 10 steps



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Art. 1467 of the Italian Civil Code provides for the right of a party to long-term contracts to terminate such contracts if the performance of its obligations has become excessively burdensome, due to the occurrence of extraordinary and unpredictable events. Termination cannot be asked whether the onerousness of the contract is part of the normal uncertainty of future conditions.

In order to invoke such relief, there must be a significant alteration of the contractual obligations balance (“synallagma”), imposing on one of the parties an unforeseen and unbalanced financial sacrifice. Generally speaking, this may happen in the event that, when the obligation is to be performed, its costs are higher than those expected at the time in which the contract was entered into, causing a significant alteration of the contractual balance.

The excessive onerousness of the obligation must be assessed on the basis of strictly objective criteria (i.e. without referring to the representation of the parties and the debtor’s organisation) and cannot be invoked in case of mere difficulty to perform, to which Italian law does not attribute any relevance for the purposes of the relief at hand.

The termination of the contract is retroactive: it entails the release of both parties from their obligations and the duty to return and reimburse the services performed and/or received up to that point.

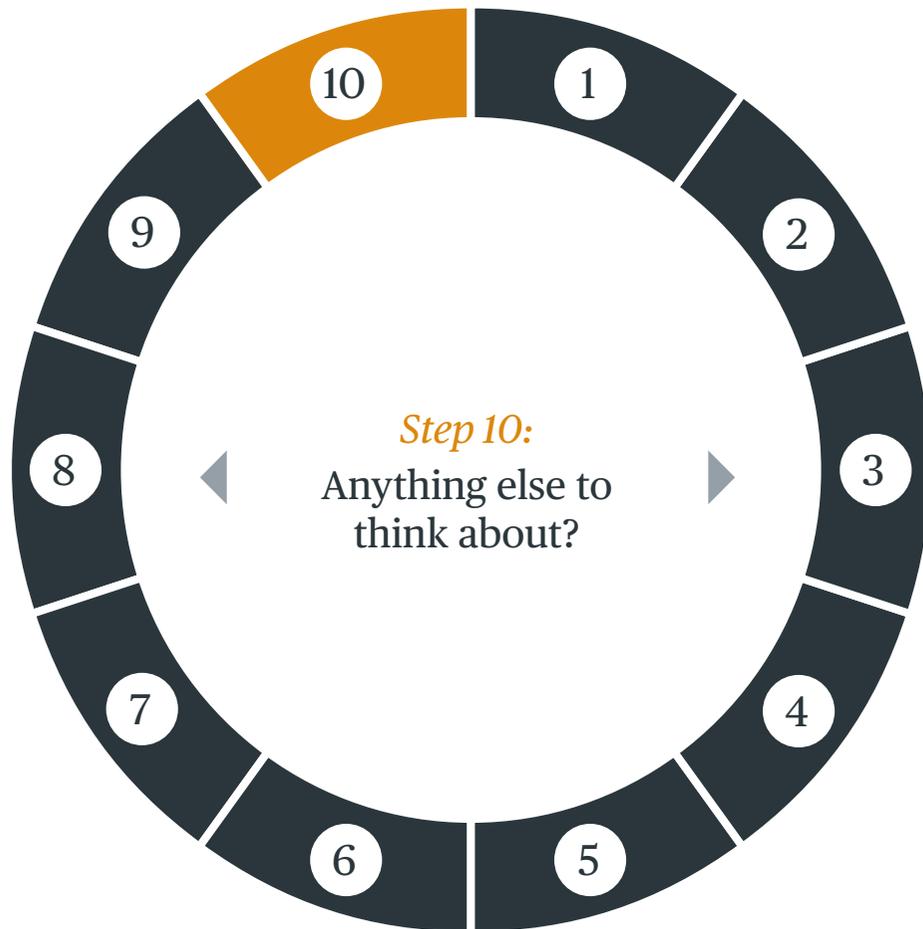
The party against whom the termination of the contract is requested may avoid it by offering the other party to “fairly” modify the terms and conditions, on the basis of a good faith assessment aimed at rebalancing the contractual relationship.

Unlike in case of impossibility to perform (in which the debtor is automatically relieved from its obligations), excessive onerousness does not automatically authorize the debtor to suspend the performance of its obligations. In order to obtain relief and not incur in liability for default, the debtor must take legal action to request termination of the contract.

The Italian Law does not provide for remedies applicable in case an imbalance arises among the contractual obligations, but it is not severe enough to determine the possibility to apply for the remedy regulated by Art. 1467 of the Italian Civil Code. Unless the contract contains specific rules, there could be the possibility, resorting to the general principles of good faith (Articles 1366 and 1375 of the Italian Civil Code) and the principle of fairness (Art. 1374 of the Italian Civil Code), to claim the existence, on one hand, of a right of the party suffering the effects of unexpected events to renegotiate the terms of the contract, and, on the other hand, on obligation for the other party to behave in accordance with to renegotiate. However, the negative outcome of such renegotiation could not be qualified as a breach of the obligation to renegotiate.



Italian law 10 steps



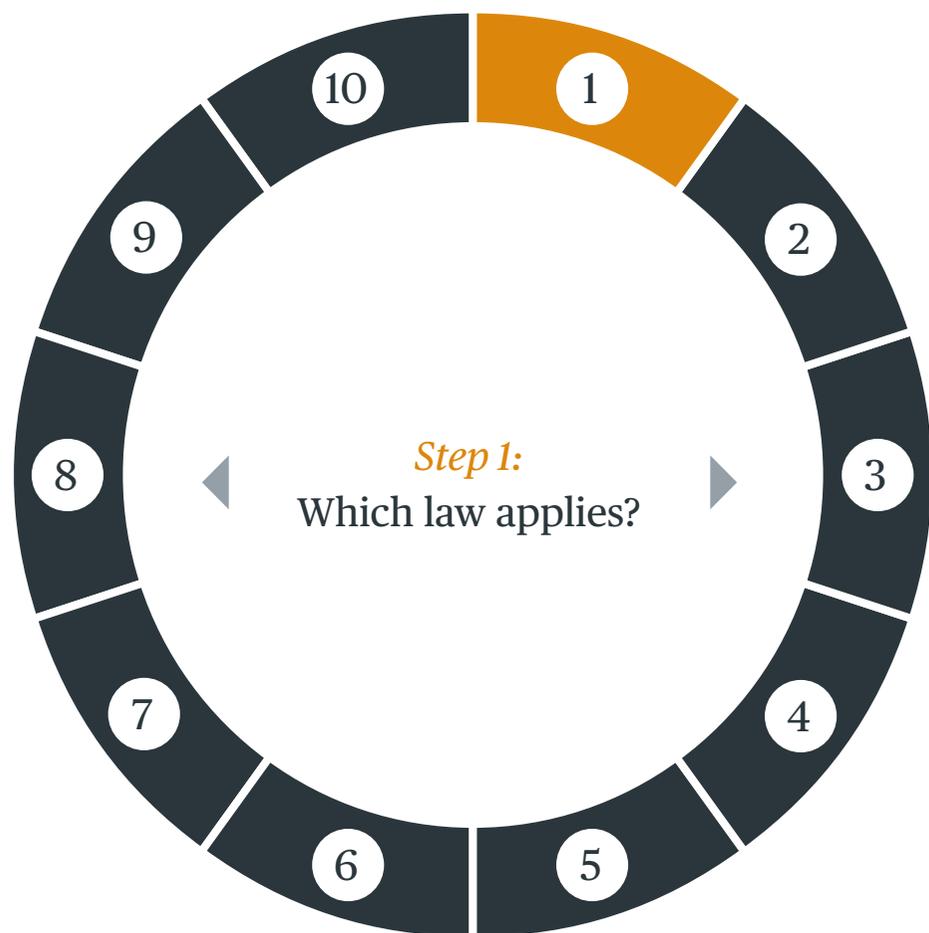
1. Pay constant attention to new legislation issued from time to time in order to timely undertake any necessary step;
2. Always determine the steps to be taken trying to limit the damages contractual counterparties may incur in: a conservative and cooperative approach may protect you from allegations of bad faith;
3. Follow the contractual process for notification meticulously and, if the contract does not contain any hardship or force majeure provision, carefully tailor any communication in the light of potential litigation.
4. Take a holistic view of the contract analysis - consider which clauses may help/hinder and don't forget to look at the boilerplate.
5. Retain documented evidence of steps you are taking, of the reasons surrounding those steps, of the steps taken to mitigate and also steps counterparties may be taking if they are the ones invoking force majeure. This could include credible records - containing trustworthy public domain information where available - which set out the factual context for the decision in question. It is important to document the alternative options available at the time of performance (or lack of them!).
6. Consider whether you wish to adopt a collaborative/non-adversarial approach to resolve the issue. Early engagement with contract counterparties and a collaborative resolution of issues may be preferable to an adversarial approach.
7. Re-source supply wholly or partially - risks can be reduced or removed if you have a viable alternative which can be implemented quickly. Consideration should be given to the lead times for re-supply and how these fit with existing inventory. Be careful as re-sourcing may be in breach of existing supply contracts.
8. Recover assets - you may have supplied tools or certain assets may be used under licence. Equally, there may be stock or other materials on site which belong to you. The terms of any applicable contract will strongly influence your ability to recover these items, however, in case the difficulties the counterparty is undergoing end up by causing the commencement of insolvency proceedings, such recovery might become exponentially more difficult.
9. Ensure you make all required third party notifications in timely fashion (including insurance, industry regulators, etc.).

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Polish law 10 steps



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- *Check the contract (the governing law)*
- *Check the Regulation (EC) Rome I if the contract does not provide for provisions regarding the governing law*
- *Check the provisions of the law where the obligation is performed (e.g. to the test the impact of the force majeure)*

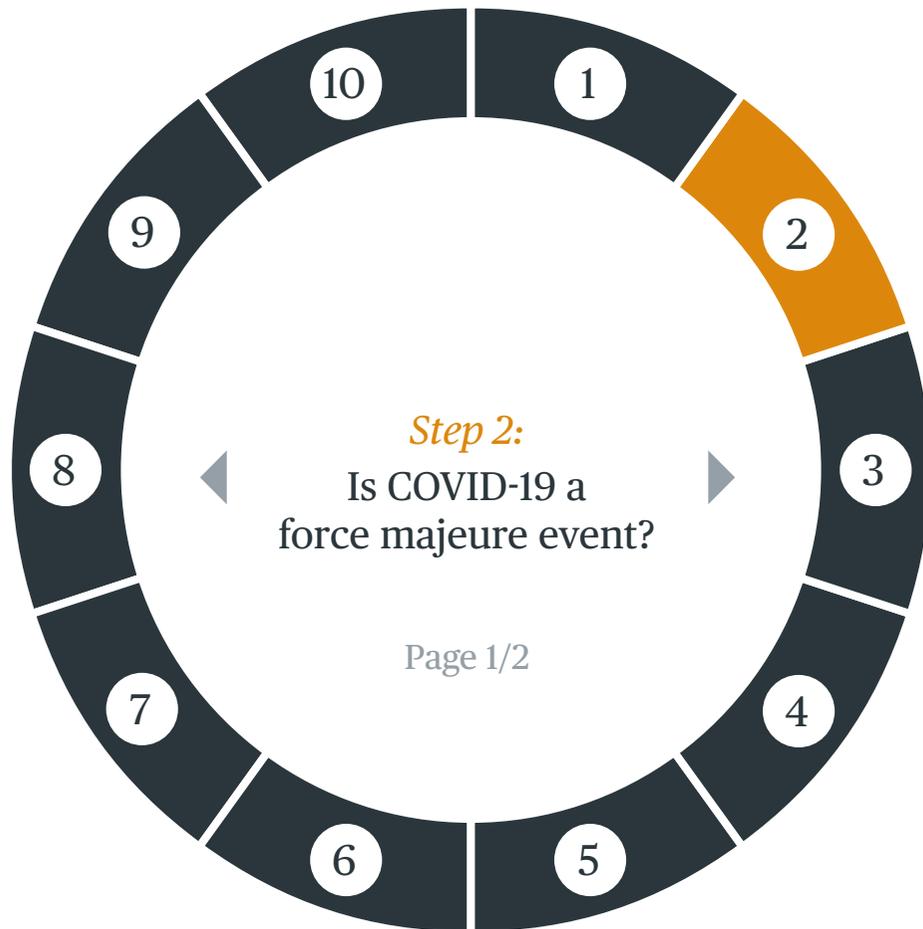
In assessing whether or not a party is entitled to relief from its liabilities, it is important to check both:

1. the governing law of the applicable contract; and
2. the laws in the jurisdiction where the obligations are being performed (particularly with regard to any mandatory restrictions in place regarding imports/exports, production and travel bans).

For example, the contract may be governed by Polish law, meaning the wording of the contract will be interpreted under Polish law interpretation principles. However, the obligations under the contract may be being physically performed elsewhere, such as Italy (e.g., at a factory or testing site), meaning Italian law governing whether or not production must be suspended will be relevant to test the impact of the force majeure event (see Steps 4 & 5 below).



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- *Check the contract*
- *Follow Polish Civil Code if the contract does not provide for provisions regarding force majeure*

Force majeure is a legal mechanism that is available:

1. if it is expressly set out in the contract, or
2. on the basis of the Polish Civil Code if not expressly set out in the contract.

Force majeure in the Polish Civil Code

Please note that there is no definition of force majeure in the Polish Civil Code. This term is found within regulations governing strict liability. However, the concept of force majeure has been defined in case law and is understood as an event: (a) external, (b) impossible (or almost impossible) to predict, (c) whose effects cannot be prevented. In other words, force majeure sets the limit of strict (risk-based) liability.

For example, the term force majeure is found within liability of the self-employed operator of an enterprise or plant operated by natural forces (e.g. company maintaining the water supply system or the railway infrastructure manager for the operation of railway services). The entity running such enterprise is liable for any damage (to person or property) caused by the movement of the enterprise or plant. However, the liability of this entity is limited. If the damage was caused, inter alia, by force majeure, the operator of the enterprise or plant is not liable for it (strict liability). Additionally, the term force majeure appears in other types of liability on a risk basis, e.g. within the liability of occupants of premises for damage caused by throwing out, pouring out or falling any object from the premises, or liability for damage caused by the owner of a mechanical means of communication moved by natural forces (e.g. damage caused by the owner of the car or motorbike).

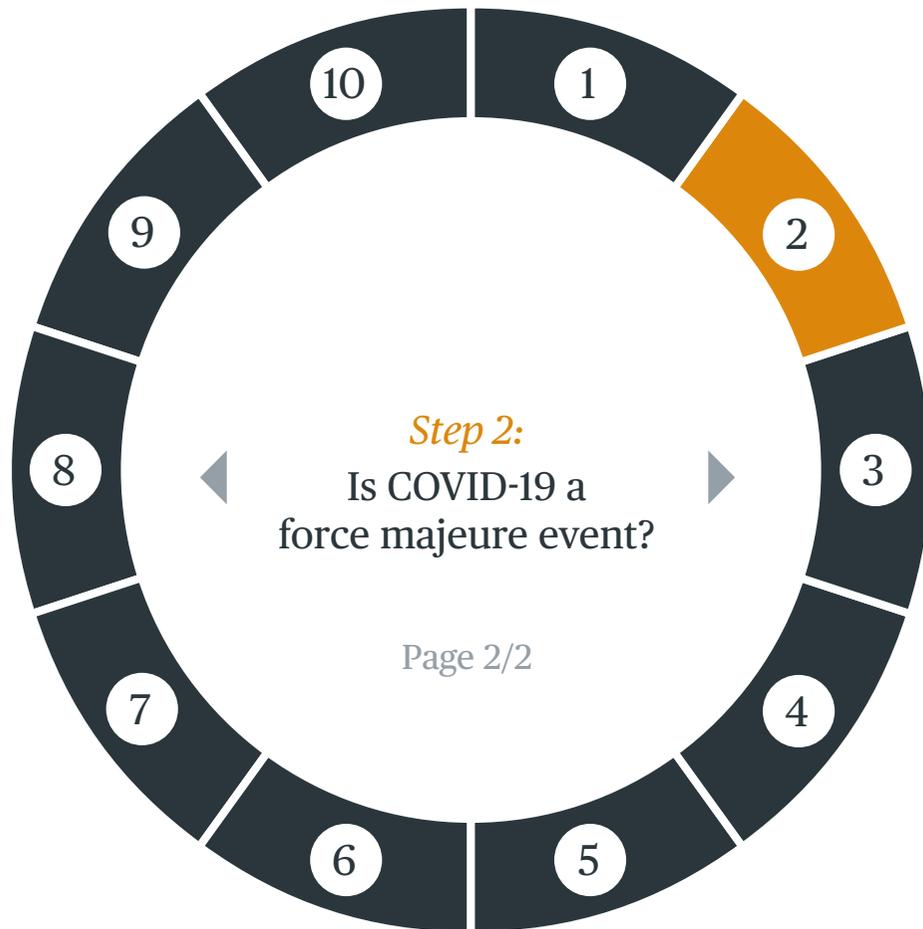
The second type of liability under the Polish Civil Code is liability on the basis of fault. Liability on the basis of fault includes, i.a. contractual liability. The debtor is liable for damage resulting from the non-performance or improper performance of an obligation, unless the non-performance or improper performance is due to circumstances for which the debtor is not responsible.

It is worth noting that the Polish Civil Code does not explicitly state that the circumstance excluding liability for non-performance or improper performance of an obligation is force majeure. The limit of the debtor's liability for damages for failure to exercise due diligence, i.e. for fault, is determined on a case-by-case bases, i.e. such non-performance or improper performance of the obligation which is not a consequence of the debtor's failure to exercise due diligence.

[Continuation of step 2](#)



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Force majeure in the contract

In many commercial contracts we can find force majeure clauses. Thus, an entrepreneur who intends to invoke force majeure must first determine whether there are force majeure clauses in the contract. Such clauses may extend or narrow the meaning of the term force majeure.

Force majeure clauses tend to follow two different formats:

- **Option 1** - An exhaustive list of events; or
- **Option 2** - A statement that a force majeure event is any event beyond the reasonable control of the affected party, followed with a non-exhaustive list of events which are considered to be force majeure.

If the contract follows Option 1 - some exhaustive force majeure clauses will contain specific wording relating to disease, epidemic or pandemic. However, if pandemic is not expressly listed, other events that may be applied to COVID-19 include:

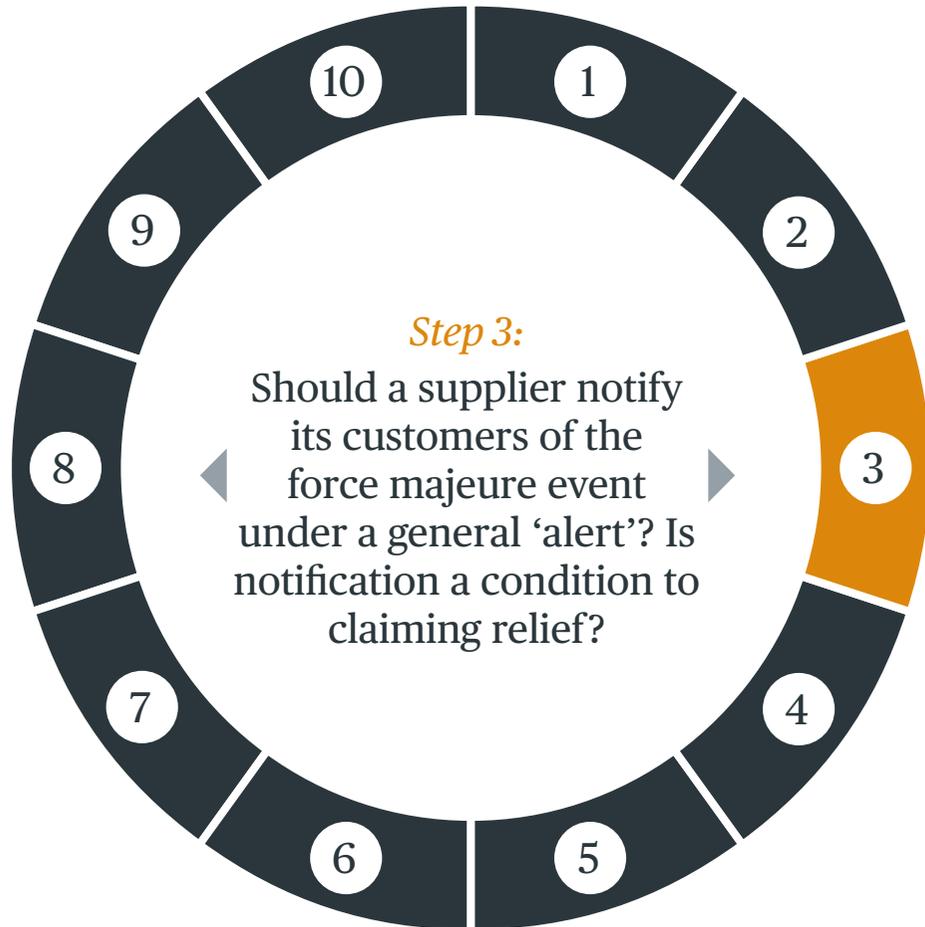
- shortage of supplies or raw materials - where the downstream impact of COVID-19 is limited availability of supplies/raw materials in the market as a whole, not just from a party's contractual or preferred supplier;
- labour shortages - where workers are unable to man factories because they are off work due to sickness or self-isolation; and
- acts of the authorities (e.g., government) - where an act by the authorities in a country has caused the disruption.

If the contract follows Option 2, on the face if it COVID-19 is an event beyond the affected party's reasonable control. In either instance, please note:

- Even if COVID-19 appears as a force majeure event under the contract, it does not automatically follow that the impact on business is beyond reasonable control, and the affected party will still need to comply with the remaining steps below in order to claim relief; and
- Is the affected party claiming COVID-19 as the force majeure event, or another event that may have arisen as a result of COVID-19 (e.g., factory closure, lack of workforce)? This could be important for when notice obligations are triggered (see Step 3 below) and how long the force majeure event is set to continue (COVID-19 may continue for months, whereas supply shortage may be shorter term).



Polish law 10 steps



Check the contract

Force majeure contractual clauses may include procedures for dealing with cases of force majeure. Some provisions may provide that if the affected party fails to observe the procedures, it is obliged to pay contractual penalties or damages, e.g. the obligation to notify the other party of the occurrence of a specific event within a specified period.

The affected party may feel there are benefits, from the relationship perspective, of flagging up the force majeure event and the delay it has caused. It may wish to serve a general alert or early warning notice to its customers that COVID-19 is causing it delay/disruption, and that it is doing whatever it can to mitigate this. Parties affected by COVID-19 sending these notices should be aware that:

- A general 'alert' may not satisfy the force majeure notification requirements in the contract as more factual detail is likely to be required; and
- A general alert may 'set the clock ticking' that the affected party considers the event to be a force majeure event, meaning formal notice should be served under the contract within the specified period.

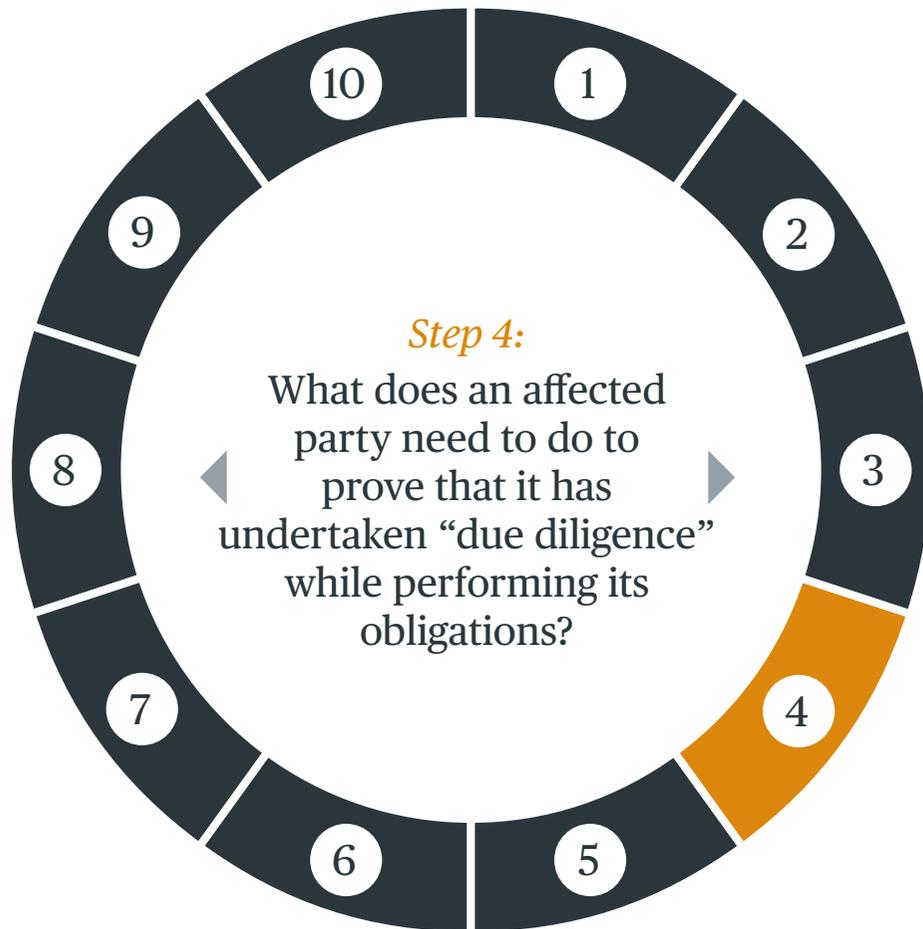
The contract is likely to require that the affected party serves notice of the force majeure event within a specified period. This may be drafted as a contractual obligation to serve notice, or as a condition to claiming relief. Look out for words/phrases such as "provided that" or "conditional upon" - these may indicate that if the affected party fails to serve notice within the required period it loses its right to claim relief, unless it is able to prove that its ability to notify the other party was also affected by the force majeure event. The affected party must follow the requirements of the notice provision meticulously, including who the notice should be addressed to, how it should be sent, and information it needs to contain.

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Act in accordance with requirements of due diligence in contractual relations of a given type Document (by collecting detailed evidence regularly and scrupulously) the impact of the force majeure on the possibility of performing a given obligation properly (e-mails, analysis, internal notes, reports, etc.)

Once a force majeure event has been established, the steps an affected party has to follow to claim relief will depend on what the contract says. Generally, we find the affected party is not liable for improper performance or non-performance to the extent that such improper performance or non-performance is justified by force majeure.

In general, if contractual liability is not extended, the affected party is not liable for improper performance or non-performance of an obligation if it has undertaken “due diligence” while performing its obligation. The Polish Civil Code sets out the measures required to determine due diligence from the debtor.

Under the Polish Civil Code, the debtor is obliged to show diligence which is generally required in the relations of a given kind (due diligence). Generally, according to legal doctrine, due diligence is often understood as a specific course of action which leads to performance of the obligations. It is a certain model, a model constructed from the rules of conduct (duties). It is a positively evaluated procedure; the term “due diligence” is a synonym for such words as: careful, preventive, prudent (anticipating), prudent, careful, reasonable.

On this basis, if the affected party wants to relieve themselves of liability on the grounds of force majeure, it has to prove due diligence while performing its obligations.

Additionally, we need to remember that mere occurrence of force majeure does not relieve the affected party of its liability. The key is the existence of a causal link between the non-performance of the contract (or improper performance) and this occurrence of force majeure and proving it.

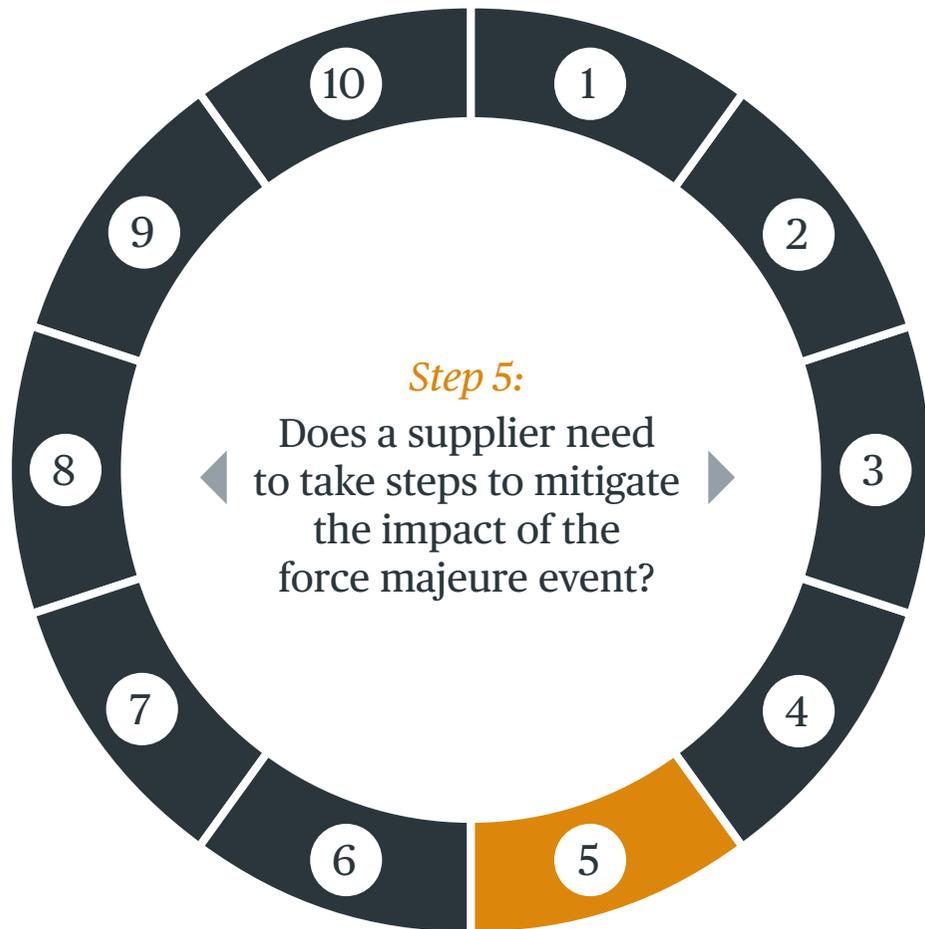
An affected party who fails to perform an obligation as a result of force majeure must prove the occurrence of the state of force majeure, which consequently makes the performance of the contract (or part of it) impossible at the time, or permanently. Therefore, in case of a possible dispute between the parties, it is worth taking care to document (by collecting detailed evidence regularly and scrupulously) the impact of the described state on the possibility of performing a given obligation properly (e-mails, analysis, internal notes, reports, etc.).

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Check the contract

Act in accordance with requirements of due diligence in contractual relations of a given type

As mentioned above, the affected party needs to exercise “due diligence” when performing its obligations. In other words, if the affected party has caused damage as a result of its own negligence, without exercising due diligence or due to willful misconduct, the damage cannot be considered to have been caused by an unintentional force majeure event.

As a result, the affected party must show it has exercised due diligence to avoid liability for non-performance or improper performance of an obligation. Polish case law has acknowledged that in practice the application of due diligence consists of:

- in the selection of a model which determines the optimal way of proceeding, adequately specified and socially approved in given conditions, and then
- in comparing the debtor’s behaviour with such a standard of proceeding.



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- Check the contract (in particular provisions regarding expiration, termination or withdrawal)
- Follow Polish Civil Code if the contract does not provide for the above provisions (in particular provisions regarding extraordinary change of relationship, statutory right to withdraw or impossible performance)

Polish Civil Code

An entitlement to force majeure relief generally means that the contract is still binding, but the affected party is exempted from contractual liability, including damages, in relation to its non-performance or improper performance of an obligation.

The protective mechanisms for failing to perform due to force majeure may include (depending on a case):

- lack of an obligation to pay compensation or contractual penalties,
- and the possibility of requesting a change in the terms of the contract or its termination on the basis of a so-called "extraordinary change of relationship clause".

Impossible performance

The furthest-reaching effect of force majeure is the impossibility of providing the performance. According to the Polish Civil Code, if the performance of an obligation has become impossible due to circumstances for which the debtor is not liable, the obligation expires.

In the case of mutual obligations, if one of the performances has become impossible due to circumstances for which the debtor is not liable and the obligation expires:

- the party who was to provide that impossible benefit cannot claim a counter-performance, and
- if it has already received such counter performance, it is obliged to return them in accordance with the provisions on the unjust enrichment.

In the situation when there is a partial impossibility to perform, the party whose performance has become partially impossible loses the right to the corresponding part of the consideration. In such a case, the other party may withdraw from the contract if the partial performance would be irrelevant to it.

Continuation of step 2



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Statutory right to withdraw

In the absence of a reservation of the right of withdrawal in the contract, the Polish Civil Code provides that if the party obliged to perform declares that it will not perform, the other party may withdraw from the contract without setting an additional period, even before the arrival of a fixed period of performance.

The creditor may exercise the right of withdrawal irrespective of the state of the debtor's delay. In the case of withdrawal from the agreement, it is worth taking into account the issues of advance or deposit settlements. If the non-performance of the agreement is due to circumstances for which neither party is responsible, the parties will, as a rule, have to return the abovementioned benefits to each other.

Provisions of the contract

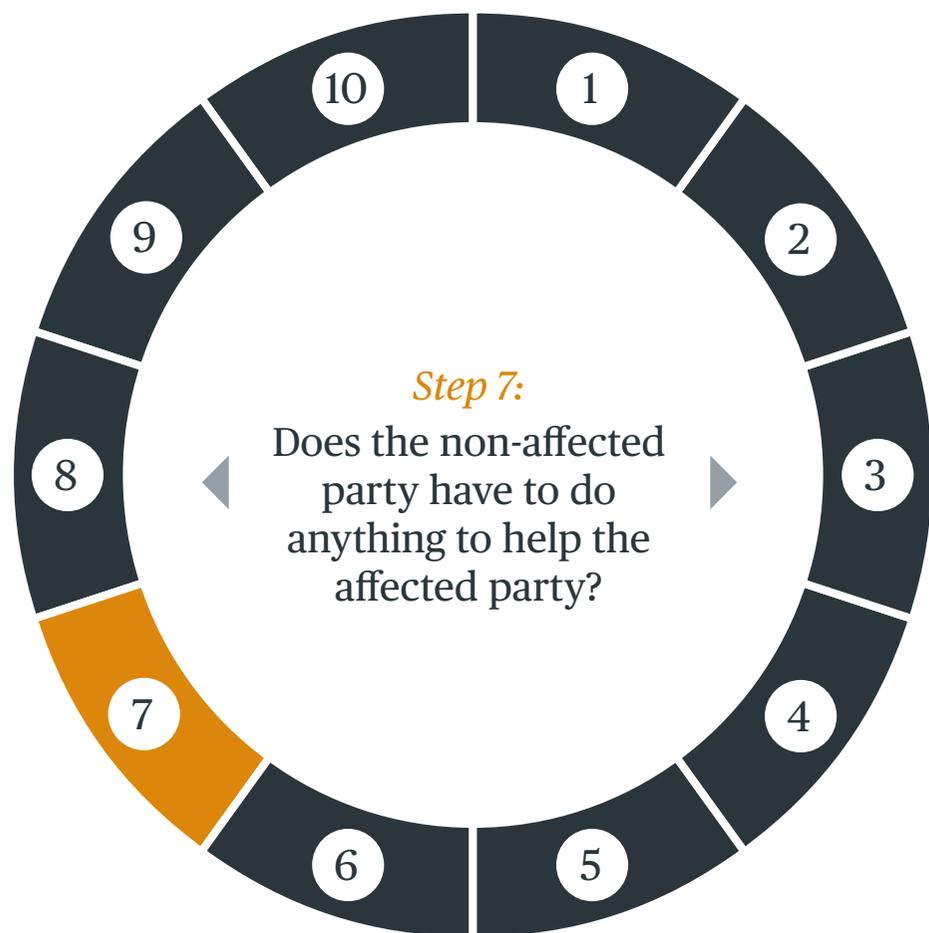
If the "force majeure" clause is invoked, the contract in most cases may provide for:

- expiration,
- termination, and
- withdrawal.

In such a situation, a thorough analysis of the contract will allow to determine and assess the contractual rights (expiration of the contract, termination, withdrawal), the way of proceeding (e.g., the need to notify the other party), or the consequences of the actions taken (e.g., payment of a contractual penalty).



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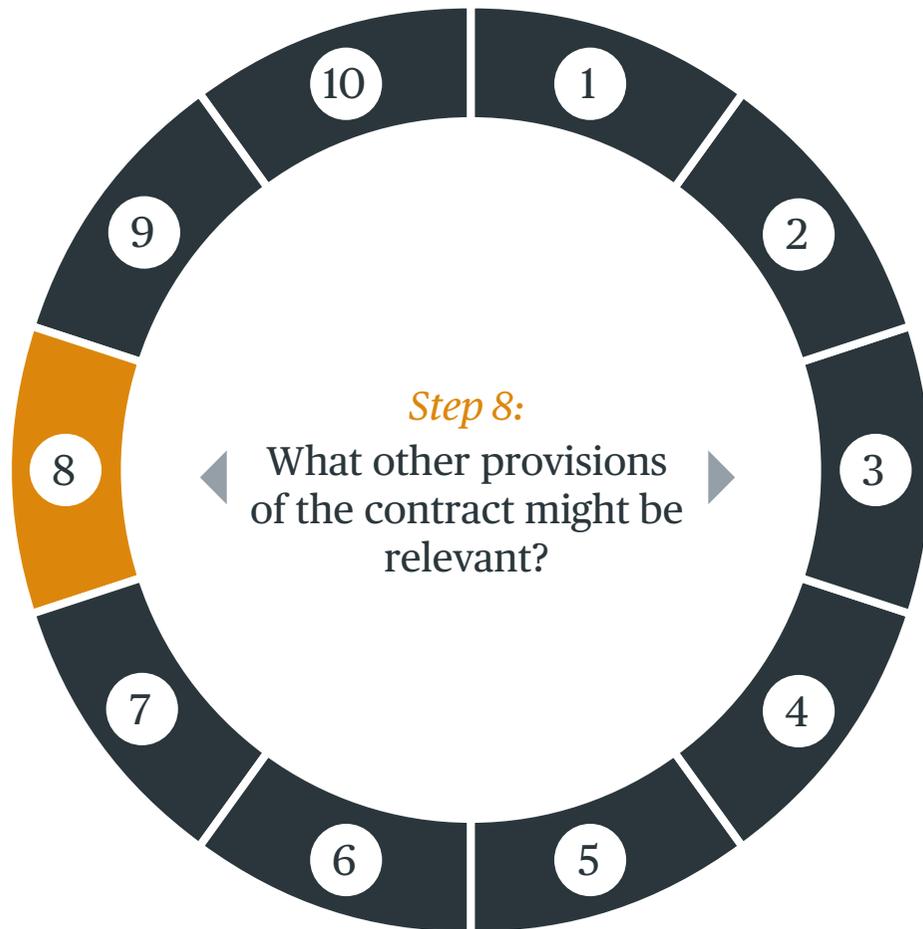
Check the contract

This will depend on the contract. The non-affected party may have a contractual obligation to help the affected party to mitigate the impact of the force majeure event.

The Civil law does not introduce any specific obligations with this regard.



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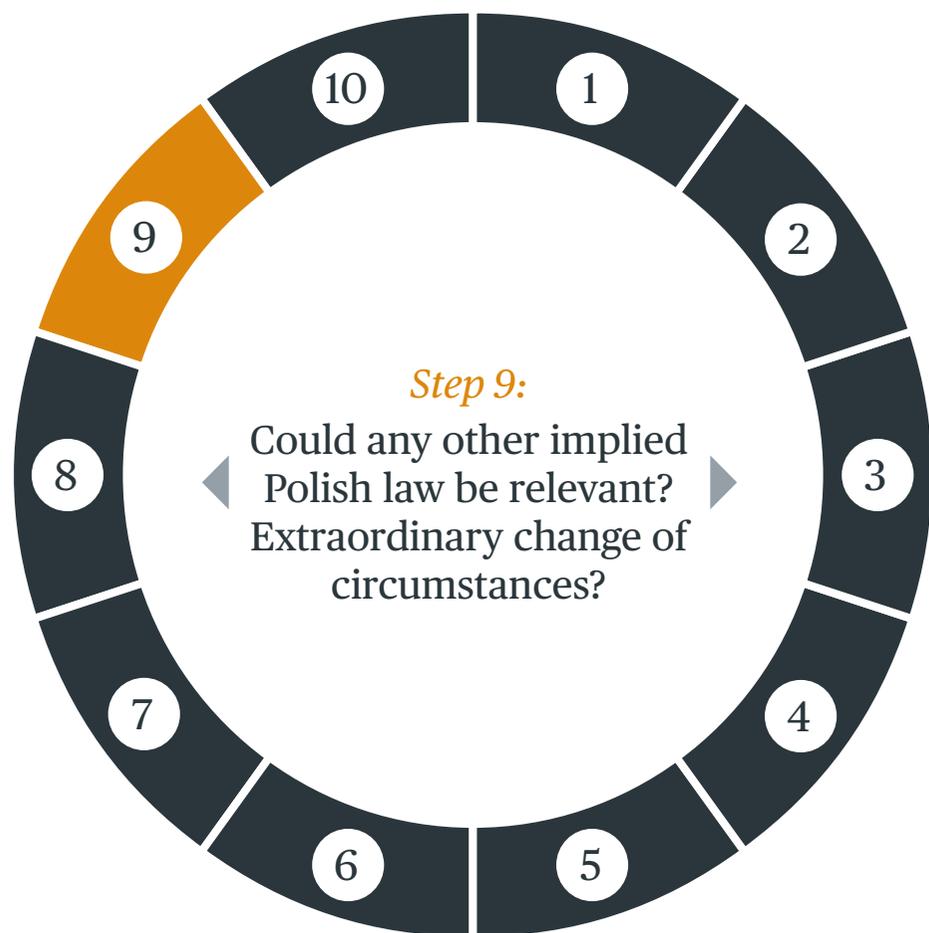
Check the contract in relation to the below clauses

We suggest taking a holistic view of the entire contract. The following clauses may be particularly relevant:

- **Payment** - any rights for the customer to withhold payments if obligations are not performed (even if due to force majeure)?
- **Suspension/hardship** - any rights for the affected party to suspend its performance (e.g., due to economic change or under an express 'hardship' clause)?
- **Termination** - any compensation payable for termination for force majeure?
- **Change in law** - many countries are introducing new laws to deal with COVID-19 which could involve more costs in the performance of obligations. How is this risk dealt with? How is "applicable law" defined for the change in law clause and does this cover guidance and legislation? For example, if a factory is in Italy and Italian law impacts costs of performance, does this still trigger a change in law price adjustment if the contract is governed by Polish law?
- **Material adverse effect** - are there any clauses entitling a party to terminate the contract if there is an event that has material adverse consequences or means that the contract would be loss making?
- **Health & safety** - can the supplier still comply with health & safety regulations and guidance that it may be contractually bound to comply with?
- **Key personnel** - are specific people earmarked for particular obligations?
- **Notice clause** - ensure compliance in order to ensure that notices are valid and can be relied upon.
- **Variations** - any amendments agreed due to COVID-19 will need to be made in accordance with any variations clause (which may require variations to be in writing).
- **No waiver** - a no waiver clause does not necessarily protect a party from post-breach inaction. A non-breaching party should still reserve its rights and remedies and notify the party in breach by formal contractual notice.
- **Dispute resolution** - which may include a clause which includes the parties' agreement to resolve any dispute on a staged basis.



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Follow Polish Civil Code regarding extraordinary change of circumstances

Polish law recognises the provisions of extraordinary change of circumstance (*rebus sic stantibus*), which can be also considered as an additional path to deal with changing the contract and limiting the contractual liability.

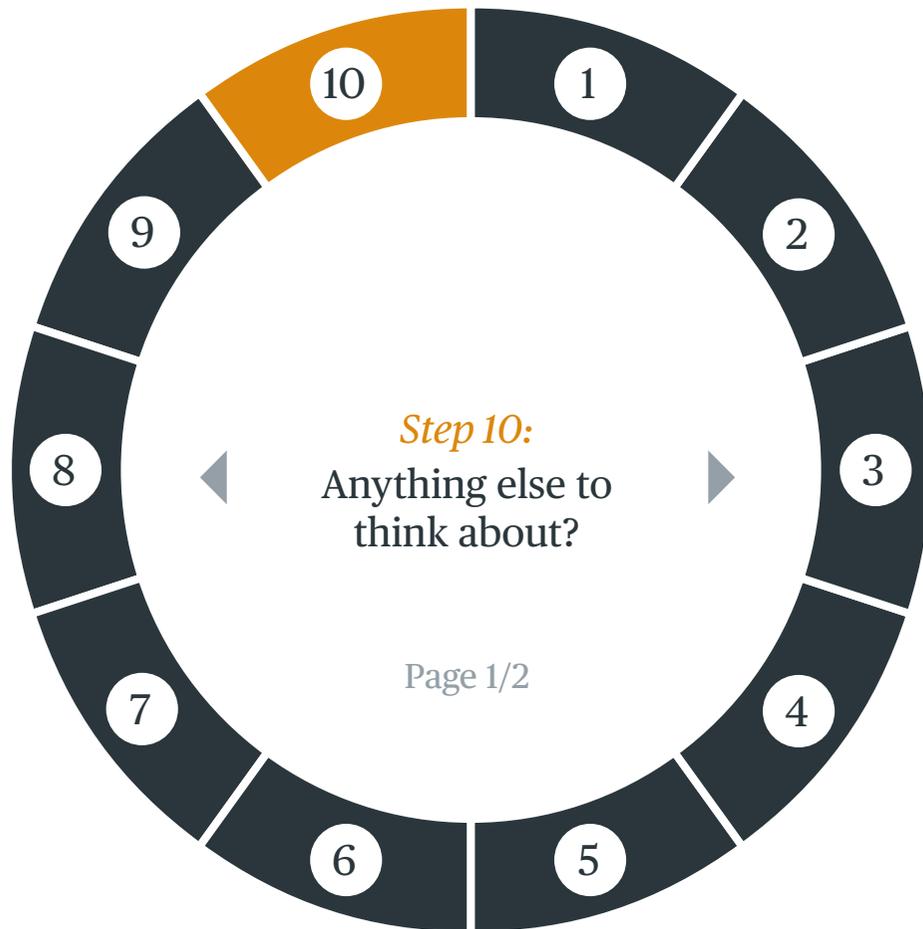
In the event of extraordinary and undue circumstances, a change in the circumstances occurs. In case of disagreement on the change of the provisions of the contract, it is possible to consider bringing an action under Article 357(1) of the Polish Civil Code with reference to the clause *rebus sic stantibus* - extraordinary change of relations.

The court may, after considering the interests of the parties, in accordance with the principles of social coexistence, determine:

- the way of performance of the obligation,
- the amount of the benefit, or
- decide to terminate the contract (when terminating the contract, a court of law may, where necessary, rule on the settlements between the parties).



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Check the contract and consider what clauses may help/hinder (in particular follow the contractual process for notification)

Follow the special Polish legislation regarding COVID-19

1. Follow the special legislation regarding COVID-19 in Poland. In particular please refer to the Act on Special Arrangements for the Prevention, Counteraction and Combating of COVID-19, Other Infectious Diseases and the Crisis Situations Caused by Them dated 2nd March 2020 and other specialist acts adopted by the Polish legislator in relation to COVID-19.

For example, the Polish legislator adopted (or is going to adopt within a few days) provisions regarding facilities for certain economic sectors (so-called “Anti-crisis Shield”):

- Entities which operate airports, railway stations, air, rail or road carriers are exempt, under the law, from liability for damage caused in connection with the actions of public authorities to counteract COVID-19 and, in particular, for lack of transport capacity.
- The provisions of the public procurement law shall not apply to service or supply contracts necessary to counteract COVID-19 if there is a high probability of rapid and uncontrolled spread of the disease or if the protection of public health requires it.
- Parties to the public procurement contract shall inform each other of the impact of circumstances related to the occurrence of COVID-19 on the proper performance of this agreement, if such impact occurred or may occur.
- The awarding entity, after stating that the circumstances related to the occurrence of COVID-19 may affect or influence the proper performance of the public procurement contract may, in agreement with the contractor, amend the contract, in particular by: (i) changing the date of performance of the contract or its part, or temporary suspension of performance of the contract or its part, (ii) a change in the way supplies, services or works are performed or (iii) a change in the scope of the contractor’s performance and a corresponding change in the contractor’s remuneration; provided that the increase in remuneration caused by each subsequent change does not exceed 50% of the original contract value.

2. Follow the contractual process for notification meticulously.
3. Take a holistic view of the contract’s analysis - consider what clauses may help/hinder and do not forget to look at the boilerplate.

Continuation of step 2



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4. Retain documented evidence of steps you are taking, the reasons surrounding those steps and steps taken to mitigate (and also steps counterparties may be taking if they are the ones invoking force majeure). This could include credible records - including trustworthy public domain information where available - which set out the factual context for the decision in question. It is important to document the alternative options available at the time of performance (or lack of them!).
5. Consider whether you wish to adopt a collaborative/non-adversarial approach to resolve the issue. Early engagement with contract counterparties and a collaborative resolution of issues may be preferable to an adversarial approach.
6. Re-source supply wholly or partially - risks can be reduced or removed if you have a viable alternative which can be implemented quickly. Consideration should be given to the lead times for re-supply and how these fit with existing inventory. Be careful as re-sourcing may be in breach of existing supply contracts.
7. Recover assets - you may have supplied tools or certain assets may be used under licence. Equally, there may be stock or other materials on site which belong to you. The terms of any applicable contract will strongly influence your ability to recover these items.
8. Ensure you make all required third party notifications in timely fashion (including insurance, industry regulators, etc.).

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UK

Elizabeth Reid

Partner

elizabeth.reid@twobirds.com

+44 (0)20 7905 6226

Mark Leach

Partner

mark.leach@twobirds.com

+44 (0)20 7415 6106

Sophie Eyre

Partner

sophie.eyre@twobirds.com

+44 (0)20 7415 6642

Lucy England

Partner

lucy.England@twobirds.com

+44 (0)20 7415 6609

France

Jean-Claude Vecchiatto

Partner

jean-claude.vecchiatto@twobirds.com

+33 (0)1 42 68 6070

Jean-Michel Communier

Senior Counsel

jean.michel.communier

@twobirds.com

+33 (0)1 42 68 6020

Alia Jenayah

Associate

alia.jenayah@twobirds.com

+33 (0)1 42 68 6738

Raphaël Weiss

Associate

raphael.weiss@twobirds.com

+33 (0)1 42 68 6337

Germany

Alexander Csaki

Partner

alexander.csaki@twobirds.com

+49 (0)89 3581 6195

Martin Conrads

Senior Counsel

martin.conrads@twobirds.com

+49 (0)40 4606 36176

Italy

Simone Cadeddu

Partner

simone.cadeddu@twobirds.com

+39 06 69 66 70 07

Jacopo Nardelli

Associate

jacopo.nardelli@twobirds.com

+39 02 30 35 63 67

Poland

Tomasz Zalewski

Partner

tomasz.zalewski@twobirds.com

+48 22 583 79 46

Kuba Ruiz

Counsel

kuba.ruiz@twobirds.com

+48 22 583 79 16

Karolina Niewiadomska

Associate

karolina.niewiadomska

@twobirds.com

+48 22 583 79 36

twobirds.com

Abu Dhabi & Amsterdam & Beijing & Berlin & Bratislava & Brussels & Budapest & Copenhagen & Dubai & Dusseldorf & Frankfurt & The Hague & Hamburg & Helsinki & Hong Kong & London & Luxembourg & Lyon & Madrid & Milan & Munich & Paris & Prague & Rome & San Francisco & Shanghai & Singapore & Stockholm & Sydney & Warsaw