



Force Majeure or Hardship?

When Conflict Disrupts Contracts in the GCC

The escalation of geopolitical tensions, including the US/Israeli-Iran conflict and broader regional instability affecting the GCC, raises critical legal questions regarding the performance of contractual obligations. As key global energy and investment hubs, GCC states are particularly exposed to the ripple effects of such events, including supply chain disruption, cost escalation, and regulatory responses. While there is little doubt that such developments constitute extraordinary or supervening events, the key legal question is whether they qualify as force majeure or hardship under applicable GCC laws. These doctrines are designed to address non-performance in exceptional circumstances, yet they differ fundamentally in their legal conditions and consequences.

Force Majeure vs Hardship: Legal Distinction

Both force majeure and hardship require the satisfaction of two common conditions:

- Foreseeability: the event must not have been reasonably foreseeable at the time of contracting
- Non-attributability: the event must be beyond the control of the parties

The key distinction lies in the impact on performance:

- Force majeure applies where performance becomes objectively impossible
- Hardship applies where performance remains possible but becomes excessively onerous, typically resulting in substantial or disproportionate loss

This distinction is critical, as it determines whether obligations are extinguished or merely adjusted.

Legal Nature and Consequences

Force Majeure (Civil Law Position in the GCC)

Under GCC civil law systems, force majeure is clearly recognised as a statutory doctrine. Unlike common law systems, it does not depend solely on contractual drafting.

The relevant civil codes expressly provide that where performance becomes impossible due to an external unforeseeable events beyond the parties' control, the obligation is extinguished.

In the absence of contractual provisions, the law itself governs the consequences, which may include:

- Automatic termination of the contract
- Release of the affected party from its obligations

This statutory recognition provides a built-in legal framework but also creates risk. In particular, automatic termination may not align with commercial expectations in long-term or phased developments. As a result, parties often seek to regulate force majeure contractually to manage these outcomes.

Hardship (Civil Law Position in the GCC)

Hardship is also expressly recognised under GCC civil codes and is generally treated as a mandatory legal doctrine.

Where hardship is established:

- The contract remains in force
- Courts or tribunals may intervene to:
 - Adjust obligations
 - Reduce burdens
 - Restore economic equilibrium

Unlike force majeure, hardship reflects a policy objective of preserving contractual relationships, rather than terminating them.

Impact of Geopolitical Events

The legal impact of geopolitical instability extends beyond direct physical disruption and includes:

- Sharp increases in energy and material costs
- Supply chain breakdowns
- Labour and logistics constraints
- Regulatory or governmental measures

These indirect effects are often central to hardship claims, particularly where performance remains technically possible but commercially strained.



Force Majeure Under English Common Law: A Distinct Approach

Parties operating in the GCC frequently elect English law as the governing law of their contracts. This introduces a fundamentally different legal framework.

Absence of a Freestanding Doctrine

English law does not recognise force majeure as an independent doctrine. It is purely a creature of contract, deriving its force and effect from the express terms agreed between the parties.

There is no implied right at common law to be excused from performance due to unforeseen events. As a result, a party seeking relief must rely on an expressly drafted force majeure clause.

Absent such a clause, there is no recourse to force majeure, regardless of how extraordinary the event may be. This stands in clear contrast to GCC civil law systems, where statutory provisions apply as a matter of law.

Interpretation of Force Majeure Clauses

Where a force majeure clause is included, English courts interpret it strictly, applying established principles of contractual construction.

Key principles include:

- Clauses are construed restrictively (*Metropolitan Water Board v Dick Kerr & Co [1918]*)
- The burden of proof lies with the party invoking the clause (*Great Elephant Corp v Trafigura Beheer BV [2013]*)
- The event must be beyond the party's control and not self-induced
- A duty to mitigate is typically implied
- Strict compliance with notice and procedural requirements is essential

Failure to comply with contractual requirements may prevent reliance on the clause altogether.

Force Majeure and Frustration

In the absence of a force majeure clause, parties may seek to rely on the doctrine of frustration. However, this is narrowly applied and requires:

- Impossibility or a radical change in obligation

It does not apply where performance is merely more onerous (*Canary Wharf v European Medicines Agency [2019]*).

Importantly, where a force majeure clause exists, it may preclude reliance on frustration, as the parties are deemed to have allocated the relevant risks.

Practical Considerations for GCC Parties Using English Law

For contracts governed by English law, careful drafting is essential. Parties should:

- Clearly define force majeure events (including war, sanctions, and government actions)
- Specify the required level of impact (prevent, hinder, or delay)
- Include clear notice and procedural requirements
- Address mitigation obligations

- Define the consequences of force majeure (suspension, extension, termination)
- Consider whether alternative performance is acceptable

Burden of Proof

A party invoking force majeure or hardship must demonstrate:

- Satisfaction of the legal tests
- A clear causal link between the event and non-performance
- Whether performance is impossible or onerous

This evidentiary burden is often determinative.

Obligation to Mitigate

Parties are required to take reasonable steps to:

- Minimise the impact of the event
- Explore alternative means of performance

This obligation is grounded in the principle of good faith.

Practical Measures for Contracting Parties

In light of current conditions, parties should:

- Assess whether performance is impossible or merely onerous
- Review contractual provisions and comply with notice requirements
- Document disruption and mitigation efforts
- Engage proactively with counterparties

GCC Legislative Framework

- UAE Civil Code – Articles 249 (hardship), 273 (force majeure)
- Saudi Civil Transactions Law – Articles 97 (hardship), 110 (force majeure)
- Qatar Civil Code – Articles 171(2), 188
- Bahrain Civil Code – Articles 130, 145
- Kuwaiti Civil Code – Articles 198, 214

These provisions reflect a harmonised civil law approach balancing certainty and equitable intervention.

Final Thoughts

The current geopolitical environment highlights the importance of carefully assessing contractual obligations in the face of extraordinary events. While conflicts and regional instability may constitute supervening events, their legal classification as force majeure or hardship is not automatic and requires a detailed, fact-specific analysis.

Under GCC civil law, force majeure and hardship are clearly recognised statutory doctrines, providing a structured legal framework for addressing disruption. In contrast, under English law, force majeure exists only where expressly agreed, and relief depends entirely on contractual drafting. This distinction is critical for parties operating across the region.

Ultimately, parties should not assume that geopolitical events will excuse non-performance. Instead, they must undertake a structured legal and commercial assessment, supported by clear evidence and mitigation efforts. In practice, the allocation of risk is determined less by the event itself and more by the governing law and the quality of the contract.

