

Contracts may have a well-defined *force majeure* provision or they may simply refer to force majeure without definition or they may make no provision for delayed or prevented performance. Frustration may be available if the performance has radically changed and if a *force majeure* provision does not impliedly exclude the doctrine (see our previous post “Force Majeure, force majeure, with or without frustration”).

Other provisions might apply, such as Art 79 of the United Nations Convention on Contracts for the Sale of Goods, excusing performance prevented by an impediment beyond control, not expected at the time of contract and not able to be avoided or overcome. Similar provisions exist in national laws, such as the US Uniform Commercial Code and Art 1267 of the Philippines New Civil Code, which says “When the service has become so difficult as to be manifestly beyond the contemplation of the parties, the obligor may also be released therefrom, in whole or in part.”

For ready reference, we compare a well-defined *force majeure* provision with frustration in the table below. This is necessarily a summary that cannot capture the nuances in various situations and is intended only as a general guide.

Feature	Force Majeure	Frustration
<b>Source of the Principle</b>	Contract	Common law
<b>Threshold to Be Met to Claim Relief</b>	As defined – often if performance delayed or prevented	Radical change in circumstances
<b>Effect of the Principle</b>	Obligations suspended, deferred	Contract terminated
<b>Party Control Over the Principle</b>	Wide control	No control other than through FM or providing for every possible eventuality
<b>Events Attracting the Principle</b>	As defined	Any event producing the required effect
<b>Performance Affected to Attract the Principle</b>	As defined, often any performance delayed or prevented	Performance of substance of the contract, not merely part
<b>Cost of Performance</b>	Generally does not attract the principle, unless included	Generally does not attract the principle
<b>Foreseeable Events</b>	Generally do not attract the principle	Do not attract the principle
<b>Obligation to Pay Affected</b>	Generally does not attract the principle, unless included	Does not attract the principle
<b>Causation</b>	Must be mainly caused by the FM event, not a non-FM event	Must be mainly caused by the frustrating event
<b>Events Caused By Party</b>	Generally do not attract the principle	Do not attract the principle
<b>Notice Required</b>	As defined – may be condition of relief or not	Not required to claim
<b>Period of Relief</b>	Duration of event or consequences	Contract terminated on the radical change
<b>Flexibility of Principle</b>	High degree	None
<b>Duty to Mitigate</b>	Yes	Yes
<b>Duty to Perform in Alternate Manner</b>	Yes, if reasonable	Yes, if reasonable
<b>Duty to Allocate Among Customers</b>	Generally	No – contract terminated

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