

COVID-19: Force Majeure and Contract Considerations for Buyers and Sellers



On March 18, 2020, Robinson+Cole's Taylor Shea and Jeff White participated in the Coronavirus Special Topics Conference Call hosted by the U.S. Department of Commerce. An overview of their presentation is below.

FREQUENTLY ASKED QUESTIONS

What is a force majeure provision?

- + A force majeure provision is a clause in a contract that generally excuses a party for non-performance under a contract if the non-performance is caused by an event that is outside the reasonable control of the affected party.

What if my contract does not contain a force majeure provision?

- + Typically, force majeure provisions are not read into contracts; they must be expressly stated in a contract for an affected party to be able to invoke. If your contract is silent, there may be other remedies an affected party can pursue (e.g., under the Uniform Commercial Code or the common law).

Where is a force majeure provision found in a contract?

- + It can be anywhere, but will typically be found in the "boilerplate" language of a contract – which is basically the legal jargon at the end of agreement. Please note that the words "force majeure" may not be used, so look for terms like "acts of God," "war," "terrorism," or other actions that are outside a party's control.

Does COVID-19 qualify as a force majeure event?

- + Maybe. It depends on the contract language. Some (but probably not many) contracts will specifically include pandemics, epidemics, diseases or health crises as force majeure events. If this is the case, it is very likely that COVID-19 will qualify as a triggering event. However, the majority of contracts will not have a specific reference to pandemics or the like. In that case, you will need to evaluate whether COVID-19 qualifies under one of the events that are enumerated in your contract (e.g. an "Act of God," a governmental action, etc.).

Is there an enforceable force majeure claim under my contract?

- + Assuming that a force majeure event has occurred under the terms of your contract, the following additional elements typically must be satisfied in order for a force majeure provision to be enforceable:
 - » **Direct Causation:** The affected party's inability to perform must be caused by COVID-19 or its direct impacts and not something else.
 - » **Duty to Mitigate:** The affected party has a duty to try to minimize damages, and will typically be required to show that it took reasonable steps to avoid or mitigate (i.e. minimize) the event and its consequence.
 - » **Proper Notice:** If the contract requires notice of the force majeure event to be given to the other party, the affected party's right to invoke a force majeure claim may be jeopardized if proper notice is not given.
 - » **No Favoritism:** In general, a company can't favor one customer over another – even if that customer is their largest or if not allocating evenly across customers would be economically beneficial to the affected party.

Is the law uniform around the U.S. and the world?

- + While there are common elements to a force majeure analysis, the law and how courts will interpret and apply such provisions may differ significantly from jurisdiction to jurisdiction.

CHECKLIST

If you are making a force majeure claim:

- + Confirm that you have the right to claim a force majeure event has occurred under your contract.
- + Carefully consider what force majeure event you will declare and how it is framed.
- + Be mindful of your mitigation obligations, and document all of them.
- + Make sure you deliver notices in compliance with your contract.
- + Do not favor one customer over another.

If you receive a force majeure notice claim:

- + Confirm that the other party has a right to claim a force majeure event has occurred under your contract.
- + Confirm that the other party's non-performance was caused by the force majeure event. Consider exercising audit rights, if applicable.
- + Confirm the other party's notice is in compliance with your agreement.
- + Consider sending a response letter, asking for additional details and/or supporting documentation, if applicable, and reminding them not to favor one customer over the other.

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