



Force Majeure and Related Doctrines

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The fallout from the COVID-19 pandemic, including supply-chain disruptions, event cancellations, and social distancing, has led to questions about when a party may be excused from its obligations under a contract.

As discussed below, many contracts contain “force majeure” clauses. “Force majeure” generally refers to the excusing of performance because of traditional “acts of God” (e.g., hurricanes, fires) or human events beyond control (e.g., riots, wars). In addition, related common law doctrines may excuse performance in certain cases.

It bears emphasizing that application of “force majeure” clauses and related common-law doctrines is highly fact specific and dependent on the language of the parties’ contract and the nature of the event that is purported to have caused non-performance.

That said, below, we provide general guidance on force majeure clauses and related common-law doctrines.

“Force Majeure” Clauses in Contracts: Contracts in a variety of contexts may contain a “force majeure” clause, which excuses performance in certain circumstances. In any situation, whether an event triggers the contract’s “force majeure” clause hinges on (i) a review of the specific contractual provisions; (ii) careful analysis of the governing law; and (iii) the extent to which such events prohibited a party from being able to perform.

For parties reviewing these provisions, special attention should be devoted to:

- what events are specifically included or excluded from the clause;
- whether there are unforeseeability or reasonable control requirements;
- the extent to which performance must be impeded (e.g., must the event render performance truly impossible or is “prohibitively difficult” enough to trigger the force majeure clause);
- any obligations to attempt to avoid the impact of the force majeure event; and
- relevant notice obligations, including both for asserting a force majeure event and responding to that assertion.

Regardless of whether a party is seeking to invoke or avoid force majeure provisions, the scope of the provision could impact re-negotiation of the performance at issue.

Additionally, governing law matters. Most states surveyed, including Texas, will only use common law elements to fill in the gaps in contractual provisions. However, courts in New York and California have also injected additional common law elements such as unforeseeability and reasonable control requirements, even when expressly omitted from the contract.

Impossibility/Impracticability/Frustration of Purpose: Even where a contract does not contain a “force majeure” clause, common-law doctrines may apply. “Impossibility,” “commercial impracticability” and “frustration of purpose” are all similar common law doctrines that may be used to excuse performance in some circumstances. Generally though, the impossibility doctrines will not excuse performance merely because of financial hardship or economic difficulty.

UK Considerations: For international businesses, force majeure is treated similarly in the UK, where it generally suspends the affected party’s liability for contractual non-performance. In an English-law governed contract, because of the limited remedies provided by the common law doctrine of frustration, the precise scope and effect of a force majeure event (e.g., foreseeability, requirements to mitigate, etc.) will depend on the specific contract provisions. An economic downturn could amount to a force majeure event, but only if it is clear from the wording used in the contract that the parties intended this. For a party to rely on force majeure the triggering event must be beyond the reasonable control of the affected party and must be the sole cause of the affected party’s failure to meet its contractual obligations.



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