

# War in the Middle East Time to Review Your Company's Force Majeure Clauses

by

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## Summary:

This article outlines key issues facing U.S. and international businesses arising from the Israeli/U.S. war against Iran and its regional proxies, which has expanded into a broader Gulf (if not global) conflict. It also highlights the potential relief available through the invocation of contractual **force majeure** clauses in contracts, when and if possible.

### **The Iran War Effects Far More than the Energy Supply Chain:**

The Israeli/U.S. launch of “Operation Epic Fury” on February 28<sup>th</sup> initially concentrated risk on the Strait of Hormuz and the global energy supply chain related to that narrow channel of water. Iran’s rapid response - via drone and missile attacks—effectively shut down the Strait by triggering the withdrawal of insurance coverage for tankers who were seeking ingress or egress from through the Strait.

This disruption amounts to a de facto embargo on over 20% of the world’s oil resources. However, the consequences extend far beyond fuel markets as petroleum is essential to manufacturing an almost innumerable amount of products, including plastics, textiles, cosmetics, and construction materials, with diesel fuel being essential for global logistics. As a result, the interruption of this supply chain has already and will continue to render performance by parties under countless commercial contracts as impracticable to even impossible around the world.

### **Force Majeure Clause:**

A Force majeure clause (often referred to as an “Act of God” clause) is (or at least *should be*) standard in all commercial contracts (U.S. and international), as this clause may provide for the delay or excuse of performance by a party for at least an amount of time (if not completely release the party from contractual obligations and compliance), when extraordinary events beyond a party’s control occur. These typically include both natural and human-made disruptions.

To successfully invoke such a clause, the triggering event must make contractual performance impracticable, impossible, or illegal—at least temporarily. Depending on the contract’s terms, prolonged disruption may excuse performance in whole or in part.

- **Acts of Nature:** Natural events like hurricanes, tsunamis, tidal waves or pandemics.
- **Acts of Man:** Human-made events such as war, terrorist attacks, strikes, or tariffs.

### **Key Limitations and Risks Regarding Force Majeure Clause:**

As with all contractual issues or questions - when in doubt, read the directions. The specific Force Majeure language in a commercial contract will control in every instance, which is why it is critical to ensure that this language is concise, well drafted and clear, without ambiguities or inconsistencies. Common issues found in Force Majeure Clauses include:

- **Notice Requirements:**
  - Most Force Majeure Clauses will require the party to specifically cite and to some degree timely identify the triggering event(s) which rendered contractual compliance to be impracticable, impossible, or illegal at that time.
    - Some Force Majeure clauses impose a strict “use-it-or-lose-it” notice provisions requiring timely written notification after a triggering event. Failure to comply may waive the right to invoke the clause.
- **Scope of Covered Events:**
  - The triggering event must either be explicitly listed or fall within a valid catch-all provision. Ambiguity increases the risk of dispute.

### **Immediate Steps to Undertake:**

After two months of sustained conflict in the Gulf, businesses should take undertake the following proactive steps in order to better prepare for potential disruptions and minimize the financial risks associated with this unpredictable regional conflict.

1. **Review Existing Commercial Contracts for Force Majeure Clause (If Any):**  
Confirm whether or not there is a Force Majeure Clause in each commercial contract and assess whether current conditions may qualify and justify the invocation of the Clause under the specific terms of each commercial contract.
2. **Update Clauses for Future Contracts:**  
When negotiating new contracts, consider the new risks and evolving geopolitical realities to include in the language of the Force Majeure Clause.
3. **Renegotiate Existing Contracts:** If possible (whether or not a Force Majeure Clause exists in a particular contract), businesses should explore renegotiating the existing contractual terms, in order to avoid formal disputes (whether a dispute could arise due to an absence of a Force Majeure Clause or regarding the drafted and controlling Force Majeure clause).

### **Strategic Decisions and Potential Leverage in the Mere Threat to Invoke the Clause:**

Invoking force majeure carries inherent litigation risk. In some cases, the credible threat of invocation may provide sufficient leverage to renegotiate terms without the need to actually trigger the Clause itself and thereby avoid potentially costly and long formal disputes in litigation or arbitration. A careful, contract-specific analysis is essential before taking action.

**Conclusion:**

The widening Middle East conflict has far-reaching commercial implications well beyond the energy sector and that region of the globe. Businesses should immediately review their contractual obligations to determine whether force majeure relief is available and if so if it may be advisable to claim (or at least threaten to claim vis-à-vis all contractual parties).

Proactive contract review—and, where necessary, revision through possible re-negotiations - will better position companies to manage risk, maintain flexibility, and protect against ongoing and future disruptions in this turbulent global economy.

**S. George Alfonso**

S. George Alfonso founded The Law Offices of S. George Alfonso, PLLC over thirty years ago. He provides his unique brand of “Concierge Counsel” to both U.S. and international clients regarding commercial contract negotiations, as well as U.S. litigation and arbitration. Mr. Alfonso’s firm focuses on “Problem Solving” (dispute resolution) in a multiple of commercial scenarios, including pre-litigation or arbitration as well as during litigation or arbitration.

The Law Offices of S. George Alfonso, PLLC is a Strategic Partner with Schulz Trade Law, PLLC providing the firms’ respective clients with elite international trade, contract and dispute resolution representation.

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