

## [Coronavirus and Force Majeure Checklist](#)

This Coronavirus and Force Majeure Checklist provides guidance on issues and measures counsel should consider when determining the applicability of the coronavirus with respect to force majeure clauses in your clients' commercial contracts. This checklist is jurisdiction and industry neutral and, therefore, you should review applicable state and industry law before taking any definitive action regarding your client's agreements.

The impact that the expanding outbreak of the novel coronavirus (aka COVID-19) is having on commercial transactions has become readily apparent. Large scale events are being cancelled or postponed, parties in the supply chain are unable to secure necessary materials and supplies, distribution and shipping channels have been disrupted, and there are shortages in the labor force, among other negative consequences. The ability to invoke a force majeure clause in a client's contract based on the coronavirus will naturally be fact-specific, focusing on the specific terms of the client's agreement and the unique facts and circumstances germane to the client's transaction. Relevant factors will include the existence of and particular language contained in a force majeure clause, whether and how the coronavirus has impacted the contracting party's capability to reasonably perform the contract, and whether the coronavirus has rendered performance impossible or impracticable.

For additional information on force majeure and sample clauses, see [Force Majeure Clause Drafting](#) and [Force Majeure Clauses](#).

When determining whether the coronavirus might constitute a force majeure event in your clients' agreements, you should consider the following:

### **1. Determine if your client's agreement include a force majeure clause.**

You should review your clients' agreements and ascertain if they include a force majeure clause or similar provision. A force majeure clause generally states that the occurrence of certain unforeseen events or circumstances beyond a party's reasonable control will excuse that party from its performance obligations. The provision usually lists a series of force majeure events or circumstances, the occurrence of which will excuse performance for the duration of that force majeure event (and sometimes for a reasonable period thereafter) and relieve that party from liability caused by such nonperformance. A force majeure clause may also set forth obligations on the party claiming a force majeure event, such as providing notice of its occurrence, advising of its anticipated effect on performance and likely duration, and taking reasonable measures to diminish the impact or shorten the duration of the force majeure event. If there is no force majeure clause in the client's agreement, relief may still be available on other grounds, such as failure of a condition or supervening events. For further guidance, see [Excuses for Nonperformance: Conditions Following Contract Formation](#).

### **2. Does the force majeure clause include language that would encompass the coronavirus?**

Examine the specific language in the force majeure provision to determine whether the coronavirus constitutes a force majeure event. See if the clause expressly includes a pandemic, epidemic, public health emergency, outbreak of communicable disease, or other similar occurrence as a force majeure event, which would increase the likelihood of enforceability. If such language is not included, consider whether the coronavirus outbreak would fall under another part of the force majeure clause, including general force majeure language (such as acts of God or events beyond the control of a party), governmental or administrative action, disruption to the labor force, unavailability of materials, etc. The party invoking force majeure must be able to establish that the coronavirus falls within the scope of the provision. While a force majeure event must usually have been unforeseeable at the time of contracting, this will not likely be an issue for contracts entered into before the coronavirus outbreak.

### **3. Is the coronavirus the reason the party is unable to perform the agreement?**

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Establishing causation between the coronavirus and the client's inability to perform its contractual obligations is required to invoke force majeure. Such a determination will be fact-sensitive. Even if the client's agreement includes a provision that encompasses the coronavirus, this will not automatically excuse performance or relieve it from liability resulting from nonperformance, as you must still meet the other force majeure requirements. The coronavirus must be the true reason your client cannot satisfy its contractual obligations. For example, the coronavirus may have impacted its distribution and supply chain channels, precluded it from securing necessary materials, prevented the timely transportation of goods, or resulted in an insufficient workforce. However, if the party asserting force majeure would not have been able to perform notwithstanding the coronavirus, it will not find relief in force majeure. The standard for force majeure may also be a critical factor. The relevant language may require that performance be "impossible," as opposed to a lesser standard such as requiring performance be "impeded," "impracticable," or "hindered." Depending on the relevant standard, a party may not be excused simply because the ability to perform has become more difficult or expensive. If the client can still perform in an alternate manner (such as by obtaining materials or labor from another, more expensive source), it may not be released from its obligations.

### **4. Are there any exceptions or exclusions that would prevent application of force majeure?**

Ascertain whether there is any language in the force majeure provision that might serve as an exception or otherwise exclude its applicability. For example, some agreements may exclude force majeure from events that could have foreseen by a party or that are a result of a change in market conditions. Additionally, the provision may include carve-outs to its application, such as for a party's payment obligations.

### **5. Weigh the risks of declaring force majeure.**

Before invoking the coronavirus as a force majeure event, confer with the client and carefully consider the potential ramifications that such action may trigger. If performance by the client has been rendered impossible or economically unfeasible, there may be no other viable alternative. Invoking force majeure will, however, be accompanied by business and legal perils. While declaring force majeure may advance the client's immediate business interests, there could be unintended and unwanted consequences that the client should contemplate. For example, the client's reputation in its industry could be impaired, relationships with critical customers could be jeopardized, and the terms of the contract may permit the other party to terminate the agreement. The other party may also dispute the applicability of force majeure and initiate litigation and/or exercise other remedies available in the event of the client's nonperformance. If a force majeure declaration results in litigation, there is the possibility the presiding court or tribunal will interpret the provision narrowly and rule against the client. In light of the possibility of litigation, ensure the client documents all relevant facts and circumstances that will support its force majeure declaration.

### **6. Provide timely notice of the force majeure event.**

Ensure your client meets all notice requirement contained in the force majeure provision or as may otherwise be required by the contract. Many force majeure provisions establish specific procedures that must be adhered to in order to effectively obtain relief. Some provisions will require a party to furnish notice of a force majeure event immediately or within a few days after it experiences the event. The clause may also state what information must be included in the notice, such as the specific event giving rise to the claim, its anticipated effect on performance, and the expected duration. Even if the agreement does not expressly mandate notice within a specific time period, best practices call for prompt written notice to the other party or parties to the agreement.

### **7. Determine how force majeure will apply to the client's performance obligations.**

How a force majeure event such as coronavirus will impact the client's contractual obligations will largely depend on the controlling language in the parties' agreement and the particular circumstances resulting in invocation of force majeure. Generally, if applicable, then the client should be relieved of those performance obligations that have been prevented by the event without being in breach of contract—the time for performance will be delayed for the duration of the force majeure event. However, the client may still be able to perform certain aspects of the agreement, as the force majeure event may only influence some of its contractual responsibilities. For example, a

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supplier may not be able to provide certain goods that it receives from China but still be able to furnish other goods as required by the contract. The declaration of force majeure may also trigger termination rights, as discussed below. The client may also be required to take available and reasonable measures that would lessen the impact and/or duration of the force majeure event.

### **8. Ascertain whether a party can terminate the agreement.**

For certain agreements, the force majeure provision may permit a party to terminate the agreement if there is a force majeure event. Termination rights often require that the force majeure event must delay performance for a specified period of time. Review the agreement and determine whether contract termination might be or become an available option and, if so, under what circumstances. If termination may be the outcome, ensure the client is aware of this fact and has taken it into consideration before making a final decision on whether to declare force majeure. In such transactions, the client may be able to take measures and/or engage in communications with the other party an early juncture to try and stave off termination.

### **9. Determine the client's duty to mitigate the impact of the force majeure event.**

Parties to commercial agreements will often have a duty to engage in reasonable measures to mitigate the adverse consequences of a force majeure event. Ensure the client satisfies mitigation obligations after declaring a force majeure event, such as taking action that will serve to reduce the period of delay. Measures such as seeking alternate locations to perform the contract, securing new suppliers, or allowing personnel to work remotely, may be required by the contract or warranted under the circumstances. Any mitigation efforts by the client should be well-documented, as the client may need to demonstrate its mitigation efforts in potential litigation resulting from its nonperformance due to force majeure, even if the efforts prove to be unsuccessful. For additional guidance, see [Mitigation of Damages in Sale of Goods Contracts](#).

### **10. Require substantiation if your client receives notice claiming force majeure based on the coronavirus.**

If your client received notice from a party it has contracted with alleging force majeure due to the coronavirus, request the other party provide relevant information and/or documentation that substantiates the force majeure claim. Also review the subject agreement and verify that the force majeure provision applies to the prevailing circumstances. As discussed above, the mere existence of the provision will not necessarily mean that it can be properly invoked by a party. Ascertain the rights and remedies available to the client, including possible termination of the agreement.

### **11. Review and revise (as necessary) your clients' force majeure provisions.**

In light of the coronavirus pandemic and the possibility that similar events may occur in the future, you should review the existing language contained in your clients' force majeure provisions and update their forms as may be necessary and prudent. If not already existing, you can add language expressly including events such as pandemics, epidemics, local disease outbreaks, public health emergencies, communicable diseases, and quarantines to the list of force majeure events. Also revisit the standard for invoking force majeure, such as if the event must render performance impossible or whether a lower threshold is preferable.