



A Litigator's Checklist of *Force Majeure* Considerations in the COVID-19 Era

1. Consider why *force majeure* may need to be invoked.

- Proper identification of the *force majeure* event will be very important.
- What specifically is causing an impact on the party's ability to perform under the contract?
 - Stay-at-home order
 - Shut down of nonessential businesses
 - Closure of a facility due to employee illness/exposure to virus
 - Issues with the supply chain
- Has the event caused performance to be impossible or simply made performing more expensive or difficult?
- Analyze whether performance was at risk prior to the *force majeure* event.
- Consider whether other confounding events have also impacted contractual performance.

2. Examine whether the *force majeure* provision is triggered.

- Does the *force majeure* provision broadly excuse performance issues for events caused by conditions outside the reasonable control of the invoking party, but not list specific events?
- If specific events are listed, is the event at issue specified in the *force majeure* provision?
 - Epidemic, pandemic, disease outbreak, public health event/crisis
 - Governmental actions, regulations, or orders
 - Act of God – may not be sufficient for COVID-19
 - Catch-all – will typically be categorically limited to the type of specific events that are listed before the catch-all language
- Is the event at issue specifically excluded in the *force majeure* provision?

3. Determine the standard of performance and effect of invoking *force majeure*.

- Determine whether the *force majeure* provision requires contractual performance to be “impossible” or simply “inadvisable” or “commercially impracticable.”
- Does the *force majeure* provision provide for termination of the contract or simply excuse a temporary delay in performance and require that performance resume when the *force majeure* event has subsided?
- Does *force majeure* excuse payment obligations or is there a carve-out in the provision?

4. Examine other provisions in the contract that could be relevant (especially if there is no *force majeure* provision).

- Dispute resolution procedure – specifies the timing and steps that will need to be taken to resolve disputes (i.e., notice of default, right to cure, mediation, arbitration, litigation, etc.).
- Choice of law/jurisdiction/venue for disputes – identifies which jurisdiction’s substantive law will be applied to disputes and where such disputes must be brought.
- Timing of performance/consequences for delay – specifies when certain contractual obligations must be completed and the penalty for failing to complete within such timeframes.
- Time of the essence – requires contractual obligations to be strictly performed in accordance with time periods set forth in the contract.
- Termination – sets forth the grounds upon which the contract can be terminated prior to the expiration of its term.
- Material adverse change – permits cancellation of the contract if an adverse change significantly threatens the fundamental agreement in a material way.
- Limitation of damages/liquidated damages – limits certain categories of damages and/or sets predetermined amounts of damages for default or breach.
- Other provisions allocating risk between the parties – damage provisions, warranties, technical specifications, performance standards.

5. Consider applicable law.

- After determining which jurisdiction’s law governs the contract, analyze relevant case law to determine how that jurisdiction may interpret the relevant contractual provisions given the facts of your case.

■ Potential inquiries may include:

- Whether *force majeure* has been sanctioned in similar situations (i.e., pandemics, public health events, government shutdowns, stay-at-home orders).
- Whether the *force majeure* event must be unforeseen or outside the invoking party's control.
- Whether the invoking party must attempt to perform regardless of the *force majeure* event.
- Whether *force majeure* results in temporary suspension or permanent cancellation of obligations under the contract.
- Whether the *force majeure* event must be the sole cause of performance issues or simply a contributing cause.

- Consider whether other contractual defenses may apply – impracticality/impossibility of performance, frustration of purpose, material adverse change, illegality (i.e., violation of government orders).

6. Consider whether a non-contractual commercial solution is available.

- Engaging with suppliers and customers proactively in a helpful and cooperative manner, while still reserving all rights pursuant to the contract, can result in an efficient and successful resolution of the dispute without the need for litigation.

- For example, notifying the other party to address a potential performance disruption or to suggest alternative performance solutions, such as extending the time for contract performance, can result in a resolution that is acceptable to both parties and preserves the business relationship between them.

- Regardless of the approach taken, a party must remain vigilant and take steps to document its position and preserve relevant evidence in case a dispute escalates and litigation cannot be avoided.

7. Consider the effect of invoking *force majeure* on obligations under other contracts.

- Analyze other contracts such as bank loans or asset purchase agreements to determine whether the invocation of *force majeure* may render representations and/or warranties made to other parties no longer true.

- Consider whether there is a risk of taking inconsistent positions with respect to similar language in other contracts, especially where invoking *force majeure* could enable parties in other contracts to invoke *force majeure* against the party.

8. Understand the mechanics for invoking *force majeure*.

- Determine whether the *force majeure* provision requires either a minimum amount of notice prior to the event contemplated by the contract (i.e., performance deadline) or notice within a certain number of days of the triggering *force majeure* event.

- In either case, make sure to comply with any applicable notice provision.

- Determine whether the contract specifies what must be included in the notice, the manner in which it must be sent, and to whom.

Identify the triggering event clearly in the notice and provide as many supporting facts as possible.

Consider whether/when to provide updated notice as circumstances change, especially if subsequent events implicate other events specified in the *force majeure* provision.

9. Remain cognizant of post-invocation obligations.

Determine whether *force majeure* results in temporary suspension or permanent cancellation of obligations under the contract and proceed accordingly.

Both parties may have a duty to mitigate damages under the contract or common law.

10. Preserve relevant evidence.

Preservation of relevant evidence is essential.

Such evidence should include documentation of performance history prior to the *force majeure* event, all communications with the opposing party, and evidence regarding efforts made to perform under the contract despite the *force majeure* event.

It may be appropriate to retain an expert to consider causation and damages issues.

11. Avoid creating harmful evidence.

Engage counsel as early as possible in the process.

Ensure that employees avoid taking inconsistent or harmful positions.

Minimize or avoid unnecessary non-privileged communications regarding the contract, performance obligations, or anything else that may be relevant to the dispute.

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