

## Does the COVID-19 pandemic constitute a force majeure event that excuses contractual performance?

*Updated as of March 20, 2020:*

As the COVID-19 outbreak continues to spread and government authorities ramp up measures to mitigate its impact, companies in virtually all industries worldwide are finding that the virus is either affecting their ability to perform their contractual obligations, or similarly impacting their contractual counterparties. Since the World Health Organization declared COVID-19 a pandemic just two weeks ago, governments have imposed unprecedented restrictions on travel and public life. Cities and states have implemented (or are considering) measures to combat the spread of the virus, including everything from issuing statewide shelter-in-place orders, to closing public schools, to prohibiting dine-in services at bars and restaurants, and issuing guidance to encourage the public to engage in social distancing. In the past week alone, the Trump administration released guidelines calling on the public to avoid groups of more than 10 people and discretionary travel, and the Governors of New York and California have ordered all residents to remain in their homes to the extent practicable. These wide-sweeping government restrictions have affected businesses in every sector in the economy.

A threshold legal question for many companies faced with this uncertainty is whether the COVID-19 pandemic, or the actions taken by governmental authorities to address it, constitute force majeure events. While the intuitive response, given the severity and scale of the COVID-19 disruption, would tend to be yes—and that may well be the answer in many circumstances—there is no bright line answer. As a general matter, parties seeking to invoke force majeure must look to the specific force majeure provisions in their contracts, which can vary widely across contracts and industries. Whether COVID-19 constitutes a contractual force majeure event excusing performance depends on the terms of the provision and the unique facts and circumstances of the entity claiming an inability to perform.

Generally, force majeure clauses will either specifically delineate a set of triggering events, (e.g., “quarantine,” “epidemic,” “government action,”), or they will contain catch-all language requiring that the event affecting performance be one that was unforeseeable by the parties and beyond their reasonable control. In deciding whether to invoke a force majeure clause to delay or excuse performance, a contracting party must ask itself two threshold questions.

First, does the party’s particular circumstances flowing from COVID-19 fall within the scope of the definition of “force majeure” in the contract provision? Terms such as “acts of God,” “natural disaster,” or “act of government,” would need to be fit to the circumstances at hand. Wide-spread infections of work forces, “shelter-in-place” orders, mass-venue closures, mandatory quarantines of people and cargo, and (potential)

temporary nationalization of private enterprises are all examples of events that might well fall within the ambit of a contract's force majeure provision.

Assuming the facts fit within the scope of the force majeure clause, the second broad question requires an analysis of if, and if so how, the contractual provision links the force majeure event with the event with performance. Some contracts require that the force majeure describes the impact that the force majeure event must have on contractual performance. Many contracts state that the force majeure event must render performance illegal or impossible, and courts have strictly construed those terms to exclude situations where performance has been rendered more expensive or significantly more difficult than originally contemplated. On the other hand, some force majeure clauses excuse performance where the event has rendered it "commercially impractical." Where a force majeure clause is silent on the issue, parties should be aware of the standard used by the courts in their jurisdiction, because while many require that performance be "impossible" for nonperformance to be excused, that is not the standard in all jurisdictions. There must be a causal connection between the COVID-19 triggering circumstances and the party's claimed inability to perform. In short, each contract's terms and the unique facts and circumstances must be analyzed under the applicable law. We are already seeing scenarios where COVID-19, almost by definition, constitutes force majeure under the circumstances, and we can envision numerous other, less direct scenarios where strong arguments would support claims that COVID-19 should excuse (or delay) performance under a force majeure clause.

That said, today's rapidly evolving real world scenarios can quickly get thorny. Consider a manufacturer that sells widgets is deemed by the government to be "nonessential" and thus required by edict to significantly reduce its workforce due to COVID-19. As a result, the seller is unable to fulfill its supply contractual obligations to a buyer. Further, assume that the buyer has been deemed an essential business and remains in full operation. If, as a result of the seller's default, that downstream buyer is then unable to fulfill its obligations to a further downstream third party, it could be arguable whether a force majeure clause between the buyer and the third party might excuse the seller's performance. A clause that referred to "government action," might excuse the seller's nonperformance under the right circumstances, while a clause that specifically identifies (as some do) "failure of suppliers" would even more clearly support force majeure downstream.

Many force majeure clauses contain notice provisions that are important to understand when assessing a party's rights or risks under a contract. While it may be difficult to discern exactly when compliance with the contract became impossible (or commercially impractical), contracts may call for prompt notice to counterparties of the fact of the force majeure event, even if the event has not yet caused delay or inability to perform. Many contracts call for such notice within a certain number of days of the force majeure event. Contracting parties should review their contracts now to understand what, if any, notice obligations they may have. All the same, if you *receive* one of these sorts of notices, be sure review your contract language

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carefully to be sure that the non-performance is in fact excused and has been timely noticed. Do not just assume that the invocation of force majeure is valid given the unprecedented COVID-19 circumstances.

Finally, and importantly, businesses should be mindful that they may find themselves on both sides of the force majeure issue—on the one hand, seeking to enforce a counter-party's performance of the contract in one context, while seeking to be excused from performance in another. As such, it is important that companies consider all potential implications of the positions they are taking.