

# COVID-19 as a contractual force majeure event: A simple checklist for New York contracts

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Email overload on whether the new coronavirus, COVID-19, triggers a force majeure clause?

Whether you're considering a claim, worried about receiving one, or busy drafting following the outbreak, here's our 10-point, jargon-free checklist on what to do:

## 1) Check your contract's governing law

- a) This note focuses on New York law-governed contracts, where the actual language used in the contract is what ultimately matters. New York courts tend to apply force majeure clauses narrowly, and remedies are limited to what the contract does or doesn't say.

## 2) Find the force majeure clause

- a) It could be buried somewhere unexpected or referred to as "exceptions," "unforeseen events," or "acts of God" rather than force majeure.

## 3) Establish the events the clause covers

- a) Look closely at how force majeure events are defined and decide whether COVID-19 — and the impacts of COVID-19 — fit the definition. Under New York law, the event triggering force majeure has to be enumerated within the contract.
- b) If neither epidemics nor pandemics are mentioned, the clause could still be triggered where it covers labor and supply shortages not limited to the affected party or "acts of government," particularly where the government has directly imposed restrictions that are impeding performance.
- c) If there is no force majeure-type clause or the event is not covered by the contract wording, consider relying on provisions such as those dealing with material adverse change, price adjustment, liability limitations and exclusions, extensions of time, or changes in law (for example, laws prohibiting employees or transport from working, which slow down the supply chain). New York law makes it difficult to claim that the contract cannot be completed due to impossibility since a party's performance may not be excused unless truly impossible to perform rather than simply more financially difficult.

Similarly, under New York law, it is not enough to claim that performance was hindered. You must show that there are no alternative means for performing under the contract; increased costs or other difficulties in performing will not be sufficient.

#### **4) Work out how your clause links COVID-19 and non-performance**

- a) A force majeure clause usually requires performance of contractual obligations to be "prevented", "impeded," "hindered," or "delayed". "Prevent" requires that the obstacle to perform is insurmountable, for example that it is no longer physically possible or legally permissible to perform the contract. "Impede," "hinder," and "delay" can be construed more broadly and do not require the affected party to prove impossibility to perform.
- b) To rely on the clause, the event must be the only one affecting contractual performance. In other words, "but for" COVID-19 or government-imposed restriction, a party must have been willing and able to perform.

#### **5) Understand the effects of notifying a force majeure event**

- a) Depending on how long performance is affected, the contract may allow the affected party or either party to terminate. Are you prepared for one or more of these consequences? Is there an opportunity to renegotiate a difficult commercial situation?
- b) If a dispute were to result from the claim, is your dispute resolution mechanism robust or are there drafting gaps, for example over the law governing dispute resolution? What would be the steps to enforce court orders or arbitral awards?

#### **6) Comply strictly with contractual notice requirements**

- a) Ask yourself:
  - i) Is an initial notice of the force majeure event needed and if so, how quickly must the notice be given?
  - ii) Must you supply supporting details and evidence of the event and its effects, and if the details are not yet known, must you give notice anyway to meet the timing requirements?
  - iii) By when and in what form should notices (initial and subsequent) and supporting documents be served?
- b) Pinpointing when COVID-19 starts to affect your contract might not be easy. Consider notifying force majeure at the earliest opportunity, followed by further periodic notices or updates regarding the continuing disruption so your claim is not time-barred.
- c) An extension of time may require an amendment to the contract. Consider when and how to document this, and how to measure the delay given the contract language.

#### **7) Document evidence which supports your claim**

- a) Properly record and store evidence of all communications with your counterparties about the disruption and its effects, including order or service cancellations.
- b) You must mitigate the effects of a force majeure event, so document reasonable steps taken to do so.

## **8) Respond quickly to force majeure notices**

- a) Failure to respond to a notice within stipulated time limits may constitute acceptance of the counterparty's force majeure claim.
- b) Review subcontracts and supply contracts in case you too need to claim force majeure. If this will require force majeure event notices from counterparties, engage them early to manage the risk of late or premature notices.

## **9) Prepare for the force majeure event ending**

- a) Agree with your counterparty to a target date when obligations will resume after the event and its effects have ended, especially if the contract is unclear.
- b) The supply chain will need time and resources to resume operations or clear backlogs and the party claiming force majeure won't want to be in breach once the event is over. You are more likely to get relief during the post-restriction period by demonstrating that the preventing effects are still being felt.
- c) As the effects of COVID-19 are felt at different times, force majeure notices could continue to be issued after it is downgraded from a pandemic. At this stage, return to the contract wording to check if the altered circumstances still support the existence of a force majeure event. For example, would your clause be triggered if there were still restrictions at the place of delivery but not the place of manufacture?

## **10) Learn lessons for future disruptions**

- a) Assess your supply chain contracts so you know which counterparties are likely to be affected by COVID-19 (if they haven't already) and by other future force majeure events. Engage with them early to plan how to manage these situations.
- b) Do force majeure clauses in your existing and future contracts clearly and expressly allocate force majeure risk? Depending on your relationships with counterparties, think about amendments to prepare for future outbreaks. Specifically, consider how to treat pandemics and epidemics in future force majeure clauses.

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