



Coronavirus and Force Majeure: What You Need to Consider

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As the rapid spread of the novel coronavirus (officially [designated COVID-19](#) by the World Health Organization (WHO) and its associated quarantines, travel restrictions, and government lockdowns continue to dominate headlines worldwide, businesses are increasingly facing real-world complications in the fields of labor, logistics, and transportation. The WHO declared the outbreak a “Pandemic” in March. Now businesses with obligations that are becoming difficult to meet in the face of the disease’s spread have increasingly begun to consider exercising their rights under contractual force majeure provisions.

Force majeure clauses are common in contracts among businesses that require ongoing obligations between the parties, such as supplier contracts or sales contracts. Generally, these clauses are designed to excuse a party’s partial performance or failure to perform under the contract in cases of natural emergencies, such as earthquakes or floods, that render a party’s obligations difficult or impossible to satisfy. Past disease outbreaks, such as the 2002 SARS epidemic, have qualified as force majeure events in some cases. Since the beginning of February 2020, more than [1,600 companies](#) in China have applied for and received force majeure “certificates,” issued by the government to bolster businesses’ claims under force majeure clauses and mitigate the economic impact of the virus on the Chinese economy.

The language of force majeure clauses varies from contract to contract, however, and whether the COVID-19 outbreak qualifies as a force majeure event under the terms of an agreement will depend on the exact language of the provision in question. In fact, where the force majeure language in an agreement would not cover the COVID-19 outbreak as it currently stands, a party that chooses to cease or modify its performance under the contract risks inadvertently repudiating or breaching the contract. Additionally, contracts with force majeure clauses often require a party claiming a force majeure event to comply with additional obligations, such as

providing notice of the event or mitigating the delay or damages associated with the disaster.

Accordingly, the following are best-practices an entity that plans to assert its rights under a force majeure clause may consider taking:

- Evaluate and document COVID-19's impact on the business's functions and the business's ability to perform its obligations under a contract.
- Retain counsel, or ask in-house counsel, to carefully review the contract in question for (i) a force majeure provision and, if one is present, for the precise language of the clause (keeping an eye out for words like "disease," "epidemic," or "act of God"); (ii) any notice provisions under the contract; (iii) any terms governing cancellation, repudiation, or breach of the contract; (iv) any requirements that a party submit evidence or information along with a notice of reliance on the force majeure clause; and (v) any terms requiring the business to mitigate its damages or delays incurred as a result of the force majeure event.
- Evaluate COVID-19's impact on the business's performance of the contract considering the contractual provisions governing the relationship between the parties to determine whether the impact on the business's functions is significant enough to justify non-performance under the force majeure clause.
- Draft a notice letter. Whether or not notice is required under the contract, the business should draft a notice letter that includes (i) the scope of the outbreak and its impact on the business's functions, with citations or references to relevant news articles or WHO publications; (ii) an overview of the outbreak's actual impact on the business's functions and ability to perform under the contract; (iii) a formal notice that the business intends to modify its performance of the contract under the force majeure clause; and (iv) a statement that the business's exercise of its rights under the force majeure clause should not be interpreted as a breach, repudiation, or cancellation of the contract.

Although the threat to normal operations posed by COVID-19 is growing, businesses should think carefully about choosing to modify their performance under a contract pursuant to a force majeure clause at this stage in the outbreak. Attorneys with experience in the field of force majeure clauses and business litigation can help determine whether the challenges faced by a particular business qualify for protection under the particular force majeure clause governing its contractual relations. Additionally, businesses should keep in mind that notice letters and any internal documentation regarding a force majeure event can be admitted as evidence in a breach of contract action that arises as a result of the event. Accordingly, the letter and supporting documentation should be drafted by an attorney with experience both with force majeure events and associated litigation.

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a [Coronavirus Resource Page](#). We have also convened a dedicated Coronavirus Response Team, with attorneys on hand to field questions concerning labor and employment matters, commercial contracts, litigation risks, as well as business succession, continuity and crisis response planning.

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