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COVID-19: A Global Guide

Comparison report

	United States	United Kingdom
Impact on Supply Chain (including Force Majeure, Frustration)	<p>Legal situation under United States law</p> <p>On 30 January 30 2020, the World Health Organization (WHO) declared the outbreak of illness caused by a novel coronavirus (COVID-19) a "public health emergency of international concern." Less than two months later, on 11 March 2020, the WHO officially characterized the COVID-19 outbreak as a pandemic. Shortly thereafter, the United States Government issued a Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease Outbreak. Individual states, cities and counties have also followed with their own declarations, in addition to quarantine measures and "stay-in-place"/close-business orders.</p> <p>The U.S has also invoked statutory authority to ban the export of certain products deemed essential to combatting COVID-19. Disruptions due to illness among workers, travel restrictions, facility closures, work stoppages and delays, and other supply chain disruptions are significantly impacting and their</p>	<p>Understand how force majeure is treated</p> <ul style="list-style-type: none"> • The contract wording is what matters. <p>Find the force majeure clause</p> <ul style="list-style-type: none"> • Perhaps buried somewhere unexpected or called "exceptions", "unforeseen events" or "acts of God"? Are there provisions excusing breach caused by third party acts or omissions? <p>Establish if coronavirus fits with how force majeure events are defined</p> <ul style="list-style-type: none"> • Those claiming want non-exhaustive lists of events; counterparties exhaustive lists which potentially exclude coronavirus. • No lists? The clause could be triggered where it covers coronavirus-caused shortages or defines events as exceptional, beyond one party's control, unavoidable and not attributable to the other party (but check all preconditions are met).

ability to perform their contractual obligations. If the failure to perform the contract is caused by the pandemic, the defaulting party might be relieved by invoking the following grounds as a defense:

- the pandemic has triggered the force majeure clause under the contract;
- the contract performance has been frustrated by the pandemic;
- the contract performance is impossible; or
- the contract performance is commercially impractical.

Force majeure

When considering your contracts during this period of uncertainty, keep in mind that the courts will usually seek to enforce performance of a contract and will be slow to accept that external events, no matter how serious or extreme, should excuse one of the parties from fulfilling their obligations.

The interpretation of force majeure clauses in commercial contracts often is highly dependent on the jurisdiction and the exact wording of the clause itself. Thus, it is vital to consider the precise wording of the clause in the contract, as well as the governing law.¹

Force majeure and COVID-19

There are two ways in which a force majeure clause may cover a pandemic:

- the contractual definition of a force majeure event expressly includes a pandemic;² or

- Epidemics and pandemics, and who declares them and their location, generally aren't defined. However, the hurdle is lower now coronavirus is a pandemic.
- No force majeure-type clause? Event not covered? Consider material adverse change, price adjustment, liability limitation, time extension, variation or change in law provisions (but beware – some government-issued rules may not be "law" as defined in your contract). Proving frustration is difficult – it means performance is impossible.

Know how your clause links coronavirus and non-performance

- Typically, performance must be "prevented" (requiring the obstacle be practically insurmountable) or "impeded", "hindered" or "delayed" (not requiring impossibility).
- The event must be the only one affecting performance (unless stated otherwise). "But for" coronavirus, a party must have been willing and able to perform.

Comply strictly with contractual notice requirements

- Is an initial force majeure event notice needed, with details and evidence of the event and its effects?
- By when and in what form should these be served?

- the force majeure clause covers extraordinary events or circumstances beyond the reasonable control of the parties.³

With respect to the first option, if drafted before February 2020, a force majeure clause will almost certainly not identify the COVID-19 virus by name. But it might specify events like pandemics or epidemics, or they may be subsumed within more general terms such as "disease" or "illness," that may enable a company to argue the outbreak constitutes one or more of the specified force majeure events.⁴ Similarly, emergency measures to address or contain an outbreak may be covered under general terms such as "government action," "government order," "national or regional"⁵ or "quarantine." Adding "pandemic" to the list of force majeure events would significantly reduce the risk that a court would question that a force majeure event has occurred in that situation where the WHO or a state agency has declared the outbreak to be a pandemic; however, because force majeure is intended to cover unexpected events, companies wishing to cover COVID-19 as a force majeure event should consider identifying it by name.

If neither epidemics nor pandemics are mentioned in force majeure clause, COVID-19 could still be a force majeure event if the clause includes labor or supply shortages and such shortages are caused by coronavirus. And although the typical force majeure clause may not mention disease, epidemics, or quarantines specifically, it might include more general language covering "acts of God," acts of government, "other circumstances beyond the parties' control," or

- If unsure when coronavirus affects you, notify at the earliest opportunity then update periodically.

Appreciate the effects of notifying

- Depending how long performance is affected, the contract may allow suspension, more time or termination. Are you prepared for this? Could you leave or renegotiate a difficult commercial situation?
- Is your dispute resolution mechanism robust if disputes ensue? Could gaps lead to satellite claims, for example over the law governing an arbitration? How would you enforce orders or awards?

Support your claim evidentially

- Record and store all communications about the disruption and its effects.
- Force majeure clauses usually require you to mitigate an event's effects. Document steps taken to do so.

Respond on time to force majeure notices

- Failure may constitute acceptance of a claim.
- Review supply contracts and subcontracts in case you need to claim force majeure. Quickly engage counterparties who must notify you if they're affected.

Prepare for the event and its effects ending

- Agree a resumption date.

other catch-all terms that could arguably apply to the coronavirus crisis because the crisis has both a naturally-occurring component (i.e., the virus) and a government-action component (e.g., quarantines, lockdowns, etc.).

Some contracts include a list of circumstances excluded from the definition of force majeure event (e.g., economic downturns and other financial hardships). This could preclude remedies under the clause. Thus, whichever the specific list of force majeure events a company is faced with, it should look closely at how the events are defined and decide whether coronavirus fits the definition.

With regard to the general, catch-all wording, it may be sufficient if it is determined that the factual circumstances caused by the pandemic are beyond the reasonable control of the parties. It is also possible that the consequences of or relating to a pandemic (e.g., government policies, travel restrictions, quarantines, increased border checks) could themselves amount to a force majeure event if they are beyond the reasonable control of the parties.

Now that coronavirus and its effects are arguably a foreseeable event, in addressing and updating force majeure clauses, parties should consider the following:

- COVID-19 will most likely not be covered by general, catch-all force majeure clause.⁶
- An explicit reference to COVID-19 or an explicit exclusion might be necessary for a court to find force majeure.

- Supply chains need time to restart and the claiming party won't want to be in breach once the event ends. Although you might explore requesting more time (perhaps pursuant to a contractual right), you'll more likely get relief during remobilisation by informing your counterparty the event is over but the preventing effects are still being felt.
- Notices might be issued after coronavirus is downgraded from a pandemic. At this stage, re-examine your clause. For example, would it cover epidemics at the place of delivery but not manufacture?

Learn lessons for future disruptions

- Assess your contracts to establish which counterparties could be affected by coronavirus and other future force majeure events. Plan managing these situations with them early.
- Do force majeure clauses in existing and future contracts clearly allocate risk? Consider amendments - remembering future outbreaks might now be "foreseeable".

For a checklist of policies, procedures, standards and recommendations to help you prepare for a return to the workplace, please see our [COVID-19 Crisis Leadership Framework and Back to Work Index](#).

For more information contact [Peter Watts](#) and [Richard Welfare](#).

- Companies purchasing goods might wish to build in the right to terminate at some reasonable point in time if the supplier has not performed.
- Companies supplying goods might wish to build in the ability to suspend or extend performance.
- Parties should consider other potential alternative means for performing obligations and steps to avoid or mitigate the coronavirus outbreak and its consequences.

Other risk areas

Foreseeability

In some jurisdiction a party must establish that the force majeure event, even if specifically identified in the contract, was not foreseeable. For instance, courts applying New York law typically require the non-performing party to demonstrate the unforeseeability of the alleged force majeure event. Moreover, a catch-all provision generally requires a showing of unforeseeability. Arguably, the previous SARS epidemic in 2003 may suggest the effects of the coronavirus were reasonably foreseeable and could have been prevented, avoided or overcome.

Causation

There must be a causal link between the force majeure event and the affected party's failure to perform (i.e., the affected party must establish that the force majeure event must have caused the non-

performance). If there are too many steps between the force majeure event and the non-performance it will be difficult for the affected party to satisfy causation.

Extent of impact

Irrespective of the approach taken, a force majeure clause will generally also specify the extent to which the event must have impacted performance in order to qualify as a force majeure event. Various approaches are possible such as showing that it has "prevented: performance entirely" or the event as "hindered" or "delayed" performance.

Impact on suppliers and subcontractors

Buyers who are part of a chain of supply contracts may themselves need to declare force majeure in response to a supplier's declaration in order to avoid being in breach. Each contract in the chain may of course be on different terms or subject to entirely different governing laws and this can create substantial challenges for the buyer.

Notification

- Failure to respond to a notice within stipulated time limits may constitute acceptance of the counterparty's force majeure claim.
- The affected party must notify the counterparty of the force majeure event promptly or in a timely manner stating their claim for an exemption of liability and providing proof of the existence of the event and the impact of the event on the affected party's non-performance.

Mitigation

If the impacted party fails to utilize its best efforts to overcome the impact of the force majeure event on its non-performance it may not invoke the clause.

Frustration

If a contract contains no force majeure clause or the force majeure clause does not cover an event like COVID-19, a party may seek to take advantage of the common law doctrine of frustration. A contract may be frustrated where a significant change of circumstances makes performance radically different from the obligations undertaken originally. For instance, if a COVID-19 pandemic fundamentally changes the principal purpose for the parties to enter into the contract such that its performance is radically different from what could have originally contemplated, the defaulting party may be excused from performing the frustrated contract. However, U.S. courts are reluctant to find that frustration exists, and the fact that something has happened to make performance more onerous or expensive, is unlikely to persuade a court to excuse performance.

Impossibility of performance

Certain jurisdictions recognize the doctrine of impossibility of performance as providing another basis by which a party lacking an applicable force majeure clause can seek to excuse non-performance. The impossibility doctrine applies where the "destruction of the subject matter of the contract or the means of performance" renders it objectively impossible for a party to execute its obligations under a contract. The impossibility must have resulted from

an unanticipated, unforeseen event that the parties could not have "guarded against in the contract." As with both force majeure and frustration, courts very narrowly apply the impossibility doctrine, reserving it for extreme circumstances.

Commercial impracticability

Article 2 of the Uniform Commercial Code (UCC) may excuse a company's performance if delivery pursuant to a contract's terms has been made "impracticable" by the occurrence of a contingency, the non-occurrence of which both parties assumed when the contract was made. In other words, the analysis under the UCC centers on the questions of: (1) did the parties foresee the contingency (i.e., the coronavirus outbreak); and (2) did they have an expectation about how it would be handled? Like proving frustration or impossibility, proving that performance is truly "impracticable" is a high bar.

As addressed above, the doctrines of frustration, impossibility, and commercial impracticability are very narrow. Whether the current circumstances with COVID-19 qualify as a situation when these doctrines might apply requires a case-by-case analysis.

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For more information contact [Kelly Hardy](#), [Kevin Sheys](#) and [Michael Mason](#).

¹ Although all 50 states have adopted some version of the Uniform Commercial Code, the statutory language and common law varies from state to state.

² Under New York law, if a force majeure clause contains enumerated examples, as opposed to a general provision, a court will typically find that only those events specifically listed are sufficient to excuse performance.

³ Under New York law, to the extent the clause also includes a catchall provision, courts will generally limit it to include occurrences "of the same kind or nature" as those enumerated.

⁴ Having a force majeure clause that specifically references epidemics or pandemics will be the most helpful to a party wanting to obtain relief from a contractual obligation as a result of the coronavirus pandemic. Prior to the COVID-19 outbreak, few contracts outside of the healthcare industry typically had such specific references.

⁵ See the WHO declared that the coronavirus constitutes a "public health emergency of international concern" on January 31, 2020.

⁶ Given that the WHO declared that the coronavirus constitutes a "public health emergency of international concern" on January 31, 2020 and the WHO characterized COVID-19 as a pandemic on 11 March 2020, there is a real risk a court would say that from at least Wednesday on the risk was known and parties should have drafted around it.

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