



Litigation & Trial Practice ADVISORY ■

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Does Your Force Majeure Provision Extend to the Coronavirus?

On January 30, 2020, the World Health Organization declared that the coronavirus is a global health emergency. Since then, many companies have faced challenges fulfilling contractual obligations because of business disruptions caused by the coronavirus. These disruptions not only impact business operations in China but also the operations of companies in the U.S. that rely on Chinese manufacturers for the supply of both component parts and finished goods.

The question many companies now face is whether the coronavirus is a force majeure event that will excuse their nonperformance. Companies should keep the following factors in mind when determining whether they can rely on force majeure provisions in connection with the coronavirus.

How Is Force Majeure Defined?

There is no generally accepted or implied definition of “force majeure”; therefore, whether the coronavirus 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.

Unforeseen event

Many force majeure provisions contain broad language referencing an unforeseen event outside a party’s control. This broad language is likely to cover delays or nonperformance caused by the coronavirus because the outbreak involves both a disease outside a company’s control and a number of government actions, including quarantines, that are also outside a company’s control.

Specified unforeseen events

Other force majeure provisions reference specific unforeseen events:

- **Outbreak of Disease:** A specific reference to “disease” is likely to extend to the coronavirus because it has been defined as a global health emergency.
- **Epidemic/Pandemic/Quarantines:** Other force majeure provisions refer to epidemics or pandemics. It is unlikely that a company will be able to rely on that language unless the World Health Organization designates the coronavirus as an epidemic or pandemic. However, if a force majeure provision contains a reference to

“quarantines,” it is possible that the quarantines imposed by the Chinese government in response to the coronavirus could be considered a force majeure event assuming that nonperformance is a direct result of a quarantine.

- **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 since Chinese authorities have ordered lockdowns and closed factories in the wake of the outbreak.
- **Act of God:** Generally, an “act of God” is considered to be either a natural disaster or weather event. The coronavirus is unique because it involves both a disease and government actions, and therefore it is possible that a court would consider a disease to fall within the definition of an “act of God.”

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 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.
- **Hindrance 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.

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 directly caused its failure to perform or delay in performance. That means that the coronavirus itself must have hindered performance as opposed to making performance more costly or time consuming. For example, if a company is able to ship parts from a different manufacturing facility, even if that requires increased freight costs or overtime for employees, then it will be difficult for a company to establish that it was unable to perform under the contract. 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. There might be other legal defenses that would excuse performance.

Impracticality of performance

The law excuses performance that has been rendered legally impossible or commercially impracticable. A company could argue that, because of the coronavirus, performance under a contract is now impracticable and that the virus was unforeseen at the time it entered into the contract. Government regulations that prevent performance are often grounds for raising the defense of impracticality of performance.

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 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 coronavirus.

What Are My Next Steps?

Since companies are likely to see an increase in the number of force majeure notices and may want to send notices themselves, companies should consider the following next steps.

If you receive a force majeure notice:

- Check the terms of the contract to identify the applicable force majeure language.
- Confirm that any notice requirements in the contract have been satisfied (e.g., time limitations on reporting the force majeure event).
- Keep detailed records of the supplier's inability to supply. If a company is questioning whether a particular supplier can properly rely on a force majeure provision, collect evidence of whether the impacted supply chain is obtainable elsewhere in the market, evidence establishing that the coronavirus is not a direct cause of the supplier's nonperformance/delayed performance, and any evidence demonstrating that the supplier did not take proper steps to mitigate damages.

If you want to send a force majeure notice:

- Check the terms of the contract to identify the applicable force majeure language.
- Check other terms of the contract (escalation clauses or price adjustments) to determine whether another provision would apply to protect the company from a disruption in its supply chain.
- Confirm that any notice requirements in the contract have been satisfied (e.g., time limitations on reporting the force majeure event).
- If nonperformance or delay has occurred, 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.
- Consider whether alternative suppliers can be used to comply with contractual obligations (even if those alternative suppliers will result in increased cost to the company).
- Check insurance agreements to see whether they will extend to the force majeure event.

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