

FORCE MAJEURE CLAUSES: A 4-STEP CHECKLIST & FLOWCHART

To Our Clients and Friends:

The rapid spread of COVID-19, and increasingly stringent government orders regulating the movement and gathering of people issued in response, has raised concerns about parties' ability to comply with contractual terms across a variety of industries. The most common term addressing parties' obligations under such circumstances is a *force majeure* clause, which is often (but not always) included in commercial contracts. Such clauses generally set forth limited circumstances under which a party may terminate or fail to perform without liability due to the occurrence of an unforeseen event. Assessing applicability and enforceability of such clauses requires a highly fact-specific analysis.^[1]

To assist clients in identifying issues they should evaluate in connection with their contractual obligations in the face of the pandemic, we have prepared a **4-Step Checklist and Flowchart** to review and assess *force majeure* clauses.

STEP 1: Does COVID-19 trigger the *force majeure* clause? *The first step is to review the triggering events enumerated in the force majeure clause.*

Many *force majeure* clauses are triggered by an "act of God," but do not specifically enumerate public health events.^[2] If the *force majeure* clause covers only "acts of God," the current pandemic may be outside its scope. If your *force majeure* clause specifically references an "epidemic," "pandemic," "disease outbreak," or even "public health crisis," the current situation relating to COVID-19 may fit within that clause. Where a *force majeure* clause does not explicitly reference disease or public health, it may still include a reference to government action as a *force majeure* event, including, "acts of civil or military authority," "acts, regulations, or laws of any government," or "government order or regulation." Where such clauses are present, recently adopted regulations and executive orders regulating, among other things, the size of gatherings or mandating the closure of certain establishments may qualify as *force majeure* events.

Many *force majeure* clauses also contain catch-all provisions (e.g., "any other cause whatsoever beyond the control of the respective party") that may appear to cover *any* unforeseen event. However, courts generally interpret *force majeure* clauses narrowly and typically do not interpret a general catch-all provision to cover externalities unlike those specifically enumerated in the balance of the clause.^[3] Where a contract contains a broad *force majeure* clause that does not enumerate any examples, but generally refers to events outside the performing party's control, it may cover the current pandemic. If litigated, however, a party may have to prove that the clause, when drafted, was intended to cover a similar situation (a public health crisis as opposed to a natural disaster). A party may also be required to demonstrate that the event that triggered the *force majeure* provision was beyond its reasonable control

and without its fault or negligence and that it made efforts to perform its contractual duties despite the occurrence of the event.[4] Some *force majeure* clauses also specify that they only apply for the length of the event triggering the clause—in those instances, a party claiming relief under the *force majeure* clause may have the burden of demonstrating that it was actually prevented from performing for the length of time claimed.[5]

STEP 2: What is the standard of performance? *The second step is to review what specifically the force majeure clause excuses.*

Force majeure clauses may codify an impossibility standard and require that performance of contractual obligations be “impossible” before all obligations are excused. Others may be less stringent, requiring only that the performance, in light of the triggering event, would be “inadvisable” or “commercially impractical,” or may provide for relief only “to the extent that” performance is impaired. For example, if the applicable jurisdiction has adopted a ban on gatherings of more than 50 people through April 15, 2020, but the contract relates to an event in late April, the *force majeure* clause may not allow termination if it relies solely on an “impossibility” standard of performance but may cover a termination if the relevant performance standard is “inadvisable.” Finally, not all *force majeure* clauses provide for *termination* of an agreement; some only excuse delayed performance, providing that any failure to perform due to a triggering event will not constitute a breach under the relevant agreement.

STEP 3: When must notice be given? *The third step is to review the contractual requirements, if any, for notice.*

Force majeure clauses may require either (i) a minimum amount of notice ahead of an event contemplated by the contract, or (ii) notice within a certain number of days of the triggering event. Failure to provide timely notice may prohibit a party from obtaining the benefit of a *force majeure* clause in the agreement even when a triggering event is covered by the contract’s *force majeure* clause.[6] For example, a new government regulation (e.g., shrinking the maximum size of permitted gatherings from 500 to 50) may be a *force majeure* event under the particular language of an agreement and may start the clock on the notice period even though your event may be in the future.

STEP 4: Are there requirements for the form of notice? *The fourth step is to review whether the contract requires a specific form of notice.*

Notice provisions may specify the form of the notice, to whom it must be sent, and the manner in which it must be sent. Additionally, many agreements will require that notices given thereunder must provide sufficient specificity to make clear why the relevant triggering event applies to a given provision in a contract. Given the current work-from-home orders, it may be difficult to comply with all formal notice requirements in a contract, and clients may wish to propose alternative methods of providing notice with contract counterparties for so long as the current climate persists. Gibson Dunn may also be able to assist clients with mailings—either notices required to be given or responses to notices received—especially where the client does not have an operational mailroom.

Step 1. Does COVID-19 trigger the *force majeure* clause?[7]

<p>Does the <i>force majeure</i> clause broadly cover events caused by conditions beyond the reasonable control of the performing party without enumerating specific events?</p>	<p>No <input type="checkbox"/></p>	<p>Yes <input type="checkbox"/></p>		<p>If yes, proceed to Step 2. Inquiry should also be made into what additional elements a party may need to demonstrate based on the applicable law. Some courts may require a party invoking a <i>force majeure</i> provision to demonstrate that the triggering event was beyond its control and without its fault or negligence and that it made efforts to perform its contractual duties despite the occurrence of the event.</p>
<p>Does the <i>force majeure</i> clause specifically reference an “epidemic,” “pandemic,” “disease outbreak,” or “public health crisis”?</p>	<p>No <input type="checkbox"/></p>	<p>Yes <input type="checkbox"/></p>		<p>If yes, proceed to Step 2. Inquiry should also be made into what additional elements a party may need to demonstrate based on the applicable law. Some courts may require a party invoking a <i>force majeure</i> provision to demonstrate that the triggering event was beyond its control and without its fault or negligence and that it made efforts to perform its contractual duties despite the occurrence of the event.</p>
<p>Does the <i>force majeure</i> clause refer specifically to “acts of civil or military authority,” “acts, regulations, or laws of any government,” or “government order or regulation”?</p>	<p>No <input type="checkbox"/></p>	<p>Yes <input type="checkbox"/></p>		<p>If yes, proceed to Step 2. Inquiry should also be made into what additional elements a party may need to demonstrate based on the applicable law. Some courts may require a party invoking a <i>force majeure</i> provision to demonstrate that the triggering event was beyond its control and without its fault or negligence and that it made efforts to perform its contractual duties despite the occurrence of the event.</p>

<p>Does the <i>force majeure</i> clause cover only “acts of God”?</p>	<p>No <input type="checkbox"/></p>	<p>Yes <input type="checkbox"/></p>		<p>If yes, under leading current case law, the <i>force majeure</i> clause may not have been triggered by the current pandemic. Many courts have interpreted the phrase “act of God” in a <i>force majeure</i> clause in a limited manner, encompassing only natural disasters like floods, earthquakes, volcanic eruptions, tornadoes, hurricanes, and blizzards.</p> <p>The common law doctrine of impossibility or commercial impracticability may still apply, depending on the jurisdiction.</p>
<p>Does the <i>force majeure</i> clause have a catchall provision that covers “any other cause whatsoever beyond the control of the respective party” and contains an enumeration of specific events that otherwise do not cover the current situation?</p>	<p>No <input type="checkbox"/></p>	<p>Yes <input type="checkbox"/></p>		<p>If yes, the <i>force majeure</i> clause may not have been triggered because courts generally interpret <i>force majeure</i> clauses narrowly and will not construe a general catch-all provision to cover externalities that are unlike those specifically enumerated in the balance of the clause.</p> <p>But depending on the jurisdiction, courts may look at whether the event was actually beyond the parties’ reasonable control and unforeseeable and the common law doctrine of impossibility or commercial impracticability may still apply, depending on the jurisdiction.</p>

Step 2. What is the standard of performance?

<p>Does the <i>force majeure</i> clause require performance of obligations to be “impossible” before contractual obligations are excused?</p>	<p>No <input type="checkbox"/></p>	<p>Yes <input type="checkbox"/></p>		<p>If yes, the <i>force majeure</i> clause may have been triggered if the current government regulations specifically prohibit the fulfillment of contractual obligations. Proceed to Step 3.</p>
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Does the <i>force majeure</i> clause require only that performance would be “inadvisable” or “commercially impractical”?	No <input type="checkbox"/>	Yes <input type="checkbox"/>		If yes, the <i>force majeure</i> clause may have been triggered due to the extreme disruptions caused by COVID-19. Proceed to Step 3.
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Step 3. When must notice be given?

Does the contract require notice?	No <input type="checkbox"/>	Yes <input type="checkbox"/>		If yes, proceed to Step 4. Timely notice must be provided in accordance with the notice provision, or termination may not be available even though a triggering event has occurred. Some notice provisions required notice <i>in advance</i> of performance due. Others required notice <i>within</i> a certain number of days of the triggering event.
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Step 4. Are there requirements for the form of notice?

Does the contract contain specific provisions for the <i>method</i> of notice?	No <input type="checkbox"/>	Yes <input type="checkbox"/>		If yes, notice provisions may specify the form of the notice, to whom it must be sent, and the manner in which it must be sent. Specific notice language may also be required.
Does the contract require specific <i>language</i> to give notice of a force majeure event?	No <input type="checkbox"/>	Yes <input type="checkbox"/>		If yes, determine whether required wording is present in any notice. Some contracts may even have form of notices attached as exhibits to the contract.
Does the contract specify a specific <i>method</i> for delivery of such notice?	No <input type="checkbox"/>	Yes <input type="checkbox"/>		If yes, notice may be required by email, priority mail, or through use of a particular form addressed to specific people.

[1] Whether or not the contract contains a *force majeure* clause, the common law doctrines of impossibility or commercial impracticability may be available and legal analysis of such a claim should be conducted. *See, e.g., Kel Kim Corp. v. Cent. Mkts., Inc.*, 70 N.Y.2d 900, 902-03 (1987)

(conducting independent analysis of impossibility doctrine and *force majeure* clause). The party asserting this defense will bear the burden of proving that the event was unforeseeable and truly rendered performance impossible, and the doctrine generally is applied narrowly. For example, assertions that the event rendered performance more expensive or difficult have been rejected under the impossibility doctrine and, as result, some states, like California, have enacted statutes to address the standard applicable. *See, e.g., Gregory v. Haft*, 2013 WL 12192616, at *3 (N.Y. Sup. Ct. Nassau Cty. Sept. 30, 2013) (defendant provided insufficient proof “that Hurricane Sandy delayed the permits for so long that it made it impossible . . . to perform”); *see also, e.g., Cal. Civ. Code § 1511(2)* (Excusing performance under a contract when: “it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary.”).

The analysis in the absence of a *force majeure* clause may also depend on the particular type of contract or industry involved. For example, in the real estate context, if the landlord closes a building, the landlord may arguably be in breach of the covenant of quiet enjoyment. However, the covenant to pay rent generally is considered an independent covenant, and the tenant may not be excused from paying rent just because the landlord has closed the building. On the other hand, closure may excuse the tenant from having to perform under a continuous operation covenant.

[2] An “act of God” is generally defined as an unusual or extraordinary natural event such as floods, earthquakes, volcanic eruptions, tornadoes, hurricanes, blizzards, etc. *See Gleeson v. Virginia Midland Ry. Co.*, 140 U.S. 435, 439 (1891); *Carlson v. A. & P. Corrugated Box Corp.*, 364 Pa. 216, 219 (Pa. 1950); *Cormack v. New York, N.H. & H.R. Co.*, 196 N.Y. 442 (N.Y. 1909).

[3] *See, e.g., Kel Kim Corp.*, 70 N.Y.2d at 902–03. Expansion of the application of such clauses to COVID-19 by legislative action, executive order or judicial interpretation may be a response to the crisis.

[4] *See, e.g., Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd.*, 782 F.2d 314, 319 (2d Cir. 1985); 30 Williston on Contracts § 77:31 (4th ed.). Similarly, a party may be unable to claim the protection of a *force majeure* clause if its actions were to blame for the occurrence of the *force majeure* event or if they made the event foreseeable. *See Goldstein v. Orensanz Events LLC*, 146 A.D.3d 492, 492 (1st Dep’t 2017) (holding that event space owner would not be entitled to protection of *force majeure* clause in lawsuit seeking damages for cancelled event if the triggering “order of the . . . City government,” which had required the event space to close, was triggered by the owner’s actions).

[5] *See, e.g., Constellation Energy Servs. of New York, Inc. v. New Water St. Corp.*, 146 A.D.3d 557 (N.Y. App. Div. 2017) (holding that flooding due to Hurricane Sandy might excuse payment of certain minimum utility fees under a *force majeure* clause but requiring the defendant would have to prove that its abandonment of the property for the length of time at issue was “an unavoidable result of the storm”).

[6] *See Toyomenka Pac. Petroleum, Inc. v. Hess Oil Virgin Is. Corp.*, 771 F. Supp. 63, 67–68 (S.D.N.Y. 1991) (noting that a *force majeure* notification outside the limits of a notice period may

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waive the applicability of the *force majeure* clause if the parties intended the notice period as a condition precedent to the clause).

[7] As noted above, if an agreement does not have a *force majeure* or “act of god” clause, an analysis under the doctrine of impossibility or commercial impracticability, depending on the jurisdiction, may be warranted.



*Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact any member of the firm's **Coronavirus (COVID-19) Response Team**.*

*Gibson Dunn regularly counsels clients on issues raised by this pandemic in the commercial context. For additional information, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's **Litigation, Real Estate, or Transactional** groups, or the authors:*

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