



## “Impact of COVID-19 on Contractual Obligations: Force Majeure”



Author: Annie Ta and Isis R. Tse  
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In these unprecedented times, companies are facing difficulties meeting their existing contractual obligations. Due to the declaration of COVID-19 as a "pandemic" and recent governmental implementation of travel restrictions, closures of non-essential businesses and large gathering restrictions, the availability of a *force majeure* clause would be beneficial to non-performing parties.

If a *force majeure* clause is included in a contract, this provision would excuse a party's non-performance under a contract when extraordinary events would prevent such party from fulfilling its contractual obligations. However, the applicability of a *force majeure* provision is contract-specific, and there is a high bar for invocation of such a clause. The precise effect on the contract will depend on the language of the provision.

*Force majeure* clauses are generally included in contracts to account for circumstances where a party cannot perform the contract due to circumstances beyond its control, but which would not rise to the level of satisfying the common law doctrine of frustration, which we have discussed in a separate article (See: *Impact of COVID-19 on Contractual Obligations: Frustration*).

Every *force majeure* clause should be considered and interpreted separately and in light of the contract as a whole. It may be easier to argue that COVID-19 triggers a *force majeure* clause if the clause expressly includes a pandemic or communicable disease as a specific example of events giving rise to the clause. In the absence of pandemic or communicable disease being listed as examples, a party claiming the benefit of a *force majeure* clause would first have to demonstrate that COVID-19 is a circumstance that falls within the language of the provision. Assuming COVID-19 is a "*force majeure*" within the meaning of the provision, the party seeking to rely on it must then show two things:

1. that COVID-19 has made the performance of their obligations impossible; and
2. that the outbreak and its consequences were beyond the reasonable foresight and skill of the parties at the time they entered into the contract.

In other words, the party claiming the benefit of the clause must show that they cannot perform their contractual obligations due to unforeseeable, extraordinary circumstance beyond their control.

Whether COVID-19 makes it impossible for a party to fulfill their contractual obligations will be highly fact specific. The obligations cannot simply be more difficult to fulfill; they must be impossible. Though the exact requirements will depend on the wording of the provision of the particular agreement, *force majeure* clauses often contain requirements regarding prevention, mitigation, and notice, as set forth in the following in more detail:

1. COVID-19 affected the performance of the contract to the extent/in the way specified by the *force majeure* provision. For example, if a *force majeure* clause stipulates that it will be triggered if a *force majeure* "prevents" performance of the contract, this is likely to require that performance is physically or legally impossible. By contrast, a requirement that the specified event should "hinder" or "delay" performance of the contract sets a lower bar. In either case, the fact that it has become more expensive to perform a contract is, without more, unlikely to be sufficient.
2. The party has taken reasonable steps to mitigate the impact of Covid-19 on performance of the contract. Reasonable preventative steps can include quarantine protocols, increased sanitation, policies with respect to travelling and remote work capabilities, and seeking guidance from public health officials. Importantly, reasonable steps may change with the circumstances, particularly in the context of a public health crisis evolving daily.
3. *Force majeure* clauses may also contain strict notice obligations. They typically require that notice that a *force majeure* event has occurred be given in writing within a specified number of days of the event.

As a result, companies need to continue monitoring the COVID-19 impact on their contractual performance and document and take all reasonable steps to mitigate, where possible, its effect on their business operations.

The lawyers at DD West LLP have extensive experience relating to contractual disputes.

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