

# Boilerplate Contract Language Coming to the Forefront: Force Majeure Clauses and COVID-19



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The rapid spread of COVID-19 and the swift and sweeping action from government agencies at all levels are having a ripple effect on markets. These events are causing significant disruption in most industries, including the cancellation/postponement of major conferences and events like South by Southwest, March Madness, and Facebook's F8, and Mobile World Congress.

One impact is that many companies are struggling to meet their obligations under their contracts. If your company is in this situation, you may find potential relief within a "boilerplate" provision in your contracts: the Force Majeure Clause.

## What is a Force Majeure Clause

A Force Majeure Clause is a contract provision present in most commercial contracts that excuses a party's performance of its obligations under the contract when certain circumstances arise beyond the party's control making performance inadvisable, commercially impracticable, illegal, or impossible. Force Majeure Clauses provide a list of extreme events (generally called force majeure events) that, if they occur, can excuse a party's performance under the contract. Force Majeure Clauses can vary greatly in language and length; however, many include events like epidemics or pandemics, along with war, terrorist attacks, "acts of God,"

famine, strikes, and fire in the list of events excusing overall performance or delay in performance.

## **When Can a Party Obtain Relief under a Force Majeure Clause**

If your contract has a Force Majeure Clause, you should review it to determine if it can provide relief if your company is struggling to perform its contractual obligations. To obtain relief under a Force Majeure Clause you must show:

- Your particular event (in this situation the COVID-19 pandemic or the related governmental action) falls within the list of events the Force Majeure clause includes; and
- Your particular event is a direct cause of your company's inability to perform its contractual obligations.

For a company to obtain relief from its obligations under a contract through a Force Majeure Clause, the force majeure event must be a legal or physical restraint and not just an economic restraint. Even though many Force Majeure Clauses will have "catch-all" language in the list of force majeure events (e.g., "any event that is beyond the reasonable control" of the affected party), courts have generally interpreted the Force Majeure Clauses narrowly so only an event actually listed in the Force Majeure Clause will be deemed a force majeure event.[1] If the Force Majeure Clause includes pandemic (or something similar like disease or epidemic or even, potentially, "acts of God" ) or "governmental action," then it is likely the COVID-19 pandemic and related sweeping action to combat the pandemic is a force majeure event under the Force Majeure Clause.

## **Practical Tips When Considering Invoking a Force Majeure Clause**

- Give timely notice to your counterparty if using COVID-19 as a basis for suspending performance or for non-performance under a Force Majeure Clause. Failure to give timely notice may result in a waiver of any ability to obtain relief for non-performance or delayed performance.
- Many Force Majeure Clauses have a "carve-out" for payment obligations, meaning the Force Majeure Clause cannot be used to excuse a party's breach of its payment obligations under the contract. If your company only has a payment obligation under a contract (such as a tenant in a lease or a purchaser of goods), it may need to look elsewhere in the contract for relief.
- Many Force Majeure Clauses allow the non-affected party to terminate the contract if your non-performance extends for a long period of time (usually 30-75 days). Before invoking a Force Majeure Clause, consider the risk it could provide the other party to the contract a right to terminate that contract.
- Force Majeure Clauses vary in scope, and the language must be carefully scrutinized to determine if your company can rely on it to excuse nonperformance or to delay performance. Seek out legal advice before invoking a Force Majeure Clause.

- Communicate often and early with the counterparty to your contract and look for business solutions to resolve the issue – such as delays in shipment, reductions in supply (without cutting supply completely off), etc. This is particularly important if you have a weak case for invoking a Force Majeure Clause.
- It will likely be governmental actions taken to combat COVID-19 and supply chain disruption that will provide the strongest position for your company to claim a force majeure event has occurred (e.g., limitations on public gatherings; closures of facilities; lack of certain materials, services, or goods due to shutdowns within the supply chain).
- Some key contracts may include requirements for Business Contingency Plans (BCP). If you are dealing with a contract requiring a BCP, you should review and consider whether your BCP should be implemented to mitigate the risk from COVID-19.
- Force majeure is temporary and only applies for the period of time the force majeure event restrains a party's performance under the contract.

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[1] Some Force Majeure Clauses include language like “and other similar events”. Courts, when interpreting those Force Majeure Clauses, have allowed events that are similar to the events listed in the Force Majeure Clause to be considered a force majeure event.

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