



The Legal 500 Country Comparative Guides

Portugal: Force Majeure

This country-specific Q&A provides an overview of force majeure laws and regulations applicable in Portugal.

For a full list of jurisdictional Q&As visit [here](#)

Contributing Firm



VDA

Authors



Frederico Gonçalves Pereira
Group Executive
Partner Dispute Resolution | Litigation & Arbitration
[The Legal 500](#)

fgp@vda.pt



Filipe Rocha Vieira
Managing Associate
Litigation & Arbitration

frv@vda.pt



Marta Martins da Costa
Associate Litigation & Arbitration

mdc@vda.pt



Madalena Reynolds
Trainee Litigation & Arbitration

mbr@vda.pt

1. Is there a legal definition of force majeure in your jurisdiction?

Portuguese law does not provide a general definition of force majeure, although certain provisions of the Portuguese Civil Code make standalone references to force majeure events in the context of specific legal regimes (such as article 505 regarding the exclusion of liability in case of accident due to fault of the affected party or a third party or a force majeure event, article 509(2) regarding liability for damages caused by electric or gas installations, and article 1072(2)(a) regarding a lessee's non-use of the leased property).

2. If there is not, give a brief overview of this concept.

Force majeure is typically characterized by Portuguese legal doctrine and jurisprudence as an extraordinary, inevitable event beyond the control of the parties, which prevents one or both parties from fulfilling their contractual obligations. Typical examples of force majeure include wars, acts of terrorism, revolutions, natural disasters, epidemics, fires, floods and other similar events.

A distinction is usually made between fortuitous events and force majeure events, based on the inevitable (although potentially foreseeable) nature of the former and the unpredictable (but potentially preventable) nature of the latter.

3. Does force majeure allow a party to suspend its obligations? If yes, for how long?

Considering that force majeure is not enshrined in Portuguese law, the consequences of an impossibility to perform, owing to a force majeure event, will depend on what has been expressly provided for in the contract by the parties.

Nevertheless, according to our experience, force majeure clauses normally foresee that when the impossibility to perform is only temporary, the affected party is entitled to suspend and delay the performance of its contractual obligations without incurring liability for the damages caused to the counterparty, for as long as the impediment persists and prevents the performance of the contractual obligations in question.

This is consistent with article 792 of the Portuguese Civil Code, which states that when a contractual obligation becomes temporarily impossible to perform, the affected party shall not be deemed liable for the delay while the impossibility persists. If, however, the creditor loses its interest in the obligation, the impossibility shall be considered definitive and the contract may be terminated, with both parties being relieved from the performance of their obligations. The debtor may also terminate the contract when it is unlikely that the temporary impossibility will cease, and it is unreasonable to demand that he remains bound to perform the contract.

4. Does force majeure allow a party to totally or partially avoid liability for failure or

delay in performing its obligations?

Although this will depend on the content of the force majeure clause in question, these clauses are traditionally intended to exempt a party's liability for failure or delay in performing its contractual obligations due to an event outside of its control which disrupts the normal performance of the contract.

According to our experience, under most force majeure clauses, the affected party will be released from its contractual obligations if its inability to perform due to force majeure is definitive, except in what concerns any ancillary obligations which may still be performed. In such a case, the counterparty shall likewise be released from performing its reciprocal obligations.

5. Does force majeure give a party the potential right to terminate the contract?

The right to terminate the contract due to an event of force majeure will depend on the content of the force majeure clause.

According to our experience, this right is granted whenever the event renders performance definitively impossible or, if only temporarily impossible, whenever the duration of the impossibility exceeds what is deemed reasonable by the parties (the limits of which may be expressly defined in the contract).

It is also common for parties to stipulate contractual mechanisms for the restitution of payments in order to prevent a situation of unjust enrichment. This is the default rule pursuant to article 795(1) of the Portuguese Civil Code, which states that if the affected party decides to terminate the contract and subsequently becomes released from its contractual obligations, the counterparty has the right to demand the restitution of what has been provided (if anything), under the terms of the legal regime governing unjust enrichment.

6. Is the concept of force majeure enshrined in legislation?

As previously stated in our answer to Question 1, force majeure is not defined in Portuguese law and there is no legal framework established for its enforcement as a contractual clause. Therefore, the concept tends to be materialized by legal enforcers and court decisions.

In the absence of a contractual clause on force majeure, Portuguese courts tend to resort to the legal framework on the impossibility to perform.

7. Would the courts be willing to imply force majeure terms into contracts?

Although Portuguese court decisions on this matter are not abundant, it is our understanding that courts are willing to enforce force majeure as regulated by the parties in contractual

clauses, provided that the substance of the agreement does not breach civil law principles such as the principle of good faith, amongst others (i.e., the will of the parties will, in principle, prevail).

The agreement, considered as a whole, may also imply that the parties chose to give effect to a force majeure concept even if they have not expressly included a clause with that intent. If this is the case, the courts will imply the necessary provisions.

When force majeure is not expressly foreseen by the parties or may not be implied by the general terms of the agreement, as mentioned above, courts usually resort to civil law institutes such as the legal framework on the impossibility to perform.

The contractual regime usually featured in agreements has several similarities with said legal regime and, therefore, in one way or another, courts are, indeed, willing to imply force majeure terms into contracts.

8. How do courts approach the exercise of interpretation in relation to force majeure clauses?

A force majeure clause will be interpreted as any other contractual clause and will, therefore, be subject to the general rules foreseen in the Portuguese Civil Code to determine the parties' will. Furthermore, and as previously stated, force majeure clauses are subject to civil law principles, meaning that their enforcement will be subject to their conformity with such principles.

In the absence of a legal definition of the concept, courts will adopt a case-by-case approach to determine if the event constitutes force majeure with reference to a certain agreement and clause. As a result, and to remedy the difficulties that could arise from a vague definition of the concept, parties usually catalogue a list of situations that they choose to consider as force majeure.

In what concerns events not included in said list - or clauses that do not specify or establish a list of force majeure events - their inclusion in the scope of the clause will depend on the interpretation of the agreement as a whole and, principally, on an analysis of the contents of the obligations of the parties, the particular risk provisions that the parties chose to bind themselves to and the disturbances that they chose to safeguard.

9. What types of events are generally recognized by courts of your jurisdiction as being force majeure?

Force majeure events recognized by the courts are usually those foreseen in the relevant clause or which have the typical features mentioned above: a factual situation known as being extraordinary, inevitable and beyond the control of the parties.

An analysis of case law reveals that courts have recognized events such as earthquakes, floods, storms, electrical discharges, wars and revolutions, among other events of a similar nature, as potentially constituting force majeure.

The most common instances in which force majeure events treated by Portuguese superior courts have been raised refer to lease agreements, supply of electric power, accidents with vehicles and animals and damages caused by works.

10. What types of events have been dismissed by courts of your jurisdiction as being force majeure?

Portuguese courts tend to dismiss events that could have been avoided or derived from parties' fault as being force majeure. Furthermore, even within the scope of unavoidable events, other elements of the concept must be considered. Therefore, the analysis of case law is very important to grasp the borders of the concept, and consideration should also be given to the relevant legal and contractual framework of the specific event, as it may influence the result.

For instance, in December 2007, the Supreme Court of Justice did not qualify the diversion of rainwater runoff due to works as force majeure, on the grounds that it resulted from the lack of diligence adopted by the construction owner and building contractor.

In October 2008, the court considered a power supplier to be held contractually liable for the interruption of supply caused by a storm, on the ground that this event should not be qualified as force majeure since it is included in the specific risks of the business and the necessary means to avoid the negative impacts of the event had not been adopted.

Natural phenomena caused or magnified by human action may also be excluded from the concept. In November 2009, regarding a case of potential breach of safety conditions at work, the Portuguese Supreme Court ruled that a landslide was not considered force majeure since the conditions of operation of a quarry had enhanced the risk of this natural disaster.

In November 2010 the Portuguese Supreme Court ruled that the lessee's bankruptcy or declaration of insolvency does not qualify as force majeure to prevent the right of termination of a lease agreement due to the suspension of activity for over a year.

In what concerns the impossibility to perform regime, if compliance with contractual obligations is still a possibility, even if it has become more burdensome, then courts will resort to other civil law institutes, notably to the legal framework on supervening change in circumstances.

11. Have courts recognized the COVID-19 pandemic as force majeure in your

jurisdiction?

To the best of our knowledge, there is not yet a (public) Portuguese court decision that recognizes the COVID-19 pandemic as a force majeure event.

12. Would a governmental decision or announcement that an event is a force majeure influence courts of your jurisdiction (e.g. force majeure certificates provided by the Chinese Government to Chinese companies during the covid19 pandemic)?

It is unlikely that a general government announcement not backed by the corresponding legislative process would have an influence on Portuguese courts, which are only bound by the Constitution and the Law. It certainly would not automatically bind the Portuguese courts.

Either way, parties in a legal proceeding would always have to present facts that fulfil the concept of force majeure, as previously defined, regardless of any official announcement.

As for governmental decisions on the matter, in our legal system it is unlikely that any such measures would be put in place without a legislative process.

However, it is possible that legislation established by the Portuguese government and Parliament to deal with the pandemic be invoked as a force majeure event in certain circumstances, except when such legislation expressly states otherwise. This is the case, for example, of the Exceptional Regime for the Financial Rebalance of Long-Term Contracts in the Context of the COVID-19 Pandemic, which suspended any clauses and legal provisions in contracts entered into with the State or any other public entity providing for the right of financial rebalance or compensation for loss of revenues, between 3 April (date of the first renewal of the state of emergency) and 2 May (end of the state of emergency), thus preventing private parties from relying on such clauses and provisions in respect of events occurred during this period, and the Limitation of the State's Non-Contractual Liability in the Context of the COVID-19 Pandemic, which sets aside non-contractual liability of the State (as compensation for sacrifice) for any damages caused by acts of the State or any other public entity aimed at preventing and fighting the COVID-19 pandemic, provided that those acts are duly performed within the scope of the powers vested by public health and civil defense legislation, or as part of the state of emergency.

13. What is the approach taken to drafting force majeure clauses in your jurisdiction?

From our experience, a typical force majeure clause should:

a) define and/or list the events that excuse performance by a party. The examples listed should be without limitation, so that the scope is not limited to certain typified events and can ramify to other unexpected, although typically related, events in the future;

b) specify the standard (such as “commercially reasonable efforts” or “best efforts”) that must be established to excuse such performance;

c) consider the risk allocation between the parties, resulting from the occurrence of an unexpected and unavoidable event;

d) set forth additional requirements such as notice and mitigation obligations; and

e) specify the consequences of a force majeure event, such as temporary suspension of contractual obligations or termination (when the impediment is or becomes final).

It should be noted, however, that a party’s specific approach to a force majeure clause will vary greatly depending on the nature of the contract, whether the party has performance obligations or is the beneficiary of the performance obligations of the other party—or both—under the contract (services, supply of goods, or others), the specific industry, the relative bargaining leverage and other relevant considerations.

In light of the current COVID-19 pandemic, and its possible future recurrence or the emergence of any other pandemics, epidemics, outbreaks of infectious diseases or any other public health crises, etc., we have been including express references to these situations in the examples of force majeure events.

Finally, it should be noted that the choice of governing law and of dispute resolution provisions may also impact the drafting of force majeure clauses, to the extent that they can influence the interpretation (scope, applicability, frustration of purpose) and/or enforceability of such clauses.

14. Is it common practice to include force majeure clauses in commercial contracts?

Yes, it is common practice to include such clauses in commercial contracts.

15. If a force majeure clause is not explicitly provided for in a contract, would a party still be able to rely on force majeure?

A party is entitled to rely on force majeure only if a force majeure clause has been expressly included in the contract.

In the absence of such a clause, the affected party would have to rely on other contractual provisions or legal rules regarding the supervening impossibility to perform due to circumstances beyond the parties’ control, namely those provided for in articles 790 et seq. of the Portuguese Civil Code (or others applicable to specific types of contracts).

16. On whom would the burden of proof lie with when attempting to rely on force majeure?

According to article 342(1) of the Portuguese Civil Code, the burden of proof lies with the party seeking to exercise a certain right, in this case with the affected party attempting to invoke force majeure.

17. What would a party seeking to rely on force majeure be required to show?

Without prejudice to other specific requirements foreseen in the force majeure clause, the affected party seeking to rely on force majeure would be required to show and evidence the following cumulative requirements:

- a) the existence of an event of force majeure as defined in the contract;
- b) that the event of force majeure was a result of external circumstances beyond its control and that there were no reasonable measures it could have taken to avoid or mitigate the effect of the event;
- c) the temporary or definitive impossibility to perform its contractual obligations; and
- d) the direct causal link between the event of force majeure and the impossibility to perform.

A careful case-by-case analysis of the contract and of the impact of the event of force majeure on its performance is thus required.

18. To what extent is a party required to mitigate its position/losses before seeking to rely on force majeure?

The affected party must comply with all obligations it is still reasonably able to perform, and act with a view to mitigating any damages that may be caused to the counterparty.

Although generally provided for in the contract, mitigation duties derive from the general principle of good faith and therefore must always be complied with by the affected party, whatever the content of the force majeure clause.

The affected party should also give prompt notice of the event of force majeure to the counterparty.

19. Are there any hurdles applicable to the reliance on force majeure?

Specific hurdles applicable to the reliance on force majeure depend on the specific contents

of the force majeure clause being invoked.

In any case, the main hurdles relate to the evidence (to be provided by the affected party) that all requirements listed in the answer to Question 17 are met, particularly the effective impossibility to perform on a temporary or definitive basis and the causal link between such impossibility and the event of force majeure.

20. Are there any applicable notice requirements which an affected party would be required to comply with before invoking force majeure?

As soon as the affected party becomes aware of or should have become aware of the impossibility to perform its contractual obligations, it has the ancillary obligation to notify the counterparty of the occurrence of a force majeure event and its subsequent impossibility to perform, within the time period provided for in the force majeure clause or, in the absence thereof and in light of the general principle of good faith, within a reasonable period of time limited by the counterparty's legitimate expectations that the force majeure clause will not be invoked by the affected party.

Failure to give timely notice to the counterparty will not, in principle, preclude the affected party from invoking the force majeure clause, but it may hold the affected party liable for any damages caused to the counterparty as a result of the delayed notification.

21. What would be the impact of force majeure on any prepayments made under contractual arrangements?

In the absence of a contractual stipulation of the impact of force majeure on prepayments made under the contract, article 795(1) of the Portuguese Civil Code shall apply, according to which the creditor against whom the force majeure has been invoked may be relieved from the performance of its reciprocal obligations (except all ancillary obligations which may be performed) and may require the restitution of what (if anything) has been provided, under the terms of unjust enrichment.

22. What other contractual remedies are available to affected parties?

Under the general principle of freedom of contract, the parties may provide for other contractual remedies in the contract, in addition to or in lieu of force majeure clauses, in order to anticipate the risk of the occurrence of events outside their control, within the statutory limits established by article 280 of the Portuguese Civil Code (i.e., legal and physical possibility, determinability and compliance with public order, good morals, good faith and the law), such as hardship clauses, material adverse change clauses, sole remedy clauses and others.

Additionally, and unless expressly excluded in the contract under terms compatible with the limits of private autonomy, the parties may resort to other civil law institutes, namely to the

legal framework on impossibility to perform or supervening change in circumstances, depending on whether the contractual obligations have become excessively burdensome or effectively impossible to perform, respectively, amongst others.

23. What effect does force majeure have on consumer contracts? When can a producer or retailer effectively rely on this concept?

Portuguese consumer law does not expressly regulate force majeure. Therefore, the parties would have to expressly foresee in the consumer contract the producer or retailer's right to suspend or avoid compliance with the contract due to the occurrence of an event of force majeure and detail the applicable consequences. Otherwise, the general civil law applies.

24. Does force majeure provide adequate protection for consumers?

In addition to the rights established under Portuguese consumer law that may, in principle, provide protection in a force majeure event, such as the defense of consumers' economic interests, consumers can access the general remedies available to affected parties mentioned in our answer to Question 22 above.

Furthermore, it should be noted that consumer contracts are subject to the general contractual clauses regime, which provides additional protection, namely against commercially unfair or hostile clauses such as those contrary to the principle of good faith, contractual provisions that are too broad or vague, that exclude the responsibility of the provider to an unreasonable extent or that set excessive or disproportionate timelines / deadlines. Thus, the force majeure clause itself may be subject to restrictions and should be drafted in a way which assures that consumers' rights are safeguarded.

Moreover, the Portuguese legal framework comprises a special regime for essential public services, such as the provision of water, energy, transportation or electronic communications. Under this regime, the provision of essential public services cannot be suspended without adequate notice, except in cases of force majeure.

Due to the COVID-19 pandemic, Portugal devised a temporary legal framework for essential public services. Until 30 September 2020, service providers are not allowed to suspend the supply of water, electricity, natural gas and electronic communications when the suspension is motivated by unemployment, a decrease in household income equal to or greater than 20%, or infection by COVID-19.

25. What type of insurance policy could cover force majeure events in your jurisdiction?

Broadly speaking, different types of insurance policies may exclude from their scope of coverage, totally or partially, claims arising from force majeure events. As such, this analysis needs to be carried out on a case-by-case basis, since coverage may vary even within the same type of insurance, depending on the insurer. Mandatory insurance policies contain

fewer exclusion clauses and force majeure, strictly defined, is generally not one of them.

Moreover, other types of exclusions contained in insurance policies, although referred under a different name, may indeed correspond to a force majeure event, such as acts of war, fires, storms, earthquakes, cyclones, volcanic eruptions, epidemics, etc.

The insurer and the policyholder may agree to include in the coverage, or at least not exclude from it, force majeure events, with this feature being more common in specialist policies specifically designed to provide cover for those events and which address, in a tailor-made manner, the needs of the insured.

26. Are there any plans for reform in your jurisdiction, in terms of enacting new legislation or amending existing legislation (both for the short-term and long-term), to assist parties with force majeure, given the recent COVID-19 pandemic?

Exceptional pieces of legislation have been passed as a reaction to the pandemic, but there has not been any formal legislative act aimed at assisting parties with force majeure for contracts in general.

Considering the breadth of solutions provided by Portuguese legislation, particularly the Portuguese Civil Code, it is unlikely that the legislator will further detail this legislation to assist parties with force majeure in relation to the COVID-19 pandemic, although that possibility cannot be ruled out.