



Managing Contractual Relationships During the COVID-19 Crisis: Force Majeure Clauses and Other Approaches

This is not “business as usual”. Organizations of all sizes and spanning virtually every industry are being heavily impacted by the COVID-19 global health crisis. As you assess the short and long-term implications for your business or organization, you may find that you or a third-party partner is unable to perform the essential terms of a contract. Many agreements include language designed to address exactly these types of situations. Often referred to as Force Majeure clauses, these provisions set forth the circumstances under which the parties are excused from performance, and can help you determine parties’ rights given the situation we find ourselves in now. Can and should you invoke a Force Majeure clause? If your contract with another party does not include one, what’s next?

START A CONVERSATION

Reach out to your clients and third-party partners to understand how they are adjusting their operations. Assess the impact that their changes will have on your relationship and how any modifications you have been forced to make will affect them. Determine if both parties can continue to perform their contractual obligations. If not, can you agree to modifications? This approach may allow you to avoid reliance on the Force Majeure clause altogether.



DOES THE CONTRACT INCLUDE A FORCE MAJEURE CLAUSE?



Review your contracts to determine first if there is a Force Majeure or similar clause and then if the current situation qualifies. Force Majeure clauses are often limited to scenarios that make it illegal or impossible to perform. Many of the restrictions now in place rise to that threshold, including those on gathering, travel and construction. A Force Majeure cause may delay the time a party is required to perform or modify the obligations to be fulfilled. Some clauses may allow for termination in the event that a party is unable to perform due to circumstances beyond their reasonable control.





IF THE CONTRACT DOES NOT INCLUDE A FORCE MAJEURE CLAUSE

Even without a Force Majeure clause, the analysis is effectively the same.

- The question becomes whether performance is impracticable, meaning that unforeseen circumstances have made it impossible to perform, or
- Whether the current circumstances frustrate the purpose of the agreement, meaning that the essential bargain of the parties fails.



CONSIDER THE LONG-TERM RELATIONSHIP

Are there ways to lessen the parties' burden now but make up for it over time? If so, an amendment to the contract may be less controversial than a full termination.

CONTACT US

Not all Force Majeure clauses are equal. You should carefully review the terms of your contract before taking any action. The stakes are high for all businesses and organizations; it is important to act appropriately to avoid conflict and possible litigation.

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