



The Legal 500 Country Comparative Guides

Chile: Force Majeure

This country-specific Q&A provides an overview to force majeure laws and regulations that may occur in Chile.

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

Chilean law defines force majeure in Article 45 of the Civil Code as “the unforeseen event that cannot be resisted”.

This definition has been largely discussed by scholars and case law.

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

N/A

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

If the contract does not provide a specific consequence, in principle, force majeure is legally regulated as an exoneration of liability. This means that if one party suffers an event of force majeure, said party will not be liable for damages caused by it. However, scholars and case law has established that force majeure also allows a party to suspend its obligations for as long as the force majeure event lasts.

4. Does force majeure allow a party to totally or partially avoid liability for failure or delay in performing its obligations?

This may be regulated by the parties in a contract. If not, force majeure does allow a party to avoid liability for both failure and delay in performing its obligation insofar said liability is a direct consequence of the event of force majeure.

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

If the contract does not provide anything specific, force majeure might allow the party who did not suffer its consequences to terminate the contract based on the failure or delay of performance of the other party’s obligation. The party who suffers the consequences of the event of force majeure may not terminate the contract but, as said, may avoid liability and suspend its obligation.

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

Yes. Apart from its legal definition, it has also been developed by scholars and case law.

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

When parties do not include force majeure clauses, the legal definition and its consequences apply. Therefore, if no terms are provided courts will apply legal regulation.

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

In general, courts tend to be highly strict when analysing and checking the unforeseeable and irresistible feature of the force majeure event.

Courts in Chile operate on a case-by-case basis and tend to understand that the impossibility feature of the event needs to be absolute and objective for any person who is in that same situation, although there is a tendency to switch to more flexible criteria.

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

Article 45 of the Civil Code explicitly mentions as examples shipwrecks, earthquakes, capture of enemies and acts of authority executed by a public official. Nonetheless, its characterization and ability to be considered as something impossible that cannot be resisted depends on the specific case (an earthquake may be considered force majeure in a context, but not in others). Likewise, acts of authority such as a quarantine, have often been considered as force majeure.

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

There is no consistency as for what events are not considered force majeure. Each individual case must be analysed. To this end, if the parties have not stipulated anything in the contract, the party alleging the unforeseen event must prove that the requirements of force majeure have been met.

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

No, our courts have not yet recognized (nor denied) the Covid-19 pandemic as a case of force majeure, as it is still a very recent phenomenon.

However, there is a general acceptance that the coronavirus pandemic cannot be qualified per se as an event of force majeure itself, because although it is clear that the emergency resulting from the pandemic meets the condition of being an external and unforeseeable event, it is not in all cases an irresistible situation.

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)?

No. Courts are independent from government to determine if an event counts as force

majeure and, in any case, this is analysed on a case-by-case basis.

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

When included, force majeure clauses may provide a more specific definition, or even a different one, than that established in the law, or may specify the effects that follow the occurrence of the event.

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

It is common in more sophisticated contracts. Standard commercial contracts do not necessarily include these types of clauses.

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?

Yes. If the parties do not include a force majeure clause the contract is still subject to the legal definition and its consequences.

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

The party who claims a force majeure event as an excuse for failure or delay in performing its obligation is required to prove it.

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

In general, it has to prove the event itself (unless it is a public and notorious fact) that the event was unforeseen and irresistible.

However, a criterion of reasonableness also tends to operate, mainly in more sophisticated commercial contracts, where these assumptions have been more regulated and the parties often incorporate clauses regulating cases of force majeure and their effects, with force majeure often referring to consequences that cannot reasonably be avoided.

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

In general terms, there is a principle in our legislation to mitigate the effects of force majeure that derives from the general principle of good faith that parties must observe. This is also related to reasonableness, and in more sophisticated contracts the parties expressly regulate it as an obligation to mitigate the damages that can reasonably be expected.

For the affected party, it is quite possible that the contract contains an obligation to mitigate the effects of force majeure, and even if it does not, given the principles of good faith it is advisable to do so. For the same reason, a proactive and collaborative attitude is always convenient.

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

Besides the fact that proving the occurrence of a force majeure event may be somehow difficult, there are no specific hurdles.

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

When regulated in the contract, it is usual to include a notice requirement when a force majeure event occurs. When not, the law does not provide for any notice requirement, but scholars and case law have stated that said notice is required as a form of meeting the burden of mitigating losses.

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

In general, if prepayments were made by the party not affected by force majeure, it may claim the restitution of said payments.

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

The party not affected by force majeure may suspend the performance of the its own obligation based on the failure or delay of the other's. If the failure or delay is material, the party not affected by force majeure may claim the termination of the contract.

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

In our consumer protection law, force majeure is not expressly regulated, so the general rules of the Civil Code apply. However, as a result of Covid-19, the National Consumer Service issued an instruction on good practices in order to protect the interests of consumers.

In addition, the National Consumer Service has issued other resolutions to protect consumers during the health crisis, including, for example, suspension of warranty periods, information duties, regulation of distance contracts, risk prevention and protection of consumer life and health.

24. Does force majeure provide adequate protection for consumers?

A distinction could be made. In general, in the case of consumer credit contracts, as they consist in money obligations, they are not affected by any force majeure event, thus the consumer should pay anyway. Legal regulations have not yet been implemented to force banks and retailers to renegotiate loans, for example by granting extensions without increasing interest, as has happened in other countries. That has been left to the goodwill of the parties and some have proposed some formulas.

However, in the case of other consumer contracts such as concerts, flights, travel, and in the specific case of the coronavirus, it should be noted that the National Consumer Service interpreted that all the rights that the consumer has - to ask for refunds, changes, etc. - are suspended during the state of catastrophe decreed in Chile. Therefore, all consumers retain all their rights during this emergency and can claim what they are entitled to when the situation returns to normal.

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

In general terms, there is no specific type of policy for this as it depends on each individual insurance policy.

However, as for the coronavirus it is possible to distinguish mainly two areas for analysis in this matter:

With respect to life insurance, the determining factor will always be the coverage and exclusions contained in the respective policies, without prejudice to the fact that it is typical on this type of insurance that a deterioration in health or even the death of a person as a result of a virus is included in the coverage.

With respect to damage insurance, although there is a presumption of coverage in these insurances, the exclusions contained in the policies are also decisive, since it is possible that epidemics or pandemics are excluded from coverage in certain insurances.

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?

Yes. There is a bill which intends to explicitly recognize material adverse effects (“Teoría de la Imprevisión”, in our legal tradition), since it is a matter not regulated in the Law that has been applied only exceptionally in our case law.