

PUBLICATION

Coronavirus: *Force Majeure* and Managing Your Business Risk, Part 1

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Do you have a contract where performance is likely an issue? Does it contain a *force majeure* clause? Is COVID-19 covered by your contract's *force majeure* clause? How does this affect your business?

A *force majeure* clause in a contract excuses or delays a party's contractual obligations if a "Force Majeure Event" takes place. The definition of what constitutes a "Force Majeure Event" can vary widely from contract to contract.

Until the COVID-19 pandemic and the resulting drastic impact on restaurants, bars, the travel industry, professional services, construction, real estate, and service organizations, to name a few, whether a contract contained a *force majeure* clause, and what it meant, likely drew little attention. Unfortunately, it may now be an essential consideration and one that will likely lead to reams of litigation. If you would like to learn more about how *force majeure* is impacting particular industries, refer to these previous alerts by Baker Donelson that cover the [hospitality](#), [real estate](#) and [construction](#) industries and look for future alerts which may be forthcoming.

As these types of clauses are open to interpretation by courts, there is likely no definitive answer absent a great deal of specificity in your contract. The *language* of the *force majeure* clause in question, if any, will be the *most important* factor when determining what will happen if either party asserts that a *force majeure* event prevents (or prevented) performance, and relieves the parties from their contractual obligations. Does the contract contain a specific *force majeure* clause, and if so, how definitive or limiting are the defined events? Does the global COVID-19 pandemic rise to the level of a "Force Majeure Event" in the contract's *force majeure* clause?

What if your contract has a *force majeure* clause?

Common clauses found in contracts will reference circumstances not in the reasonable control of either party, and then will specifically identify what is meant. For example, acts of God, natural disasters, war, etc. are typical. A clause may also provide a remedy for these type of events without using the words "*force majeure*." Whether the COVID-19 pandemic is covered by the *force majeure* clause and will excuse performance of the contract will depend on the definition and breadth of the listed covered events. Does the contract contain a specific reference to epidemics, quarantines, or pandemics? If so, the clause will likely control and excuse performance or otherwise dictate the remedies of the parties.

If the contract does not clearly define what is covered by the *force majeure* clause or does not specifically reference a pandemic, the party seeking enforcement of the clause may be left with fewer protections than existing under common law. What if the *force majeure* clause contains language such as "requirements of law", "action by any governmental authority" (whether or not having the effect of law, such as mandated work stoppages in China or bans on large gatherings or "shelter-in-place" orders issued by state or municipal governing authorities) or "labor stoppages" (labor stoppages, in most *force majeure* clauses, are usually in the context of labor strikes) – will this COVID-19 pandemic constitute a "Force Majeure Event" using this language?

If your contract contains a *force majeure* clause, it will often contain a provision requiring notice that is a precondition to pursuit of other remedies. Make sure to read your contract closely and follow all notice requirements. You may also be required to (or should) mitigate your damages.

What if your contract does not have a *force majeure* clause?

If there is no *force majeure* clause, the parties will be left to common law to determine whether or not performance will be excused, and ultimately the courts if agreement is not reached between the parties. There are two limited legal avenues that may excuse a party's obligations when an unanticipated, supervening event arises:

1. Impracticability;
2. Impossibility; or
3. Frustration of Purpose.

How will your *force majeure* clause be interpreted?

Force majeure clauses are narrowly interpreted. While sometimes impossible to avoid, litigation is often the last place either of the parties want to be in resolving their dispute.

The language of the *force majeure* clause in a contract will generally define the available scope of liability and performance obligations. It may excuse a party's obligations in their entirety, postpone a party's obligations, or provide opportunities for other remedies.

In sum, the key factors that are determinative are whether the COVID-19 pandemic falls within the scope of the *force majeure* clause, whether it has sufficiently triggered the clause and resulting release or delay of a party's obligation(s), whether any mitigation efforts have been made, and whether any preconditions or notice requirements have been met. Careful drafting of your contract specific to the concerns of business should be of paramount importance for future negotiations and contracts. If you have an existing contract, you need to figure out a path going forward; for future contracts, a careful analysis of the protections needed, the law applicable to your contract and specific language will make a difference.

Avoiding risk may incentivize the parties to compromise and agree on how the contract will be handled moving forward, whether your contract contains a *force majeure* clause or common law is applied. Modification or cancellation of the contract may be in both parties' best interests, given the uncertainty and expense of litigating the dispute. Consider a mediation if the parties are unable to reach an agreement.

In the coming days, Baker Donelson will distribute alerts on how to determine a path forward on existing contracts and how to analyze the protections needed to craft clauses for future contracts. For more information specific to this topic, please visit our [Commercial/Business Litigation page](#) to learn more about our *force majeure* experience. Also, please visit the [Coronavirus \(COVID-19\): What you Need to Know information page](#) on our website.

Do You Need to Quickly Review Your Commercial Contracts?

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