FORCE MAJEURE AND COVID-19
A GUIDE FOR SUPPLIERS IN THE GARMENT INDUSTRY

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Due to the global coronavirus pandemic known as COVID-19, some brands may cancel or refuse to pay for orders by claiming that COVID-19 constitutes an event of "force majeure". But what is "force majeure", and what steps can you (as a supplier) take to protect yourself and your business where a brand cancels or refuses to pay on this basis?

This note explains the concept of force majeure as it relates to COVID-19 and contracts between brands and suppliers in the garment industry. It also provides a list of suggested action points for when a brand invokes force majeure, and details of force majeure legislation in some key European jurisdictions.

What is force majeure?

Force majeure may excuse a party to a contract from performing some (or all) of its obligations under the contract following the occurrence of certain events (often called "force majeure events") which are outside of its control.

Given that parties are generally free to negotiate their own force majeure clauses, and that force majeure protection is implied into contracts in some jurisdictions but not in others, ***the scope and applicability of force majeure must always be assessed on a case-by-case basis,*** in accordance with the specific wording of the clause at issue and the governing law of the contract.

Are the rules on force majeure the same in every country?

It is important to note that ***the rules and effects of force majeure differ by jurisdiction***.

In **England**, for example, "force majeure" is not a recognised term under the law. This means that a party will not be able to rely on force majeure unless their contract explicitly contains a valid force majeure clause specifying what events are to be covered and what the effect on the contract should be.

However, in other jurisdictions (like **France**, for instance), "force majeure" is written into national law. Though parties may still draft their own force majeure clauses, if their contract does not contain a force majeure clause (or if this clause is invalid), then default provisions under national law may still apply.

It is therefore ***very important that you check the governing law of your contract to determine which rules around force majeure apply to your contract***. Often, governing law will be set out in the contract itself, and in such case will likely have been specified by the brand/retailer as the jurisdiction in which they are based or have significant operations. However, if the contract does not specify governing law, then the governing law may be the jurisdiction in which the garments are made, or else where the supplier or the brand are based.

Please see **Appendix 1** for details of the rules on force majeure in certain key European jurisdictions.

Is COVID-19 a force majeure event?

Typically, a contract containing a force majeure clause will include a list of circumstances that constitute force majeure events. If this list includes "**pandemic**" or "**epidemic**", then COVID-19 will likely be considered a force majeure event under the contract.

However, depending on the wording of the force majeure clause in question, the scope of "pandemic" or "epidemic" may either be restricted to the direct effect(s) of COVID-19, or else may broadly cover COVID-19 *and its wider legal consequences.* For example, where a force majeure clause is drafted narrowly, it may only apply to obligations that cannot be fulfilled because the people involved have fallen ill with the virus. If, however, the force majeure clause is drafted more broadly, then it would likely apply to obligations that cannot be fulfilled due to a range of other consequences arising from the pandemic, such as restrictions on transport, suspension of trade, or closure of retail operations.

Even where the force majeure clause is drafted more narrowly, where the list of circumstances that constitute force majeure events includes "**government action**", "**government acts**" or "**state regulations**" (or similar), then the consequences of COVID-19 may constitute a force majeure event in any case (for example and as noted above, where COVID-19 has resulted in government action to suspend trade or to close retail operations).

If this list of events does not specifically include "pandemic", "epidemic" or "government action" (or similar) then the question of whether COVID-19 (and its consequences) qualifies as a force majeure event will need to be **assessed on a case-by-case basis** considering the wording of the force majeure clause. Where force majeure events are simply described as events that are "beyond the control of the parties", COVID-19 will likely qualify as such an event.

When is a force majeure event "beyond the control" of the affected party?

Generally, a party cannot be excused for non-performance under a contract due to an event of force majeure unless the event in question is beyond the party's control.

This typically means that there must have been **no reasonable steps that the affected party could have taken to avoid or mitigate the force majeure event or its consequences**. Depending on the wording of the clause, this can be quite a high bar to reach. For example, where a contract specifies that a party must be "prevented" from fulfilling its obligations under the contract, this usually means that the obligations must have been "**impossible**" to perform. ***Therefore, a brand cannot rely on force majeure to get out of a contract that is merely difficult or less profitable***. Force majeure is not a cure for a contract that is no longer practical or economically viable for a brand or retailer.

Additionally, **many force majeure clauses exclude foreseeable/foreseen events** (as noted above, this may depend on the exact wording of the force majeure clause, but could also include the consequences of such events). Foreseeability is determined by reference to the time when the contract was entered into. For contracts entered into before COVID-19 began to be reported on in the international media, the current pandemic is likely to be considered "unforeseeable". However, if your contract was entered into more recently, then COVID-19 (and the consequences of COVID-19, such as government action to suspend trade or to close retail operations) may be considered foreseeable, and therefore force majeure may not apply.

What are the effects of force majeure?

The consequences of force majeure (including the extent of any obligation to mitigate such consequences) will ***depend on the express terms of the force majeure clause***. Typically, however, the effect of a force majeure clause can include one or more of the following:

- **Suspension of obligations**: Typically, a force majeure clause will suspend the ***affected*** obligations under the contract until the force majeure event subsides (note: a force majeure clause will not usually extinguish these obligations unless the parties have agreed otherwise under the contract). Note that ***a force majeure clause will not automatically suspend the payment obligations under a contract,*** it will only suspend those obligations that the party is actually prevented from performing by the event of force majeure. Payment obligations will continue during a force majeure event unless the clause is specifically linked to a provision relating to suspension of payment or otherwise expressly says so.

- **No liability for non-performance**: If and once the force majeure clause has been triggered, a party will not be liable for non-performance or delayed performance of the obligations that it is prevented from performing, normally for so long as the force majeure event continues.

- **Right to terminate**: Some force majeure clauses allow either or both parties to terminate the agreement after a specific period of time. This will depend on the wording of the force majeure clause.

What are my options where a brand invokes force majeure?

If a brand has invoked force majeure (e.g. to cancel or refuse to pay for an order), then you may consider taking one or more of the following steps:

1. Check your contract

- What does your contract look like?
    - Your contract might consist of a "sale of goods agreement", which would look and feel like a traditional contract and would likely have been signed by you and the brand around the date of your first order. However, it's also possible that the brand may have given you a set of terms and conditions instead, which you may or may not have been required to sign. These terms and conditions (which might also be called contracts, supplier handbooks, terms of trade or otherwise) may have been provided to you at the time of your first order or prior to you being issued a purchase order or a letter of credit, or possibly through the brand's buyer/supplier portal. The terms may also have been attached to the order forms for subsequent orders if, for example, they have been updated since the start of your relationship with the brand. The terms are likely to be standard across the brand's business, and will apply to all orders made between you and the brand. Either of the sale of goods agreement or the terms and conditions might contain a force majeure clause (though the order forms themselves likely will not).

- Does your contract contain a force majeure clause?
    - If so, then check what this clause says. Remember that in many jurisdictions, a brand will not be able to suspend its payment obligations or terminate the agreement due to force majeure unless the clause specifically states that it may do so, as these obligations are rarely "impossible" to perform.
    - Where a brand is claiming that it cannot perform any obligations apart from those relating to payment (e.g. quality control tests), then check whether these are actually *obligations* under the agreement (in which case they will likely be expressed as "*the brand will/shall perform*") or whether they are merely *rights* (which will likely be expressed as "*the brand may perform*"). Force majeure only affects obligations, and so a brand will not be able to refuse or cancel orders where it is merely choosing not to exercise a particular right.

- Check whether the force majeure clause contains any notice requirements (e.g. a brand could be required to give you 30 days' notice in writing of its inability to perform its obligations). Where the brand has not complied with these requirements, it may not have validly invoked force majeure.

- Does your contract **not** contain a force majeure clause? If there is no force majeure clause in your contract, then depending on the governing law, the brand may not be able to rely upon force majeure at all, or else default rules in national legislation may apply (in which case, it will be up a court to decide whether the brand has satisfied the relevant criteria for force majeure).

- Check the date of your agreement. If the agreement was entered into after COVID-19 became widely publicised in the media, then it's possible that the brand may not be able to rely on force majeure at all, as the event will have been "foreseeable" at the time the contract was entered into. This will depend on the wording of the clause.

2. Write a letter to the brands

- In many jurisdictions, where a brand invokes force majeure, the burden will be on them to prove the scope of the force majeure clause and whether their particular situation falls within this scope.
- You can write to the brand and ask them to explain:
  - How they justify the use of force majeure in the context of COVID-19 and based on the terms of the contract.
  - What steps they have taken to mitigate non-performance of their obligations. Remind the brands that they cannot refuse to pay for orders simply because it may be difficult or unprofitable – it must be "impossible" for them to do so.

3. Write down/keep as much information as you can

- Write down as much information as possible – take note of all relevant dates and times (e.g. when the brand stopped paying, dates/times of any phone calls, bills of loading, purchase orders, letters of credit, etc.). Takes notes during any phone/video conversations you have with the brands. If possible, speak to other suppliers to see whether the brands have invoked force majeure with them as well – the more information you have, the better.
- Keep copies of all letters, emails and other written correspondence that the brand sends you or that you send to the brand. These could be useful where, for example, you initiate legal action.

4. Seek legal advice

- See if you can obtain legal advice or consult a lawyer. There are many free resources available (such as legal aid and pro bono clinics) that may be able to assist you – even during a global pandemic. It is possible that the threat of legal action may even prompt the brand to start fulfilling its obligations under the contract.

Appendix 1: Key Jurisdictions and Force Majeure

Parties are free to draft their own force majeure clauses, and where a contract contains a force majeure clause, this wording will generally prevail over any national legislation in force. However, if a contract does not contain a force majeure clause, or if a force majeure clause is found to be void (e.g. if it is unfair or unreasonable), then in certain jurisdictions, the default provisions on force majeure under national legislation may apply.

The following table examines force majeure in seven key jurisdictions and sets out the provisions of national law relating to force majeure events, where applicable.

Jurisdiction	Is there national legislation on Force Majeure?	If so, what are the requirements under this legislation?
England and Wales	No - the term "force majeure" has no recognised meaning in English law. As a result, use of this term alone in an agreement, with no accompanying definition, is unlikely to be effective. For example, a clause stating that the "usual 'force majeure' clauses shall apply" has been held void for uncertainty.	N/A – force majeure must be defined by the parties to the contract and the consequences for each party if there is an event of force majeure must be set out.
France	Yes – see Article 1218 of the Civil Code.	Article 1218 states: *"In contractual matters, there is force majeure when an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and which effects cannot be avoided by appropriate measures, prevents performance of his obligation by the debtor.* *If the impediment is temporary, the performance of the obligation is suspended unless the resulting delay would justify termination of the contract. If the impediment is permanent, the contract is automatically terminated, and the parties are free from their*

Jurisdiction	Is there national legislation on Force Majeure?	If so, what are the requirements under this legislation?
		obligations pursuant to the conditions laid down in articles 1351 and 1351-1."
Germany	Force majeure events are not directly regulated under German law. However, under German law, such events can be subject to statutory provisions on impossibility of performance (Section 275 German Civil Code), and provisions dealing with circumstances where the events in question interfere with the basis of the transaction (Section 313 German Civil Code).	Section 275 states that performance of the obligations under a contract is excused to the extent that it is impossible for the obligor or for any other person to perform such obligations. The obligor may also refuse to perform its contractual obligations to the extent that these require unreasonable expense and effort. Section 313 states that if the circumstances forming the basis of the contract have significantly changed, the contract may be amended (if possible) or terminated if one of the parties cannot reasonably be expected to uphold the contract. The party claiming force majeure relief has to prove that it has taken all necessary and reasonable steps to avoid the effects of the force majeure event.
Italy	Under Italian law, there is no statutory definition of **"**force majeure". However, Section 1256 of the Italian Civil Code contains a general rule on impossibility of performance.	Section 1256 states: "*The obligation is extinguished when performance becomes impossible for a reason not attributable to the debtor. If the impossibility is temporary, the debtor is not responsible for the delay in performance as long as the impossibility lasts. However, the debtor is relieved from its obligation if the impossibility persists until, in relation to the title of the obligation or the nature of its subject, the debtor can no longer be considered to be obliged to perform or the creditor no longer has an interest in performing".* Law Decree 18/2020 makes specific reference to COVID-19, and provides as follows: *"the debtor's respect for the measures relating to the containment of COVID-19 will be taken into*

Jurisdiction	Is there national legislation on Force Majeure?	If so, what are the requirements under this legislation?
		account for the purposes of determining exclusion of liability, pursuant to Articles 1218 and 1223 c.c., even with regard to any waivers or penalties relating to delayed or omitted performance".
Netherlands	Yes - see Article 6:75 of the Dutch Civil Code.	Article 6:75 states: *"A shortcoming cannot be attributed to the debtor if it is not due to his fault, nor is he responsible for it by law, legal act or prevailing views."* Please note also that where a party is not able to adhere to its obligations under an agreement, under Dutch law the other party has the right to terminate the agreement. It is, however, possible to agree otherwise in the contract.
Spain	Yes - see Section 1,105 of the Spanish Civil Code. Whilst parties are free to regulate force majeure clauses in their contracts, Section 1,105 of the Spanish Civil Code will apply mandatorily and by default where they do not do so.	Section 1,105 states: *"Apart from the circumstances expressly mentioned in the law and in those cases excluded by the relevant obligation, no one shall be liable for those events which could not have been foreseen, or which, if foreseen, were unavoidable".*

Jurisdiction	Is there national legislation on Force Majeure?	If so, what are the requirements under this legislation?
Switzerland	Under Swiss law, there is no statutory definition of "force majeure". In the absence of an explicit "force majeure" clause in a contract, the legal consequences will depend on whether the impossibility to fulfil a contract exists for a limited period of time, or permanently. With respect to the Coronavirus pandemic, for most contracts, the impossibility to fulfil will last only for a limited period of time. Where impossibility of performance only lasts for a limited amount of time, the default provisions of Articles 107 to 109 of the Swiss Code of Obligations will apply.	Articles 107 to 109 provide that, in cases where a party is in default, the other party may set an appropriate time limit for the performance to be fulfilled. If there is no performance by the defaulting party during this time period, the other party may withdraw from the contract. No time limit needs be set: 1) where it is evident from the conduct of the defaulting party that a time limit would serve no purpose; 2) where performance has become pointless for one party as a result of the other party's default; and 3) where the contract makes it clear that the parties intended that performance should take place by or before a precise point in time. Where performance of the contract becomes permanently impossible, for example if an event on a particular date can no longer take place due to a prohibition by the authorities, then Article 119 of the Swiss Code of Obligations will apply. The parties' obligations under the contract will be void and the parties will also be released from future obligations they have yet to fulfil. However both parties must return any benefits (e.g. payment) they have received under the contract to the other party.