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# Interpreting Force Majeure Clauses

## *First in a series on Force Majeure in a Pandemic*

With unprecedented global travel restrictions, social isolation policies requiring a majority of employees to work remotely, closures of non-essential businesses, and orders to stay at home implemented in response to the COVID-19 pandemic and public health crisis, many businesses are experiencing a decline in productivity and difficulty performing their contractual obligations. This alert is the first in a series that will focus on 1) how to review a force majeure clause to understand its power and limits as it relates to the pandemic, 2) drafting notes and doctrines other than force majeure, and 3) those that may excuse contractual performance.

Force majeure clauses are often thought of as part of the “boilerplate” language in a contract that can be easily ignored. The COVID-19 virus has breathed new life into the importance of this clause in the performance of contracts. This alert is the first in a series that will focus on how to review a force majeure clause to understand its power and limits as it relates to the pandemic, drafting notes and doctrines other than force majeure, that may excuse contractual performance.

### **Force Majeure Clauses in the United States**

For the unindoctrinated, force majeure clauses are often found in commercial contracts and can excuse a party’s performance under the contract for certain unforeseeable circumstances that are not within the performing party’s control. In the United States, the excuse of performance for a force majeure event must be evoked contractually, not statutorily or under common law. Force majeure clauses come in many shapes and sizes, may require notice and may or may not completely cancel a party’s obligations under a contract. Economic difficulty or hardship are not sufficient to excuse performance.

### **What Constitutes a Force Majeure Event?**

Force majeure clauses can include the following elements:

- a list of events
- a “catch-all” phrase
- notice requirements
- mitigation obligations
- termination rights

In this alert we are going to focus on the first two bullets – the list of events and whether a catch-all phrase adequately protects the parties.

Below are two excerpts from examples of force majeure events in manufacturing contracts:

#### Example 1

“any cause of delay, other than financial incapacity, beyond the reasonable control of supplier, including, without limitation, strikes, lockouts, riots, sabotage, acts of war or piracy; destruction of essential equipment by fire, explosion, storm, flood or earthquake; and delay caused by failure of power supplies or transport facilities.”

#### Example 2

“causes beyond the reasonable control of the affected Party, including fire, floods, earthquakes, embargoes, epidemics, pandemics, war, acts of war, terrorist acts, insurrections, riots, civil commotions, strikes, lockouts or other labor disturbances, or act of God...”

As reflected in these examples, the list of events can vary greatly even in the same industry and there is no one-size-fits-all language. Could either of these force majeure clauses be invoked to suspend or cancel performance due to COVID-19?

#### **Interpretation by the courts**

Keep in mind that the interpretation of force majeure clauses may differ from state to state. In general, courts will interpret these clauses narrowly, looking closely at the events listed in the clauses. In Example 1<sup>[1]</sup>, the list does not include any language that could excuse performance due to COVID-19, while Example 2 specifically lists pandemics and acts of God, both of which could be interpreted to excuse performance due to COVID-19.

So, are the parties in Example 1 unable to invoke the force majeure clause because they did not list all possible events? It is impossible (and would be unwise to try) to list each and every event that is unforeseeable and would excuse performance. The more events listed, the more likely that the failure to list an event would mean that the event would be interpreted not to be a force majeure event. For that reason, parties often include “catch all” language similar to that included in the foregoing examples – “causes beyond the reasonable control, including” or “including, without limitation.” In some states, the catch all language may mean force majeure exists and performance is excused, but one should not solely rely on that assumption without further research because other states will require more specificity in the language and will rely solely on the enumerated items.

#### **State Specific Guidance**

There is surprisingly little caselaw on force majeure provisions in most jurisdictions. Click [here](#) for a chart providing guidance on the law in those states in which our firm has offices, including state specific requirements for force majeure clauses.

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1. It should be noted that Example 1 appears to be a negotiated list of events based on the type of business and events that the parties agreed should excuse performance.

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