

Japanese Law Explained

Force Majeure in Japan

Force majeure clauses have drawn increased attention in Japan due to natural disasters, the COVID-19 pandemic, and system failures (including cyberattacks). This article outlines how these clauses are generally understood under Japanese law and how they are commonly addressed in Japanese contracts.

1. The Basic Concept of Force Majeure Clauses in Japan

The Japanese Civil Code does not define force majeure (*Fukakoryoku*, 不可抗力); however it is commonly understood as an event arising from an external cause that made contract performance impossible and could not have been prevented even if a party exercised due care and took preventive measures as ordinarily required in business or under generally accepted social norms.

An enforceable force majeure clause may only be triggered by an external and unavoidable event.

Article 415(1) of the Japanese Civil Code provides for compensation for loss or damage due in a contract when one party does not perform:

“If an obligor fails to perform consistent with the purpose of the obligation or the performance of an obligation is impossible, the obligee may claim compensation for loss or damage arising from the failure; provided, however, that this does not apply if the failure to perform the obligation is due to grounds not attributable to the obligor in light of the contract or other sources of obligation and the common sense in the trading practice.”

Force majeure is generally only considered when the event is “not attributable to the obligor.” In addition, even if an event seems to trigger the force majeure clause, it does not mean the obligor is automatically exempt from liability. An obligor is exempt from liability only when the event actually made performance impossible. While “act of God” has a meaning similar to force majeure, an “act of God” is generally limited to natural disasters, whereas force majeure also includes disasters originating from humans, and may be predictable or not.

2. Should You List Force Majeure Events in a Contract?

(1) For a Party with Non-Monetary Obligations

Whether or not a contract lists force majeure events, if an event qualifies as force majeure and causes non-performance, the obligor may be exempt from liability. For this reason, some take the view that it is unnecessary to list specific

force majeure events and that it is sufficient to use a general formulation such as “an event beyond the parties’ reasonable control.”

That said, there is always uncertainty in how a Japanese court will rule, so improving predictability and reducing future disputes is always advised by drafting force majeure clauses as broadly and comprehensively as possible.

(2) For a Party with Monetary Obligations

Under Article 419(3) of the Japanese Civil Code, force majeure does not exempt a party from nonpayment.

For these reasons, detailed force majeure provisions are particularly important for parties with non-monetary obligations, while parties with monetary obligations will want to limit the scope of such provisions.

The exception however is if a party has both non-monetary and monetary obligations under a contract; where, consulting with a legal professional is highly advised.

3. Examples of Force Majeure

(1) Traditional Force Majeure Events

In Japanese contracts, it is common to list force majeure events such as earthquakes, tsunamis, lightning, floods, typhoons, cyclones, volcanic eruptions, terrorism, war, revolution, government regulations, strikes, shortages of electricity, oil, gas, or water, and the inability to use public transportation, port facilities, networks, and the like.

(2) Infectious Diseases

There have long been many infectious diseases, such as SARS, MERS, and avian influenza. However, the COVID-19 pandemic significantly affected economic activity both domestically and internationally, and triggered extensive discussion on force majeure clauses.

Under the above definition of force majeure, an infectious disease may constitute force majeure if it is unavoidable even after implementing infection-prevention measures such as recommended by the Ministry of Health, Labour and Welfare.

For a party with monetary obligations, one reasonable approach is to limit force majeure events in the contract to particularly serious infectious diseases (e.g., Category I and Category II Infectious Diseases under Japan’s Act on the Prevention of Infectious Diseases and Medical Care for Patients with Infectious Diseases). Currently, COVID-19 and seasonal influenza are classified as Category V Infectious Diseases.

(3) System failures / System troubles

System failure causes are categorized as either internal or external.

[External Factors]

A typical external factor causing a system failure are cyberattacks - i.e., a malicious, unauthorized intrusion into computer systems or networks that involves the theft and/or destruction of data or the execution of malicious programming.

For a party with non-monetary obligations, it is important to list cyberattacks as a force majeure event; however, if the damage caused by a cyberattack could have been prevented by taking precautions ordinarily required, the clause may not exempt a party from liability.

It is essential therefore that a party with non-monetary obligations take all precautions as required to avoid any liability stemming from a cyberattack.

In addition, hardware failures caused by natural disasters are also considered external factors that can lead to system failures. In these cases, courts consider if the parties exercise due care and took preventive measures to determine if a force majeure clause prevents a party from assuming liability for loss.

[Internal Factors]

Purely internal issues (e.g., in-house software bugs, aging hardware, human error, or insufficient server capacity) generally do not satisfy the requirement of “arising from an external cause,” and are therefore unlikely to be considered force majeure events.

It is possible however that an externally provided OS/application update damages internal systems of a party and may be considered an “external cause” that satisfies liability protection, but, a court may require that the party followed the relevant technical standards when the damaged occurred.

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