

## A Closer Look at Force Majeure Contract Provisions



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As we bear witness to the inevitable spread of COVID-19, a contract question is unlikely the first thought that comes to mind. But, as more and more events are cancelled and businesses shut their doors an interesting issue arises. For those with commercial leases, travel plans or hotel reservations, or contractors engaged for services, is there any way to cancel the contracts and avoid termination fees?

The *force majeure* provision is often included in contracts but seldom negotiated. Without a *force majeure* provision, the contract doctrines of “frustration of purpose” or “impossibility” would be the basis to argue that performance should be excused. These doctrines, however, apply only in narrow situations such as where performance is physically impossible or when performance is made so difficult or expensive the benefits a party expects to receive are eliminated. By including a *force majeure* provision in the contract parties can expand the contract doctrines of “impossibility” or “frustration of purpose” beyond what the common law provides.

The term “force majeure” originates from French civil law, and translates to “superior force.” It operates to relieve a party of contractual obligations where performance is impaired due to events outside the party’s control. Often a *force majeure* provision includes language requiring the affected party to recommence performance once the force majeure event ends, thus a party is not excused from performance entirely.

The scope of the provision ultimately depends on the specific language used – does it excuse performance when it becomes impossible or illegal, or when it becomes commercially impracticable? And, are the parties excused from performing altogether or just until performance can recommence? Likewise, the types of events triggering a *force majeure* provision must be specifically listed in the clause (such as Acts of God, war, explosions, labor strikes, fire, transportation or power outages or stoppages). And, are there other provisions in the contract which require performance or payment notwithstanding the *force majeure* provision? Given recent events, contract drafters are likely to start including “disease” or “epidemics” or “pandemics” with more frequency, but it is important to be mindful of the exact terminology to avoid imprecise language likely to cause disputes. For example, “pandemic” is probably preferable to “disease” because the World Health Organization designates generally-accepted pandemic phases. If you have events or reservations planned, contracts for goods or services to be delivered, or issues arising with leases, now is the time to start pulling out your contracts to evaluate your options.

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