Gordon Arata
MONTGOMERY BARNETT

# Coronavirus, Contracts, and Force Majeure: What You Need to Know

**What is force majeure and how is it different from an act of God?**

The term *force majeure* is French for “a superior force”; it’s sometimes called a fortuitous event. A force majeure clause is a contract provision that allocates the risk of loss if performance by a party to the contract becomes impossible as a result of an event that the parties did not anticipate or an event otherwise specified in the clause. Forces majeures include natural events like earthquakes, epidemics, fires, floods, hurricanes, severe weather events, and other natural disasters and catastrophes. Forces majeures also include man-made occurrences like civil unrest, organized labor activities, quarantines, terrorism, wars, changes in laws, embargoes, and other government actions and inaction (to the extent the government is not a party to the contract). The parties to a contract may also stipulate occurrences that constitute a force majeure, such as the availability of raw materials or services from a third party.

Force majeure clauses are often erroneously referred to as “act of God” clauses, which is only one type of force majeure.

Unless otherwise specified by contract, the force majeure event must make performance impossible, not merely impracticable or more burdensome (sometimes referred to as “commercial impracticability”).

**What are common features of a force majeure clause, and how does a party exercise a force majeure clause?**

A force majeure clause has three fundamental components. First, a force majeure clause will identify which party or parties to the contract may exercise the clause. The party exercising the force majeure clause is referred to as the *impacted party* because it is the party whose performance was rendered impossible by the force majeure. In most instances, the party providing the good or service at issue will be the impacted party. In some bilateral contracts, either party may likely exercise the force majeure clause; for instance, a contract where one party becomes the exclusive service provider for another, but for an agreed upon quantity.

Second, a force majeure clause will include a defined list of events that constitute force majeure. The list of force majeure events will either be restricted (finite) or unrestricted and include a catch-all or broadening statement, such as “without limitation,” “but not limited to,” “other events,” and “other similar events.” “Other acts of God” is a broadening statement used to expand a list of force majeure events to include natural occurrences not specifically listed. A restricted list or an unrestricted list incorporating catch-all language may significantly affect subsequent litigation between the parties. If the parties use a restricted list, a court may limit the parties’ exercise of the clause to only the delineated events, even though the actual event also made performance impossible. A court interpreting an unrestricted list with a catch-all phrase including “other similar events” may allow the parties to deviate from their list only to the extent the actual event is comparable or related to a delineated event.

Third, a force majeure clause will outline what steps the impacted party must take to exercise the clause, and what remedies are available to the parties as a result of the force majeure. Generally, the impacted party will be required to provide written notice of its intent to exercise the clause. The notice will most likely be required within a certain amount of time of the force majeure event, and not based on the time the impacted party was to perform. To timely exercise a force majeure clause, an impacted party must carefully scrutinize which force majeure it will identify as the precipitating event. Often overlooked by impacted parties are subsequent force majeure events caused by an initial, more obvious force majeure; for example, a natural disaster that prompts government action to which an organized labor event (strike) or civil unrest occurs.

Remedies available to the parties may include delayed or partial performance; proration or suspension of payments; extension of the contract term, particularly beyond cessation of the force majeure; and termination of the contract without liability if the force majeure continues for a predetermined amount of time or beyond the time that performance would have been valuable.

Other, less common features of force majeure clauses include exclusion of occurrences as force majeure events; stipulations on who may determine a force majeure (for example, the impacted party or an independent third party, especially for events requiring technical or special expertise); insurance requirements; alternative dispute resolution agreements; and choice of law provisions.

**If a contract does not include a force majeure clause, are there other alternatives that may excuse a party’s nonperformance?**

When a contract does not include a force majeure clause, a party may still be excused from nonperformance under the applicable law on force majeure, provisions of the Uniform

Commercial Code, state-specific laws such as articles 1873-1878 of the Louisiana Civil Code, or by asserting frustration of purpose. Certain industry-standard documents may also include provisions for excusing a party's performance, particularly in industries prone to performance delays.

**Have courts previously decided force majeure cases based upon an epidemic or a viral or disease outbreak?**

The Coronavirus/COVID-19 pandemic is not legally unprecedented. Courts have been deciding force majeure cases involving viral and disease outbreaks since at least the 1800s. For example:

- In ***Phelps v. School Dist. No. 109***, 134 N.E. 193 (Ill. 1922), the Illinois Supreme Court required a school district to pay a teacher for the days her school was closed by order of the state health department because of an influenza epidemic. The teacher had been ready and able to teach. The court emphasized that the school district was not excused from paying the teacher where their contract was silent on this issue.
- In ***McKay v. Barnett***, 60 P. 1100 (Utah 1900), the Supreme Court of Utah ruled similarly where the teacher's school was closed in response to a smallpox epidemic. The court stressed that, while closure may have been prudent, it "was not due to any cause which made it impossible for the school to keep open."
- In ***Gear v. Gray***, 37 N.E. 1059 (Ind. Ct. App. 1894), the court likewise refused to rule in favor of a school closure under order of the board of health to prevent a diphtheria epidemic. However prudent it might have been, the closure was not, the court ruled, an act of God. The court ruled that the teacher's pay was not based on the number of days worked, but the number of days contracted.

A common theme in these historical court opinions involving schools and epidemics is that the teachers were, often by contract, unable to mitigate their losses by obtaining other employment. Although these early cases might suggest that courts construe force majeure narrowly, modern cases show that's not always the case.

***Rembrandt Enterprises, Inc. v. Dahmes Stainless, Inc.***, 2017 WL 3929308 (N.D. Iowa Sept. 7, 2017), involved a purchase agreement between a large scale producer of eggs (Rembrandt Enterprises) and a manufacturer of industrial egg dryers (Dahmes Stainless). In 1914, Rembrandt began constructing an egg processing plant in Thompson, Iowa and entered into a purchase agreement with Dahmes for an industrial egg dryer for the plant. In spring 2015 an epidemic of Avian Flu occurred affecting six Rembrandt facilities—but not the Thompson facility.

Rembrandt was forced to eliminate over one million birds and ultimately abandoned construction of its Thompson facility—including its purchase of the egg dryer from Dahmes. Dahmes argued that the parties' force majeure clause superseded Rembrandt's right to invoke the common law doctrine of frustration of purpose or commercial impracticability under the Uniform Commercial Code. Dahmes argued that the force majeure clause provided no remedy for Rembrandt because this epidemic did not prevent construction of the Thompson facility or render the dryer useless. The court ruled that the force majeure clause did not prevent Rembrandt from also pursuing a frustration-of-purpose defense. Instead, the court suggested that the two doctrines might be complementary.

The bottom line is that the individual circumstances of each case and each contract need to be closely analyzed. A slight change in wording can make a world of difference.

**What should I do now to protect my interests in the exercise of a force majeure clause?**

Analyze the impact that Coronavirus/COVID-19 and any related events have on your ability to perform. Identify all events that have affected or have the potential to affect your ability to perform under an existing contract. Then compare and contrast these events to the force majeure clauses in your contracts. Document your efforts to ensure your ability to perform or to mitigate damages resulting from your nonperformance. Quantify any actual and potential damages and update these figures on a continuing basis.

Conversely, identify customers, suppliers, and other counterparties whose performance may be affected by Coronavirus/COVID-19 and any related events, and proactively contact them regarding their continued ability to perform.

Most importantly, if you're not familiar with force majeure clauses, contractual risk allocation, doctrines that may excuse a party's nonperformance, and jurisprudence interpreting the same—don't go at this alone. Reach out to a law firm like Gordon Arata Montgomery Barnett with the knowledge and experience to provide comfort and certainty during what may otherwise be uncertain times.