

# DISASTER PREP & RECOVERY

## Contract Disputes from COVID-19: Force Majeure Checklist

By Graham Ryan & Seth A. Levine on March 31, 2020

A party to a contract may under certain circumstances be excused from performing a contractual obligation when the failure to perform is caused by a “fortuitous event”—i.e., force majeure or an “act of God”—that makes performance impossible. Whether COVID-19 and related events, such as the pandemic declaration by the World Health Organization, government travel bans, or government declarations, constitute force majeure that impact contractual performance obligations depends on the language of the contract. Contracts often contain force majeure provisions, which will control in the event of a dispute over performance obligations. If the contract lacks a force majeure provision, or if the provision fails to address a particular event, such as a pandemic, specific default rules may apply depending on the jurisdiction, governing law, and industry.

*This checklist contains force majeure principles derived from substantive law and recent court decisions, to assist in analyzing the impact of COVID-19 on contracts.*

### 1. **Does the contract contain a force majeure provision? If so, the contract controls.**

- **Enumerated force majeure events.** If the contract does not specifically reference “pandemic,” “disease outbreak,” “government declaration,” or similar events, jurisdiction-specific research is required to determine the effect of COVID-19. The term “act of God” may not cover a pandemic.
- **Catch-all clauses.** A catch-all clause such as “any other unforeseen events” will likely be narrowly interpreted to be limited categorically to the type of enumerated events that precede the catch-all clause.
- **Performance standards.** A requirement that performance must be “impossible” or “commercially impracticable” may make a force majeure claim more difficult to

assert.

2. **If the contract does not contain a force majeure provision, and if the event was not reasonably foreseeable at the time the contract was made considering the parties' subjective knowledge and commercial relationship, the event may be a "fortuitous event" that justifies contractual relief, depending on a number of factors:**

- **Impossible performance.** If a party's "entire performance" is "truly impossible" and "insurmountable," the party may be entitled to terminate or dissolve the contract.
- **Partially impossible performance.** If a party's performance is only partially impossible, and if partial performance is still of value to the counterparty, the counterparty's performance may also be reduced proportionally; if partial performance is not of value, termination is possible.
- **Delayed performance.** If a party's performance is merely delayed temporarily, the party may remain bound to perform once the impediment ceases (without owing damages resulting from the delay), if delayed performance is still of value to the counterparty.
- **Performance before event.** If either party rendered partial performance before the event, and the contract is subsequently dissolved, the performing party may be entitled to the value of its performance.
- **Reasonable alternatives.** If a party claims it was prevented from performing, it may have to establish that it pursued "reasonable alternatives" to perform as a prerequisite to obtaining relief.
- **Fault preceding event.** If a party was in default before the event, relief may be precluded.
- **Assumption of risk.** If a party assumed the risk of the event, relief may be precluded.
- **Business risk.** If nonperformance resulted from a reasonably anticipated "business risk," "downturn," or "economic impracticability," rather than from COVID-19, relief may be precluded.
- **Adequate assurance.** A party may demand "adequate assurance" that the counterparty will perform, and failure to provide such assurance may result in termination in some circumstances.

- **Sale of goods.** If the contract is for the sale of goods, the Uniform Commercial Code may impose a “commercially impracticable” standard instead of the “impossible” standard.
- **Lease.** If the contract is a lease, lease-specific standards may apply with respect to the effect of an event on the obligation to pay rent, on notice requirements, and on related lease matters.

*Analysis will vary based on industry, jurisdiction, and controlling law. Prompt notice should be provided.*

---

PREPARE. RESPOND. RECOVER.

## Disaster Prep & Recovery

PREPARE. RESPOND. RECOVER.

