







# COVID-19 as Force Majeure in Aviation Contracts



## Comparative Analysis Across 7 Jurisdictions


*April 2, 2020*

As the COVID-19 pandemic and related decrease in international travel throw the worldwide aviation industry into disarray, an increasing number of businesses in the aviation supply chain are struggling to meet their contractual obligations. As an obvious consequence, many lawyers are looking at force majeure clauses as a last resort to relieve their clients of the most burdensome contracts or elements thereof. Most aircraft lease agreements are governed by English law, with a “hell or high water” clause requiring lessees to make lease payments regardless of whether an aircraft is operating normally or grounded. However, many aviation contracts (related to maintenance, ground handling, rental of airport facilities, charters etc.) are drafted under local laws and are therefore subject to various interpretations of force majeure. DFDL’s team of aviation experts has analyzed whether contractual parties may rely on COVID-19 as a force-majeure event in seven of the firm’s jurisdictions across Southeast Asia.

DFDL Jurisdiction	COVID-19 as Force Majeure in Aviation Contracts
<p data-bbox="152 730 331 767"><b>Bangladesh</b></p> 	<p data-bbox="407 571 2128 759">The term force majeure is not defined under the Contract Act 1872 (“CA”) or any other statute in Bangladesh. However, as Bangladesh is a common law jurisdiction, the concept of force majeure is recognized and used in practice. Separately however, the concept of frustration is described under the CA. In the absence of a force majeure clause in a contract, alternative recourse is available under section 56 of the CA, whereby parties may claim that a contract is frustrated and therefore void. In order to claim frustration, it has to be established that performance of the contract became absolutely impossible due to the occurrence of some unforeseen event.</p> <p data-bbox="407 807 2128 1034">In Bangladesh, since force majeure is not defined under any statute, force majeure is only available when explicitly set out within the terms of any contract and there is no requirement under local laws with regard to claiming force majeure. Therefore, any procedural requirement for claiming force majeure depends entirely on how it is set out in a contract and the remedy for force majeure will be governed by the terms and conditions of the relevant contract. Typically, force majeure includes an extension of time to perform the obligations under the contract. In some cases performance of the contract may be suspended for the duration of the force majeure event. If the force majeure event continues for a longer period of time, the parties may have the right to terminate the agreement.</p>
<p data-bbox="163 1166 320 1203"><b>Cambodia</b></p> 	<p data-bbox="407 1082 2128 1155">Force majeure is generally defined under the Cambodian Civil Code as events which unforeseeably occur outside of one’s will and which cannot be overcome. No further definition, clarification or guidance is provided as to force majeure under Cambodian law.</p> <p data-bbox="407 1203 2128 1391">Further, as the Cambodian courts generally do not publish their decisions, there is no judicial guidance publically available to construe the concept of force majeure, what may constitute an event of force majeure or what the consequences of an event of force majeure may be in relation to the obligations of parties under a contractual arrangement. As a matter of practice, requirements, such as notification requirements among others, are defined within the relevant contractual terms agreed by the parties to such a contract. Generally a force majeure clause would define events that must have such an impact on the transaction or operation that it would</p>

DFDL Jurisdiction	COVID-19 as Force Majeure in Aviation Contracts
	<p>render the performance of the contract impossible or impractical, in order for a force majeure claim to be triggered. As a matter of practice, remedies in the context of an event of force majeure are set out within the relevant force majeure provisions agreed by the parties to such a contract. Typically, such provisions initially call for a suspension period (often three or six months) after which, if the force majeure event continues, the parties may terminate the contract without penalty and without further obligation to perform under the terms of the contract, except for certain surviving provisions (e.g. governing law, dispute resolution, confidentiality, non-compete clauses and the like).</p>
<p data-bbox="176 767 309 799">Lao PDR</p> 	<p data-bbox="409 531 2123 639">Force majeure is a recognized concept in the Lao PDR and is defined under Article 3(17) of the Contract and Tort Law (No 01/NA, 08 December 2008) as an <i>“unexpected and uncontrolled event, such as a flood, thunder storm, earthquake that renders the debtor unable to perform his/her obligations”</i>.</p> <p data-bbox="409 687 2123 916">The Contract and Tort Law does not expressly mention the key requirements to claim force majeure. Article 29 of the Contract and Tort Law provides that if there are difficulties in performance under a contract, despite the party having made its best efforts, such a party must inform the other party of the cause of such difficulties within an appropriate time prior to expiry of the period in which performance was due to take place. The party may claim force majeure as a cause of the difficulties in contract performance and a key requirement to claim force majeure is to notify the other party. If the contract does not provide the requirements to claim force majeure, the general provisions of the Contract and Tort Law would apply.</p> <p data-bbox="409 963 2123 1150">Article 33 of the Contract and Tort Law provides for the non-liability of a contracting party in the case of a breach of contract due to a broadly defined force majeure event. Article 33 of the Contract and Tort Law does not however define or limit the allowable scope of force majeure. It is, therefore, unclear whether a party to a contract could successfully rely upon the force majeure provisions of the Contract and Tort Law to excuse a contract breach not excused under a more limited force majeure clause in a contract signed between the parties.</p>
<p data-bbox="165 1222 320 1254">Myanmar</p> 	<p data-bbox="409 1198 2123 1385">Force majeure clauses in any contract are governed under Section 56 of the Myanmar Contract Act (<b>“MCA”</b>). Section 56 lays down the common law doctrine of ‘frustration’ where it is stipulated that an agreement to perform an impossible act is in itself void. Therefore, while it is largely for the courts to interpret ‘when an act becomes impossible/what constitutes a force majeure event’, Section 56 provides relaxation to parties when contracts cannot be performed as a result of uncontrollable/unforeseeable events (which is beyond the party’s control).</p>

DFDL Jurisdiction	COVID-19 as Force Majeure in Aviation Contracts
<p data-bbox="147 603 338 639"><b>Philippines*</b></p>  <p data-bbox="118 804 371 962">*Prepared by DFDL's collaborating firm in the Philippines, <u>Ocampo &amp; Suralvo Law Offices</u></p>	<p data-bbox="409 296 2128 443">Furthermore, in any contract, if the provision details what would trigger a force majeure event, those provisions would be upheld by a court of law on its merits, the principles of <i>quid pro quo</i>. The remedies will depend on the contractual arrangement between the parties in cases where contracts contain a force majeure clause. The parties may decide to terminate the contract or defer the performance of the contract until the cessation of the force majeure event or waive a specific obligation of one of the parties.</p> <p data-bbox="409 491 2128 600">Article 1174 of the Philippine Civil Code provides that “(e)xcept in cases expressly specified by the law, or when it is otherwise declared by stipulation or when the nature of the obligation requires the assumption of risk, no person shall be responsible for those events which could not be foreseen, or which though foreseen, were inevitable.”</p> <p data-bbox="409 647 2128 679">The Philippine Supreme Court reasoned that four requisites must concur for a party to claim the benefits of Article 1174. These are:</p> <ul data-bbox="461 687 2128 874" style="list-style-type: none"> <li>▪ the cause of the breach of the obligation must be independent of the will of the debtor;</li> <li>▪ the event must be either unforeseeable or unavoidable;</li> <li>▪ the event must be such as to render it impossible for the debtor to fulfill his/her obligations in a normal manner; and</li> <li>▪ the debtor must be free from any participation in or aggravation of the injury to the creditor (<i>Tanguilig v. Court of Appeals, G.R. No. 117190, [January 2, 1997], 334 PHIL 68-76</i>).</li> </ul> <p data-bbox="409 922 2128 1069">The application of Article 1174 may be insufficient to generate a mutually predictable outcome for the parties. Hence, it is standard for contracts having a Philippine element to provide a definition of force majeure that will apply to the obligations in the contract. Standard force majeure terms in contracts include a general description and an illustrative list of what parties would consider to be force majeure.</p>
<p data-bbox="174 1185 309 1217"><b>Thailand</b></p> 	<p data-bbox="409 1121 2128 1305">Force majeure is recognized under the Thai legal system. Section 8 of the Civil and Commercial Code (“<b>CCC</b>”) defines force majeure as “any event that is happening or pernicious result of which could not be prevented even though a person against whom it happened or threatened to happen was to take such appropriate care as might be expected from him in his situation and in such condition”. In the absence of a force majeure clause, parties may consider seeking relief under the general principles of impossibility of performance.</p>

DFDL Jurisdiction	COVID-19 as Force Majeure in Aviation Contracts
	<p>There are no specific key requirements set out under Thai law in claiming \ relief under a force majeure clause. Typically, a force majeure clause itself would include procedures which must be followed by the relevant party in order to effectively claim relief under the force majeure clause, such as the service of a written force majeure notice. Unless specifically defined in the existing contract, the available remedies (otherwise known as the consequence of a force majeure event) are a matter of negotiation between the parties. In the most common cases, the available remedies would include but not be limited to suspension of contractual obligations, exclusion of the liability for non-performance or delay, termination of the contract and so on.</p>
<p><b>Vietnam</b></p> 	<p>According to Article 156 (1) of the Vietnamese Civil Code, an event of force majeure is an event which occurs in an objective manner which is unforeseeable and which may not be remedied by all possible, necessary and admissible measures being taken.</p> <p>It is still available even if it is not specified in a contract. In accordance with Article 294.1 (b) of the Vietnamese Commercial Law, a defaulting party shall be immune from liability upon occurrence of a force majeure event. Pursuant to Article 295 of the Vietnamese Commercial Law, a defaulting party must: (i) provide immediate notice to the other party of any event of force majeure and of the possible consequences of such events; (ii) promptly notify the other party when the force majeure ends; and (iii) bear the burden of proof to the aggrieved party to show that an event is one of force majeure.</p> <p>Under Article 296 of the Vietnamese Commercial Law, when an event of force majeure occurs, the parties may agree to extend the time to perform their contractual obligations, excluding sales and purchase contracts or service contracts with fixed times for performance. If the parties cannot agree to extend, then the time to perform is automatically extended for the duration of the event of force majeure plus a reasonable amount of time to remedy the consequences. In total, this must not exceed: five months for a contract with a performance period of less than 12 months from execution; or eight months for a contract with a performance period for delivery of goods or services more than 12 months from the date of execution. If the force majeure event persists after the relevant time limit above, either party may refuse to perform the contract without consequence. However, the party refusing to perform the contract must, within 10 days after expiry of the above time-limits, notify the other party of its refusal to perform the contract before the other party begins to perform its part of the contract.</p>

## Contacts



**Martin Desautels**  
*Managing Partner*  
 martin.desautels@dfdl.com



**Vincent Morand**  
*Senior Consultant*  
 vincent.morand@dfdl.com