

When COVID-19 Disrupts Contract Performance Understanding *Force Majeure* Clauses and the Doctrines of Impossibility, Impracticability, and Frustration of Purpose

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As the 2019 novel coronavirus spreads and greater numbers of people nationally and globally are infected with the COVID-19 illness, prudential measures and government-imposed restrictions may disrupt contractual performance in all sectors. Many parties to contracts are or will be facing inevitable and ever-increasing disruptions to performance under those contracts. Therefore, it is critical that contract parties review their contracts and related applicable law in order to understand their rights, obligations, and remedies.

Two key concepts merit specific attention in this respect: (1) the scope and application of any *force majeure* clause in a contract; and (2) the scope and application of common law doctrines of impossibility, impracticability, and frustration of purpose to contractual non-performance. Below we discuss these concepts and their practical application. We also provide [links](#) to additional, industry-specific or issue-specific guidance with respect to these concepts. We will continue to update this alert with links as we develop further specific guidance.

Force Majeure

Background

Force majeure refers to an event or circumstance that is outside of the control of the parties to a contract and that prevents a party from meeting its obligations under the contract. The term “force majeure” is French—it means “superior force”—but other terms, such as “acts of God” are also used to describe the same concept. Notably, force majeure is related to, but distinct from, the common law doctrines of impossibility, impracticability, and frustration of purpose (which are discussed further below).

The first step in determining whether force majeure applies is to identify whether a force majeure clause is included in the parties’ contract. Force majeure clauses come in many forms and may not actually include the term “force majeure.” But such clauses will typically identify (broadly or narrowly) whether a party’s performance may be altered or excused in the event of substantial and unexpected changes of circumstance that are beyond the control of the contract parties.

If a contract contains a force majeure clause, the contract language will generally govern the parties’ rights and obligations (as discussed in the next section). If a contract contains no such clause, a separate inquiry is necessary to determine whether the applicable law generally governing the contract impliedly includes a force majeure provision. In some legal systems, particularly civil law systems, a force majeure doctrine is recognized by default and impliedly included in contracts. For example, under the General Principles of Civil Law of The People’s Republic of China, as well as Chinese contract law, a force majeure provision may be implied as part of a contract. In contrast, in the United States, force majeure is not typically implied in contracts; rather, parties must expressly include a “force majeure” contract clause to address and define the parties’ rights with respect to force majeure events.

Understanding Force Majeure Contract Clauses

A force majeure clause is primarily understood by assessing the precise language of the clause. The agreed-upon governing law of the contract, as well as typical industry practice, may inform the interpretation of the clause language. Typically, a force majeure clause includes the first two, and often all four, of the following attributes:

1. **Definition of a force majeure event:** This part of a force majeure clause may specifically define events that constitute a force majeure (e.g., acts of God, floods, earthquakes, hurricanes, etc.) and/or define the requirements for an event to constitute a force majeure (e.g., an event that is not reasonably foreseeable, with effects that cannot be reasonably avoided, and that materially affects a party’s ability to perform its contractual obligations). Conversely, the force majeure clause may expressly exclude certain events from constituting a force majeure (e.g., a clause may expressly *exclude* financial hardship as a basis for declaring force majeure).

2. **Requirement of impossibility:** These clauses typically make clear that for an event to constitute a force majeure, performance must become impossible, not merely more difficult or expensive; in other words, force majeure clauses are typically written and understood *not to apply* where an unforeseen event merely increases the cost of contract compliance within reasonable bounds. Moreover, many force majeure clauses either expressly or impliedly state that, to constitute such an event, the party who failed to perform could not have contributed to the occurrence of the event.
3. **Description of the effect of declaring a force majeure:** Where a force majeure event (as defined by the contract) occurs, a typical force majeure clause makes clear that a party's performance under the contract is excused. However, some clauses are more specific in describing the consequences of a declaration of force majeure. For example, some clauses may provide only a defined period of time during which performance is excused, provide for contract termination (as opposed to merely non-performance) under certain circumstances, or expressly exclude payment under the contract from the obligations that may be excused by a declaration of force majeure.
4. **Additional requirements for the party declaring a force majeure:** These clauses sometimes include notice requirements for a party declaring force majeure to excuse contract performance (e.g., requiring written notice within a certain time period or requiring the declaring party to provide status updates to the other party until it is able to resume its obligations under the contract). Likewise, these clauses sometimes expressly require a declaring party to mitigate damages caused by its declaration of a force majeure and/or may specify certain mitigating actions that must be taken.

Considerations When a Party Declares a COVID-19 Force Majeure

With respect to COVID-19, there are several considerations to keep in mind when assessing a contract's force majeure clause, as follows:

First, does the force majeure clause apply? Other than in certain specific industries, it is uncommon for a force majeure clause to include epidemics, pandemics, illness, or disease as a specifically identified force majeure. However, the COVID-19 and its impact may fall within the scope of more commonly included, expressly identified force majeure events. For example, many clauses expressly define force majeure to include events such as (1) national or regional emergencies; (2) government orders or laws; (3) embargoes or blockades that take effect after the contract date; (4) other actions by a government authority. Furthermore, many force majeure clauses include "catch-all" language, such as "any other events or circumstances beyond the reasonable control of the party affected." Determining whether these examples may be interpreted to apply force majeure to contract non-performance resulting from the effects of COVID-19 requires careful analysis of the language of the contract, the governing law, and, in some circumstances, the specific industry or trade practice at issue.

Second, are there any additional force majeure clause obligations, and have they been met? To the extent the clause includes, for example, notice, timing, or mitigation requirements, parties must assess whether these obligations have been met.

Third, how do other contract provisions and general contract law interact with and apply to the force majeure clause? In addition to focusing on the specifics of the force majeure clause, an assessment should be made with respect to other provisions of the contract that may also create, for example, notice or mitigation obligations, or may otherwise provide for termination rights. Furthermore, governing law may require mitigation or other actions to be undertaken in connection with a force majeure event. Finally, the contract's dispute resolution clause, if any, may become relevant if the parties disagree with respect to a party's declaration of force majeure, or the applicability or scope of the force majeure clause.

Common Law Doctrines of Impossibility, Impracticability, and Frustration of Purpose

At common law, the doctrines of impossibility, impracticability, and frustration of purpose may lead to a result similar to the invocation of a force majeure clause—under certain circumstances defined by law, a party may be excused from performance of its obligations under a contract. In contrast to force majeure, which in U.S. jurisdictions typically is a function of a specific contract clause agreed upon by the contracting parties, the doctrines of impossibility, impracticability, and frustration of purpose may apply by default, without an express contractual provision. Notably, parties may wish to contract around these doctrines, by including contract terms that expressly limit or exclude the applicability of these doctrines.

Background

A brief description of each doctrine follows:

- **Doctrine of impossibility:** Applies where performance is no longer possible because of a supervening event. For example, if the subject matter of the agreement is destroyed, such as a house that was contracted to be painted being first destroyed in a fire, performance under the contract is rendered impossible.
- **Doctrine of impracticability¹:** Applies where a supervening event changes the inherent nature of performance to be substantially more difficult, complex, or challenging, contravening a basic assumption of the parties' agreement, such that the cost of performing increases excessively and unreasonably. Notably, these supervening changes must be sufficiently substantial to render performance commercially senseless in order to excuse performance. For example, if a party agrees to a distribution contract for certain items, but, due to unforeseen events that are no party's fault, the items to be distributed become extremely scarce, the distributing party may be excused from performance due to impracticability.
- **Doctrine of frustration of purpose:** Applies where one party's known principal purpose for entering a transaction has been obviated by a supervening event. For example, if a party enters into a 5-year lease for the purpose of opening a store to sell a particular product, and subsequently the government (unexpectedly) passes a law that bans the sale of that product, the party's performance under the terms of the lease contract might be excused because the purpose for which the lease was agreed upon has been frustrated through no fault of that party.

Application of the Doctrines of Impossibility, Impracticability, and Frustration of Purpose

Determining whether one of these doctrines applies to excuse performance under a contract is a contract-specific, law-specific, and fact-specific inquiry. This means that the following questions should be asked (and answered) in the following order:

1. Does the contract address these common law doctrines? Contracts may expressly, affirmatively incorporate these doctrines; expressly, affirmatively exclude applicability of these doctrines; or make no mention of these doctrines.
 - a. Where these doctrines are expressly, affirmatively incorporated, parties should first focus on the specific language incorporating the doctrines to determine whether the contract language alters or limits the doctrines' default operation under common law.
 - b. Where applicability of one or more of these doctrines is expressly, affirmatively excluded by contract, parties should confirm whether the chosen body of law governing the contract's interpretation allows these doctrines to be excluded. Similarly, where a contract contains a force majeure clause (discussed above), parties should ascertain whether the law governing the contract presumptively excludes the applicability of these common law doctrines due to the parties' express allocation of unforeseen risk through the agreed-upon force majeure clause.
 - c. Where the contract is silent with respect to these doctrines, the parties must study the law governing the contract's interpretation to determine the applicability and scope of these doctrines.
2. How does the chosen body of law governing the interpretation of the contract apply these doctrines? Most contracts identify a specific body of law (the "choice of law") that governs interpretation of the contract. For example, a contract may state that District of Columbia law governs its interpretation. Different jurisdictions apply the doctrines of impossibility, impracticability, and frustration of purpose in different ways, so one must first determine the governing law to understand whether and how one or more of these doctrines may apply to a particular contract.
3. What are the relevant facts that may meet the requirements of one or more of these doctrines under the governing body of law? The final question is whether the specific facts that a party to a contract is experiencing meet the legal requirements for applying one of these doctrines to excuse performance under the contract. This depends, of course, on the specific requirements of the governing law, as well as the specific facts and circumstances of each case. However, there are a

¹ Notably, although they are often stated as two distinct doctrines, in many jurisdictions the doctrines of impossibility and impracticability are referred to interchangeably.

couple of common requirements with respect to application of any of these doctrines, under any jurisdiction, as follows:

- a. **There must be a supervening event.** In other words, something must occur after the contract is entered into that affects one or both parties' performance under the contract.
- b. **The non-occurrence of the supervening event was a basic assumption of the parties' agreement.** In other words, the supervening event must be unanticipated by both parties, and its occurrence must materially impact one or both parties such that they would not have entered into the same agreement had they known the supervening event would occur.
- c. **The supervening event must not be the fault of either party.** Negligence, misconduct, or events within the control of one of the parties to the contract are not addressed through these doctrines, but instead are addressed through other aspects of contract law.
- d. **The risk of the event was not allocated to either party under the express terms of the contract.** While it is true that the supervening event must not have been anticipated to actually occur (per subpoint b above), parties to a contract may nevertheless expressly allocate risk for unanticipated events in a way that would exclude the applicability of one or more of these doctrines. For example, the parties might agree to a force majeure clause that expressly allocates the risk (to one party or the other) of unanticipated changes in the law that might render performance impracticable. In such instances, the parties' express agreement would govern, rather than the doctrine of impracticability.

Considerations Regarding Application of These Common Law Doctrines to Nonperformance Resulting from COVID-19

One should ask the same questions in determining whether the common law doctrines of impossibility, impracticability, and frustration of purpose excuse non-performance under a contract as a result of COVID-19 as one asks with respect to applicability of a force majeure clause. Namely:

1. Do any of these doctrines apply based on the applicable law and facts and based on whether the contract excludes their application?
2. Have the elements of each doctrine been met under the law governing the contract?
3. Are there any other provisions of the contract that speak to or affect the scope or applicability of these doctrines? For example: Does a force majeure clause limit their applicability? Are there applicable contract provisions regarding mitigation? How does the contract's dispute resolution provision apply to disagreements regarding the application of these doctrines?

Conclusion

Each day brings news that COVID-19 is increasingly widespread, and every indication is that disruptions to contract performance may continue and increase in the coming weeks. Thus, whether or not a company or individual is already having to address delays or disruption in contract performance as a direct result of COVID-19 or the government's responsive measures, it is now imperative to review such contracts and understand the rights, obligations, and remedies thereunder. This includes understanding whether the contract includes a force majeure clause, and understanding whether and how the doctrines of impossibility, impracticability, and frustration of purpose may apply. Because the interpretation of a force majeure clause and the understanding of the common law doctrines that may excuse performance depend on the language of the contract itself, as interpreted under the applicable governing law and in accordance with industry and trade practice, parties should consult with legal experts to best understand whether and how these clauses and common law doctrines may apply.