

COVID-19 as a Force Majeure: Likely Impacts of the Coronavirus Spread on Transportation Contracts

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The global coronavirus pandemic is disrupting industry on an enormous scale, and its effects are likely to be significant and long-lasting. Under the swiftly evolving conditions created by the outbreak, many transportation service providers and consumers find themselves unable to meet their contractual obligations to business partners, or learn that their business partners are unable to perform contractual duties owed to them. Such businesses are turning to their contracts in search of provisions that might excuse breaches of contract under these circumstances.

Many transportation contracts contain force majeure clauses that expressly excuse nonperformance in the event of an “act of God” or other extreme, unforeseeable occurrence outside either party’s control that thwarts contractual performance. At first blush, force majeure clauses seem perfectly suited to the extreme, unpredictable conditions created by the novel coronavirus outbreak. However, whether such a clause excuses a given type of nonperformance depends greatly on the contract and the circumstances.

How can a transportation service provider or consumer determine whether a force majeure provision excuses contractual performance in the environment COVID-19 has created? Three key questions control:

(1) How does the contract define force majeure?

Look for a correlation between the types of force majeure events described in the contract and the reason a business cannot perform. Some force majeure clauses expressly include epidemics or pandemics. Others don’t mention pandemics but might include other occurrences occasioned by COVID-19, such as embargoes, quarantines or travel restrictions. If a party can’t

perform its contractual obligations for a reason stated in the contract's force majeure clause, the party likely will be excused from its performance obligation without penalty.

Most force majeure clauses include a catch-all provision defining force majeure as an unforeseeable event beyond the parties' reasonable control, or stating that force majeure events "include but are not limited to" events enumerated in the provision. COVID-19 generally falls within these catch-all provisions. However, businesses should be aware that some force majeure provisions are limited to the events specified in the clause. If pandemics or related events (like embargoes and travel restrictions) aren't included, force majeure might not be available as a breach of contract defense.

(2) What performance does the force majeure clause apply to?

Evaluate whether the force majeure clause applies to the type of breach being contemplated. Some provisions allow a party to terminate the contract altogether, while others simply suspend performance during the force majeure event. Some provisions apply to all contract obligations; others apply only to certain aspects of performance. Some force majeure provisions provide a defense to liability for a failure to perform; others directly excuse performance when a force majeure event prevents performance.

(3) What is required for a party to invoke force majeure?

Some clauses require parties to take certain steps before invoking force majeure as an excuse for nonperformance. Commonly, contracts require notice, sometimes in prescribed forms or within specified timeframes. Some contracts also require that parties explore measures to remove or mitigate the effects of force majeure, such as by taking "reasonable" or "best" efforts to secure performance. Businesses should identify any such obligations and take steps to document their efforts to comply with them before seeking to invoke force majeure.

What if there is no applicable force majeure clause?

It depends. In some cases, businesses may have to bear the cost of their inability to perform, for instance by paying cancellation or late penalties. In other cases, businesses may be able to rely on the equitable doctrines of impossibility or frustration of purpose.

Where circumstances change in a way that would create extreme or unreasonable difficulty, expense, injury or loss to a party if it were held to its contractual commitments, a court might excuse nonperformance on the grounds of "impossibility" or "impracticability"—if the change in circumstances was unforeseeable. Similarly, if a party can show that its principal purpose in entering into a contract has been frustrated by an unforeseeable event outside its control, its duties to perform might be discharged. In both cases, the event must be unforeseeable such that the parties couldn't have directly guarded against it in the contract.

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The coronavirus pandemic likely will be regarded as an unforeseeable occurrence; after all, few of us can recall an event with the global impact on travel and trade that we are now experiencing. However, a court confronting a coronavirus defense could conclude that while the pandemic itself was unforeseeable, certain impacts were not unforeseeable. For instance, in the transportation industry, it's not unforeseeable that deliveries may be delayed on occasion, such that many parties negotiate allocation of risk of delay, and agree that delay occasioned by any reason is compensable in a certain manner.

Thus, businesses seeking to escape—or enforce—contract performance affected by the coronavirus are advised to pay close attention to the terms of their contracts. If you have any questions about the enforceability of a transportation contract in light of the COVID-19 outbreak, Foster Garvey's [Transportation & Logistics](#) group would be glad to assist you.