



## Litigation & Trial Practice ADVISORY ■

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### Does Your Force Majeure Provision Extend to the Coronavirus?

On March 11, 2020, the World Health Organization declared that the coronavirus is a pandemic. Since that time, the pandemic has caused unprecedented business disruptions on a global scale. These disruptions will continue to increase in the coming weeks and, as the economic effects mount, more industries will be significantly impacted.

Given these unprecedented business interruptions, companies need to assess their contracts to determine what rights and remedies they have if performance is either delayed or becomes impossible, impractical, or inadvisable. It is important to give due consideration of these principles in particular industries and contractual settings.

#### **How Is Force Majeure Defined?**

Generally speaking, a force majeure provision is a contractual clause that excuses one or both parties' performance obligations when circumstances beyond the parties' control make performance of the contract impracticable or impossible. There is no generally accepted or implied definition of "force majeure"; therefore, whether the coronavirus pandemic is a force majeure event will depend on each contract. The following language in a force majeure provision might serve as a basis for excusing performance because of the coronavirus pandemic.

#### ***Unforeseen event***

Many force majeure provisions contain broad, catch-all language referencing an unforeseen event outside a party's control. Courts generally interpret this language to mean that the event could not have been prevented or overcome, and there cannot be any fault or negligence on the part of the party invoking the force majeure provision. This broad language is likely to cover delays or nonperformance caused by the coronavirus because the pandemic involves both an outbreak outside a company's control and a number of government actions, including quarantines and travel bans, that are also outside a company's control.

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### ***Specified unforeseen events***

Other force majeure provisions reference specific unforeseen events:

- **Epidemic/Pandemic:** Many force majeure provisions excuse nonperformance or delay that results from epidemics or pandemics. Because the coronavirus has now been declared a global pandemic, force majeure provisions with this language will likely be interpreted to excuse performance (assuming the causal link discussed below can be established).
- **Outbreak of Disease:** A specific reference to “disease” is likely to extend to the coronavirus because it has been defined as a pandemic.
- **Act of Government:** Many provisions excuse nonperformance that is the result of an “act of government.” It is likely that such a clause would extend to the coronavirus pandemic since performance of many contracts has now been prevented or delayed as a result of government regulations in both the U.S. and worldwide. For example, shelter-at-home mandates, closures of businesses, and travel restrictions resulting from the coronavirus pandemic now render performance of many contractual obligations impossible or substantially more difficult.
- **Act of God:** Almost all force majeure provisions that contain a specified list of force majeure events include “act of God” on that list. Yet there is no generally accepted definition of “act of God.” Most attempts to define the phrase include words like “unusual,” “unexpected,” “unanticipated,” or “extraordinary.” The question of whether a court will find that the coronavirus pandemic constitutes an act of God remains to be determined and will likely be a question that is litigated in the coming months.

### **What Type of Performance Is Excused?**

Force majeure provisions excuse varying degrees of performance, and therefore whether the coronavirus can excuse performance will once again depend on the particular industry setting and the language of a particular contract. The following types of performance are commonly excused by force majeure provisions:

- **Nonperformance (in whole or in part):** Many force majeure provisions contain language that excuses nonperformance of a contract.
- **Hinderance or Delays:** Other force majeure provisions excuse hinderances or delays in performance.

The practical differences between nonperformance and delay will ultimately depend on the language in the force majeure provision. Nonperformance is likely broader than delay and would cover a scenario where a supplier cannot supply at all as well as a scenario where a supplier cannot meet other contractual requirements. Delay is arguably narrower because it will likely require the supplier to eventually comply with its contractual agreements and therefore does not excuse performance entirely.

Additionally, the circumstances under which performance is excused vary by contract. Many contracts excuse performance that is rendered impossible as a result of the force majeure event. Other contracts include the lesser standards that are more likely to extend to the coronavirus pandemic and the related governmental regulations. For example, other force majeure provisions excuse performance that is impracticable, inadvisable, or infeasible.

## Did the Coronavirus Cause the Nonperformance?

Generally, in order to invoke a force majeure provision, a company must demonstrate a causal connection between the force majeure event and the party's failure to perform. Simply establishing that performance is more expensive or time consuming is unlikely to excuse nonperformance.

In order to demonstrate causation, a company must show that the coronavirus pandemic directly caused its failure to perform or delay in performance. That means that the pandemic itself must have hindered performance as opposed to making performance more costly or time consuming. Given that standard, many force majeure provisions require that the party invoking them show that there are no alternative means for performing their obligations or that they have taken all reasonable steps to avoid the operation of the clause.

## What if a Contract Does Not Have a Force Majeure Provision?

The lack of a force majeure provision does not necessarily mean that there are no grounds to excuse performance because of the coronavirus pandemic. There might be other legal defenses that would excuse performance.

### ***Impossibility***

Many states recognize the common-law defense of impossibility of performance. This defense is narrowly applied and usually excuses performance that is objectively impossible, like the destruction of the means of performance. Importantly, courts rarely apply the impossibility defense if performance of a contract is merely inconvenient, burdensome, or expensive. Applying the impossibility defense to the coronavirus pandemic will turn on the specific contractual relationship. It is possible that the unanticipated government decrees arising from the pandemic—like the prohibitions against public gatherings, shelter-at-home mandates, and travel bans—may give rise to an impossibility defense.

### ***Impracticality of performance***

The laws of most states also excuse performance that has been rendered commercially impracticable. For performance to be impracticable, the event must be unforeseeable and not caused by the party expected to perform. Courts across the country also consistently find that circumstances making performance merely unprofitable or inconvenient usually are insufficient to invoke an impracticability defense. The application of the impracticability defense based on the coronavirus pandemic, like the impossibility defense, will largely turn on the facts and circumstances of each contractual relationship.

### ***Frustration of purpose***

The frustration of purpose defense excuses performance when, after an unforeseen event, a party's principal purpose is substantially frustrated. A company could argue that the coronavirus pandemic renders a contract impossible to perform or radically changes the underlying purpose of the contracts. Importantly, it is difficult to establish frustration if there is an alternative method of performance or if performance has simply become more expensive or time consuming because of the pandemic.

## What Are My Next Steps?

Companies with contracts containing force majeure provisions (as well as companies contemplating relying on the defenses of impossibility, impracticability, and/or frustration of purpose) should take the following steps:

- Review the terms of the contracts to identify the applicable force majeure language and the rights and remedies available under the language.
- Confirm that any notice requirements in the contract have been satisfied (e.g., time limitations on reporting the force majeure event).
- Assess and document alternative means of performance or the availability of steps that can be taken to avoid business disruption.
- If nonperformance or delay has occurred or is expected to occur, make a detailed record of the event and the cause of the event, including the timing of the event, number of impacted facilities, potential length of any delay, and parties involved.
- Check insurance agreements to see whether they will extend to the force majeure event.

Alston & Bird has formed a multidisciplinary [task force](#) to advise clients on the business and legal implications of the coronavirus (COVID-19). You can [view all our work](#) on the coronavirus across industries and [subscribe](#) to our future webinars and advisories.

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