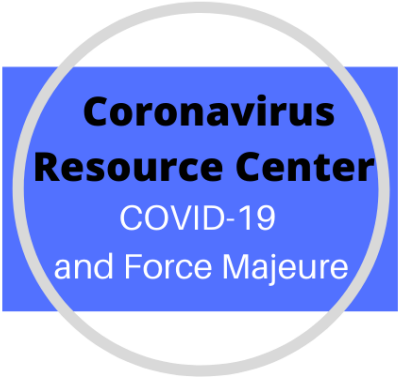


## COVID-19 AND FORCE MAJEURE

MARCH 2020

Unforeseeable circumstances - such as the outbreak of coronavirus ("COVID-19") - that prevent a party from fulfilling its contractual duties may fall under the force majeure clause of that contract. However, a great deal depends on the nature of the event and its impact on the specific contract and its performance by the parties.



**Coronavirus  
Resource Center**  
COVID-19  
and Force Majeure

The scope and effect of a force majeure clause will always depend on the specific contractual language used. Force majeure clauses operate as a risk allocation mechanism to govern situations that are beyond the parties' control, such as the outbreak of war or natural disasters. Whether the COVID-19 outbreak constitutes a force majeure event depends on the exact wording and scope of the provision in the contract. For example, if the force majeure clause:

- expressly specifies epidemics, diseases or public health emergencies, then COVID-19 likely qualifies as a force majeure event;
- covers "acts of government," then travel bans may be covered.

The party seeking to invoke force majeure usually must show a causal connection between the event-the outbreak of COVID-19-that made it effectively impossible to perform its contractual duties. The clause may operate to excuse or suspend performance of a particular contractual duty.

### **Can COVID-19 Excuse Performance Under a Contract with a Force Majeure Provision?**

Historically, courts have read force majeure provisions narrowly. For example, in 2015, the Michigan Court of Appeals held that the Chinese government's decision to flood the market with cheap solar panels was not sufficient to trigger a force majeure provision in a take-or-pay supply contract. The effect of that decision was a multibillion-dollar liability to the plaintiff. Courts have also rejected the application of force majeure provisions to unexpected business interruption caused by the September 11 terrorist attacks, sudden changes in market conditions, union strikes and unseasonable weather.

To determine whether a force majeure clause applies, consider the following factors:

- **Express references to epidemics:** Force majeure clauses are not uniform and should be read along with the other contract terms, such as termination rights

under the contract. For example, some clauses written after the SARS, MERS and Ebola outbreaks of recent years expressly cite global epidemics as examples of force majeure. Earlier forms may not do so.

- **Catchall provisions:** Even in the absence of express citation of epidemics, many contracts include a "catchall" with some enumerated qualifying examples. If the effects of COVID-19 are considered to be "unforeseeable," then they may fall within a force majeure catchall.
- **Prior statements/representations:** Invoking a force majeure clause may contrast with a party's prior statements or representations to your customers or suppliers which may impact the response by that unaffected party. Prior statements may be seen as admissions or waivers of rights in some circumstances.
- **Other provisions:** The remaining provisions of the contract may address the fulfillment of each party's contractual duties in the event of unexpected circumstances. For example, a "take or pay" supply contract is itself designed to allocate risk of unforeseen events. Such a contract may be interpreted differently than, for example, an output contract.
- **Disclosure, legal or securities concerns:** Making representations about the outbreak of COVID-19 may give rise to other legal concerns such as disclosure or other securities requirements of statements of material litigation for public companies, statements about financial performance, impact on financing from lenders and communications with unions or other contractors, depending on the jurisdiction and particular business situation.
- **Notice requirements:** Many contracts require that any party who seeks to assert force majeure as a basis for suspending performance must promptly provide notice to its counterparty. Failure to do so may result in a waiver defense or other consequences. Other contracts state that the continuation of a force majeure event for a certain period of time (e.g., 90 to 180 days) may give rise to a right of termination. In other cases, force majeure may give rise only to a suspension of the required performance. Even without an express requirement, delay in providing notice could give rise to equitable principles such as laches or good faith and fair dealing claims in certain cases. The China Council for the Promotion of International Trade announced that it will offer force majeure certificates to help companies deal with overseas contractual requirements. The effectiveness of these certificates and notices will depend on the exact language of the contract's force majeure clause.

### **Frustration of a Contract's Purpose**

If your contracts do not contain a force majeure clause, then a party still may be excused from its contractual duties under the narrower doctrine of frustration of the contract purpose. Generally, to invoke this doctrine, the event must (1) not be reasonably foreseeable and (2) radically change the contract terms from what the parties agreed to. Merely escaping a bad bargain is not enough.

### **Material Change Clauses**

Some contracts include clauses that address a change resulting from a reasonably expected event that materially changes the contract terms. Thus, the contract itself may allocate risk based on reasonably expected changes that impact a party's performance under the contract. For example, contract terms may have been updated after the prior SARS outbreak. Attention should be given to how the contract's other clauses may address the party's allocation of risk for material changes which impact performance.

## Insurance Coverage

The losses arising out of a party's inability to fulfill its contractual obligations because of the outbreak of COVID-19 may give rise to an insurance claim. Coverage will depend on the policy's specific terms and conditions. Attention should be given to the policy's specific notice provision.

In sum, a fact-specific analysis of the contract, insurance policy and business relationship must be undertaken to assess the impact of COVID-19 on your business.

### About the Author



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