

# FORCE MAJEURE CLAUSES AND THE EFFECTS OF COVID-19 IN COMMERCIAL CONTRACTS

The COVID-19 pandemic and related events have the potential to disrupt your business, operations and supply chain. These events and subsequent developments may allow parties to invoke certain contractual rights to delay, suspend or excuse performance or provide defenses in the event either party fails to perform its obligations. Many commercial contracts contain provisions that address what rights the parties may have when such unforeseen events occur. These provisions are generally referred to as “*force majeure*” clauses.

Businesses of all sizes should carefully review or have their legal counsel review their contracts including the *force majeure* clauses to determine the rights and exposure the business might have in light of operational disruptions resulting from the COVID-19 outbreak. Our attorneys have been working with clients to analyze how *force majeure* provisions in commercial contracts may be triggered and the associated risks.

## ***Force Majeure***

Contracts commonly address the risk of some unforeseen events through what is called a “*force majeure*” clause. While the actual language varies, these clauses typically contain a list of applicable events and general catchall provision. An event that falls within the scope of the listed events or the catchall provision can cause a party’s obligations under an agreement to be excused or modified.

A “*force majeure event*” generally refers to an event outside the reasonable control of a party to a contract which prevents that party from performing its obligations under the contract. A party’s ability to claim relief for a *force majeure* event depends upon the express terms of the contract and the particular language in the *force majeure* provision. Some *force majeure* provisions mandate notice or mitigation steps prior to relying on the provision, so parties are encouraged to proactively review their agreements to avoid forfeiting rights under these provisions.

## ***Is the COVID-19 Outbreak a Force Majeure Event?***

Whether the global outbreak of COVID-19 and the effects thereof constitute a *force majeure* event will depend on the express terms of the contract in question, the circumstances surrounding the prevention or impairment of obligations, and judicial interpretation of the provision. There is no uniform

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formulation of events that are covered by these clauses. Each individual clause should be reviewed in its totality based on the scope and breadth of the *force majeure* provision and the risks associated with the lines of business. While interpretation can vary among jurisdictions, courts generally will look at the enumerated events in the contract and consider whether the COVID-19 pandemic and related events fall within the same scope and character of those enumerated events.

#### ***COVID-19 as a Force Majeure Event Under the Contract***

If the COVID-19 outbreak and the ensuing effects constitute a *force majeure* event under a contract, the circumstances and degree of non-performance will need to be analyzed, since the non-performing party may have to establish that the non-performance was based on the *force majeure* event.

Businesses should also consider the degree to which the express terms of their contract excuse the affected party from performance when a *force majeure* event occurs, or if performance is only to be temporarily suspended until the event passes, if at all. Businesses should be cautious before pursuing rights under a contract and invoking *force majeure* clauses to ensure such non-performance is compliant with the agreement and does not result in a breach of contract claim or the vesting of undesirable rights in favor of the other party (e.g., it is fairly common that claiming *force majeure* would entitle the non-claiming party to terminate, rather than wait for delayed performance).

The attorneys in our [Corporate Services](#) group are closely monitoring the situation and actively assisting clients in these instances. We recommend taking proactive steps to mitigate risk, including:

- monitoring customer service lines carefully for operational or supply chain disruptions;
- communicating with customers and suppliers proactively regarding any potential updates or disruptions due to COVID-19;
- carefully reviewing any *force majeure* clauses and related procedures and consequences;
- documenting and monitoring all steps you are taking to continue fulfillment of your obligations and to avoid or mitigate the impact of the pandemic and related disruptions, including considering and seeking alternative methods to provide goods or services; and
- reviewing any notice of a *force majeure* event received from your suppliers, and examining the claim for consistency with the scope of the *force majeure* provision and requirements of the corresponding contract.

Some *force majeure* provisions mandate notice or other actions be taken prior to relying on the provision, so parties are encouraged to proactively review



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their agreements to avoid forfeiting rights under *force majeure* provisions.

Armstrong Teasdale lawyers regularly counsel companies in the negotiation, drafting and review of contracts involving *force majeure* clauses and other provisions relevant to the COVID-19 outbreak. We are available to assist clients with determining how to take proactive measures, mitigate any potential disputes and avoid the pitfalls that may lead to significant exposure to risk and liability.