
March 16, 2020

UPDATE: Force Majeure Under the Coronavirus (COVID-19) Pandemic

The coronavirus (COVID-19) pandemic has impacted the ability of businesses around the globe to maintain operations and fulfill existing contractual obligations. In just a matter of days, the World Health Organization (“WHO”) declared COVID-19 a pandemic,¹ governments imposed unprecedented travel, movement, and large-gathering restrictions,² U.S. cities and states instituted restrictive interventions, including shuttering public schools and prohibiting dine-in service at restaurants,³ and companies and organizations from all sectors experienced severe business interruptions or canceled events due to a combination of government regulations on large gatherings and contagion concerns.⁴ The fast-paced evolution of the COVID-19 pandemic gives rise to new events every day that affect a party’s ability to excuse contractual nonperformance through either force majeure provisions or other mechanisms. We have also seen a sharp rise in insurance claims for coverage of losses resulting from business interruptions.⁵ This memorandum serves as a follow-on to the [Force Majeure in the Wake of the Coronavirus \(COVID-19\)](#) alert issued March 3, 2020, taking into account recent developments and their impact on parties’ ability to invoke force majeure, and outlining alternative common law excuses of nonperformance where contracts are silent on the issue.

Force Majeure Provisions and the Impact of Recent Events

As outlined in the [March 3 Memorandum](#), force majeure clauses excuse a party’s nonperformance under a contract when extraordinary events prevent a party from fulfilling its contractual obligations.⁶ The applicability of a force majeure provision is contract-specific, and there is a high bar for invocation of such a clause. Recent events, including the declaration of COVID-19 as a “pandemic” and the implementation of travel, movement, and large-gathering restrictions, have altered the force majeure landscape in a manner that may impact the availability of such provisions to nonperforming parties.

In considering the applicability of force majeure, courts look to whether: (1) the event qualifies as force majeure under the contract; (2) the risk of nonperformance was foreseeable and able to be mitigated; and (3) performance is truly impossible. The court’s inquiry largely focuses on whether the event giving rise to nonperformance is specifically listed as a qualifying force majeure in the clause at issue.⁷ Even if a party can surmount this requirement, it cannot invoke force majeure if: (1) it could have foreseen and mitigated the potential nonperformance,⁸ and (2) performance is merely impracticable or economically difficult rather than truly impossible⁹ (unless the specific jurisdiction or contract at issue specifies a different standard).¹⁰ Recent COVID-19 developments may impact whether the outbreak and/or its effects constitute force majeure.

COVID-19's classification as a "pandemic" by the WHO will trigger a force majeure clause that expressly accounts for "pandemics." That said, the declaration of pandemic standing alone—without a reference to pandemics in a force majeure clause—will not automatically constitute a force majeure given the courts' focus on whether the event is specified within the contractual language. Clauses that are silent on pandemics, epidemics, or other viral outbreaks are likely to be insufficient for a force majeure defense due to COVID-19, unless, of course, courts liberalize the force majeure analysis to account for market realities.¹¹ If a force majeure clause clearly covers COVID-19 as a qualifying event in light of the WHO's declaration, parties seeking to invoke the provision will not need to establish the event was unforeseeable, but will still need to show: (1) that they took steps to mitigate the damage, and (2) that performance is truly impossible (or meets any other standard the clause requires).¹²

Recent governmental regulations intended to contain the COVID-19 outbreak may similarly make it easier to invoke a force majeure clause not previously triggered by the virus. Ever-expanding governmental restrictions on travel, movement, and large gatherings have resulted in significant business interruptions and widespread event and travel cancellations, with a particularly salient impact on the event, tourism, restaurant, airline, venue rental, and sports and entertainment sectors.¹³ On March 15, New York City shuttered tens of thousands of public schools, restaurants and bars in the largest shutdown in the country, and other cities and states instituted similar restrictive interventions.¹⁴ Businesses may be able to invoke force majeure provisions to excuse any contractual nonperformance resulting from these measures if the clauses at issue enumerate governmental orders or regulations that make performance impossible.¹⁵ As with clauses triggered by the WHO's pandemic declaration, the delineation of governmental regulations making performance impossible does not end the court's analysis, and parties seeking to avail themselves of force majeure must still establish inability to mitigate, along with impossibility of performance (or any other standard the clause requires).¹⁶ As a result, companies should continue to closely monitor COVID-19 developments and their potential impact on contractual performance, and take and document all reasonable steps to mitigate, where possible, their effect on business operations.

Contracts Lacking Force Majeure Clauses

As the impact of the COVID-19 pandemic magnifies, parties are increasingly looking to their contracts for potential excuses of nonperformance, such as force majeure, only to find their contracts conspicuously silent on the issue. Where this is the case, companies should begin to assess the applicability of alternative common law mechanisms for excuse of nonperformance.

While courts will likely reject a force majeure claim if the parties' agreement does not contain a force majeure clause,¹⁷ parties seeking to excuse nonperformance may still avail themselves of the common law doctrines of impossibility or, in some jurisdictions, impracticability. These doctrines may excuse nonperformance where a party establishes that: (1) an unexpected intervening event occurred; (2) the parties' agreement assumed such an event would not occur; and (3) the unexpected event made contractual performance impossible or impracticable.¹⁸

A party's nonperformance will not be excused under these principles where the event preventing performance was expected or was a foreseeable risk at the time of the contract's execution.¹⁹ Even if the event was unforeseeable, courts will still assess whether the "nonoccurrence" of the event at issue was a "basic assumption . . . on which the contract was made."²⁰ It is, for example, assumed that the subject of the contract will not be destroyed. It is not, however, considered a "basic assumption" that existing market conditions or the financial situation of the parties will not be disturbed.²¹ As a result, mere market shifts or financial inability to perform generally do not constitute unforeseen events the nonoccurrence of which was a "basic assumption" of the contract.

As a general principle, a party assumes the risk of its own subjective incapacity to perform its contractual duties unless the contract envisions otherwise.²² As a result, courts apply an objective assessment of whether the performance sought to be excused is impossible or impractical—whether the performance is beyond a party's subjectively-viewed capacity is irrelevant to this analysis.²³ Some jurisdictions, including New York, excuse performance only where it is truly impossible, rather than merely impracticable, which generally requires a showing that destruction of the subject matter of the contract or the means of contractual performance make the satisfaction of obligations impossible.²⁴ Other jurisdictions, including California, excuse performance where it is impracticable, such that it would require excessive or unreasonable expense.²⁵ We expect that the COVID-19 pandemic will require courts to address calls to liberalize the doctrines of impossibility and impracticality.

Another common alternative in the absence of a force majeure clause is the doctrine of frustration of purpose. This principle functions similarly to impracticability and impossibility, but focuses on whether the event at issue has obviated the purpose of the contract, rather than whether it has made a party's contractual performance unviable.²⁶ Frustration of purpose requires many of the same elements as the principles of impossibility or impracticability, but does not require a supervening event that impedes a party's performance: (1) an event substantially frustrates a party's principal purpose; (2) the nonoccurrence of the event was a basic assumption of the contract; and (3) the event was not the fault of the party asserting the defense.²⁷ The overarching question with respect to frustration of purpose is whether the unforeseeable event has significantly altered the circumstances of an agreement such that performance would no longer fulfill any aspect of its original purpose. There are two primary obstacles to successfully invoking this defense. First, courts interpret a party's "purpose" broadly, and the mere fact that an event has prevented a party from taking advantage of the agreement in an expected manner may be insufficient.²⁸ Second, frustration must be near total—it is not enough that a transaction was previously expected to be profitable, but is now unprofitable.²⁹

As the COVID-19 pandemic continues to develop, businesses should take proactive steps to ensure continuity of operations sufficient to meet existing contractual obligations and evaluate whether their counterparties are doing the same. If companies expect that COVID-19 may result in their own or their counterparties' inability to satisfy contractual obligations, they should assess the viability of either force

majeure or common law principles of nonperformance excusal. This assessment may also be rendered more complicated by the fact that many companies will be on both sides of this issue, as the performing party in some cases or the receiving party in others. Further complicating the issue is the reality that the applicable legal standards vary by state, sometimes in an outcome determinative manner. Businesses may wish to avail themselves of a force majeure clause or the common law principles in connection with certain contracts, but resist such a claim by their counterparties to other contracts. Companies will therefore need to be mindful of the broader implications of asserting these provisions and principles.

Recent Developments Impacting Business Interruption and Contingent Business Interruption Insurance Under the COVID-19 Pandemic

Companies anticipating potential business interruption should also review potentially applicable insurance policies and provisions, including business interruption and contingent business interruption insurance.

As outlined in the [March 3 Memorandum](#), business interruption insurance is intended to cover losses resulting from direct interruptions to a business's operations, and generally covers lost revenue, fixed expenses such as rent and utility, or expenses from operating from a temporary location.³⁰ Similarly, contingent business interruption insurance is intended to cover lost profits and costs that indirectly result from disruptions in a company's supply chain, including failures of suppliers or downstream customers.³¹ While these policies most frequently relate to physical property damage, businesses have increasingly submitted claims for coverage of losses due to business interruptions resulting from COVID-19.³² The viability of these claims depends on the terms of the insurance policy at issue, but the historical trend, based on prior viral epidemics, has been against coverage for business interruptions related to a pandemic like COVID-19.

In the wake of the Severe Acute Respiratory Syndrome (SARS) outbreak in 2002-2003, many insurers excluded viral or bacterial outbreaks from standard business interruption and contingent business interruption policies.³³ Now faced with claims relating to losses from COVID-19, insurers have largely taken the position that communicable diseases not expressly delineated in the policy at issue are not covered.³⁴ Some have even released blanket statements regarding COVID-19 confirming that view.³⁵

In light of these developments, it is critical that companies proactively assess the specific terms and conditions of their governing insurance policies to determine whether interruptions from the COVID-19 pandemic would be covered, and review their policies' insurer notice requirements to ensure their scrupulous compliance with those provisions in the event coverage is needed. Insurers should also take proactive measures by reviewing their standard policy language in anticipation of such claims, and preparing themselves for the near-certainty that insurance coverage lawsuits will be filed in connection with uncovered losses.

We will continue to closely monitor the legal and business implications associated with the COVID-19 pandemic and report on further developments.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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- ¹ Tedros Adhanom Ghebreyesus, Director-General, World Health Org., Opening Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (“We have . . . made the assessment that COVID-19 can be characterized as a pandemic.”).
- ² Client Alert, Paul, Weiss, Rifkind, Wharton & Garrison LLP, *The U.S. Imposes a Ban on Travel from Schengen Area Countries* (Mar. 12, 2020), <https://www.paulweiss.com/practices/transactional/capital-markets-securities/publications/the-united-states-imposes-a-ban-on-travel-from-schengen-area-countries?id=30847>; Donald Trump, President, White House, Speech on Coronavirus Pandemic (Mar. 11, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-address-nation/> (“To keep new cases from entering our shores, we will be suspending all travel from Europe to the United States for the next 30 days.”); Giovanni Legorano and Eric Sylvers, *As Italy Begins Coronavirus Lockdown, Neighbors Limit Travel Ties*, WALL ST. J. (Mar. 10, 2020 2:25PM), <https://www.wsj.com/articles/italians-face-up-to-life-under-nationwide-lockdown-11583844267> (“Austria banned Italians from entering the country unless they have a medical certificate and warned its citizens not to travel to Italy. Spain suspended direct flights to and from Italy until March 25. . . . Under the national quarantine announced Monday night by [Italian] Prime Minister Giuseppe Conte, travel to, from and within Italy is permitted only if it is demonstrably necessary for work or health reasons. All gatherings in public are banned, and people must maintain a distance of at least one meter, or just over 3 feet, in shops, churches and other public places. Restaurants and bars must close at 6 p.m. Schools, universities, cinemas and museums are closed across Italy. The Vatican announced Tuesday that St. Peter’s Basilica and Square would be closed to the public until April 3rd.”).
- ³ Luis Ferre-Sadurni, *Coronavirus in N.Y.: Schools, Restaurants and Bars Are Shut Down*, N.Y. TIMES (Mar. 15, 2020), <https://www.nytimes.com/2020/03/15/nyregion/coronavirus-nyc-shutdown.html> (“Facing mounting pressure, New York City officials announced on Sunday a sweeping shutdown of tens of thousands of bars and restaurants, and the closure of the city’s public school system — the largest in the nation — in an effort to suppress the spread of the coronavirus.”).
- ⁴ *Coronavirus Cancellations: A Brief List*, N.Y. TIMES, <https://www.nytimes.com/article/cancelled-events-coronavirus.html> (updated live; last visited Mar. 12, 2020); *Coronavirus Deals Blow to Global Business*, WALL ST. J. (Feb. 28, 2020 5:11PM), <https://www.wsj.com/articles/coronavirus-deals-blow-to-global-business-11582919791>.

- ⁵ Leslie Scism, *U.S. Businesses Gear Up for Legal Disputes with Insurers Over Coronavirus Claims*, WALL ST. J. (Mar. 6, 2020 10:00AM), <https://www.wsj.com/articles/u-s-businesses-gear-up-for-legal-disputes-with-insurers-over-coronavirus-claims-11583465668>.
- ⁶ TRACY BATEMAN ET AL., 77A CORPUS JURIS SECUNDUM, SALES § 370 (describing a force majeure clause as a provision that “may have the effect of excluding nonperformance arising out of certain causes as unforeseeable or beyond the parties’ reasonable control or specified by the contract”); MARIE K. PESANDO, AMERICAN JURISPRUDENCE 2d, ACT OF GOD § 13.
- ⁷ See, e.g., RICHARD A. LORD, 30 WILLISTON ON CONTRACTS § 77:31 (4th Ed.) (“What types of events constitute *force majeure* depend on the specific language included in the clause itself.”); *Kel Kim Corp. v. Cent. Mkts., Inc.*, 70 N.Y.2d 900, 902 (1987) (holding that force majeure defense is narrow and excuses nonperformance “only if the force majeure clause specifically includes the event that actually prevents a party’s performance”).
- ⁸ See LORD, *supra* note 7, § 77:31 (noting that a party seeking the benefits of a force majeure clause must show that performance is impossible “in spite of skill, diligence, and good faith” to continue to perform).
- ⁹ See *In re Cablevision Consumer Litig.*, 864 F. Supp. 2d 258, 264 (E.D.N.Y. 2012) (noting that, under New York law, force majeure clauses are “construed narrowly and will generally only excuse a party’s nonperformance that has been rendered impossible by an unforeseen event”); see LORD, *supra* note 7, § 77:31 (“Nonperformance dictated by economic hardship is not enough to fall within a *force majeure* provision.”); BATEMAN et al., *supra* note 6, § 370 (“Inability to sell at a profit is not the contemplation of the law [of] a force majeure event excusing performance and a party is not entitled to declare a force majeure because the costs of contract compliance are higher than it would have liked or anticipated.”).
- ¹⁰ See, e.g., *Facto v. Pantagis*, 390 N.J. Super. 227, 231 (2007) (“A *force majeure* clause, such as contained in the [defendant’s] contract, provides a means by which the parties may anticipate in advance a condition that will make performance impracticable.”); *OWBR LLC v. Clear Channel Comms., Inc.*, 266 F. Supp. 2d 1214, 1216 (D. Haw. 2003) (noting that the force majeure clause excused nonperformance where it was “inadvisable, illegal, or impossible”).
- ¹¹ See RICHARD A. LORD, 30 WILLISTON ON CONTRACTS § 77:31 (4th Ed.) (“What types of events constitute *force majeure* depend on the specific language included in the clause itself.”); *Kel Kim Corp. v. Cent. Mkts., Inc.*, 70 N.Y.2d 900, 902 (1987) (holding that force majeure defense is narrow and excuses nonperformance “only if the force majeure clause specifically includes the event that actually prevents a party’s performance”).
- ¹² See, e.g., *Facto*, 390 N.J. Super. at 231 (“A *force majeure* clause, such as contained in the [defendant’s] contract, provides a means by which the parties may anticipate in advance a condition that will make performance impracticable.”); *TEC Olmos, LLC v. Conoco Phillips Co.*, 555 S.W.3d 176, 183 (Tex. Ct. App. 2018) (“[T]here was no unforeseeability requirement when a *specified force majeure* condition . . . occurred that excused performance.”).
- ¹³ See, e.g., *SF Bans Large Group Events, Including Warriors, Giants Games*, NBC BAY AREA (Mar. 11, 2020 5:47PM), <https://www.nbcbayarea.com/news/local/coronavirus-sf-bans-group-gatherings-of-1000-or-more/2252324/>; Taylor Romine et al., *Broadway Theaters to Suspend All Performances Because of Coronavirus*, CNN HEALTH (Mar. 12, 2020 3:23PM), <https://www.cnn.com/2020/03/12/health/broadway-coronavirus-update/index.html>.
- ¹⁴ *Across America, States Limit Public Interactions*, N.Y. TIMES (updated live, last visited Mar. 16, 2020 7:52AM) (“Restaurants and bars were ordered closed in New York City, Massachusetts, Ohio, Washington and Puerto Rico; in some places, officials said establishments could still sell food for takeout or delivery.”).

- ¹⁵ See, e.g., *Duane Reade v. Stoneybrook Realty, LLC*, 63 A.D.3d 433 (1st Dep’t 2009) (holding that a court order constituted a force majeure event where the clause covered “governmental prohibitions”); *Trump on Ocean, LLC v. Ash*, No. 005274/2009, 2009 WL 2619233 (N.Y. Sup. Ct. Aug. 25, 2009) (finding that failure by state to issue building permit constituted force majeure where clause specifically covered “unforeseen restrictive governmental laws, regulations, acts or omissions”).
- ¹⁶ See, e.g., *Facto*, 390 N.J. Super. at 231 (“A force majeure clause, such as contained in the [defendant’s] contract, provides a means by which the parties may anticipate in advance a condition that will make performance impracticable.”); *TEC Olmos, LLC v. Conoco Phillips Co.*, 555 S.W.3d 176, 183 (Tex. Ct. App. 2018) (“[T]here was no unforeseeability requirement when a specified force majeure condition . . . occurred that excused performance.”).
- ¹⁷ See *Gen. Elec. Co. v. Metals Res. Grp. Ltd.*, 293 A.D.2d 417 (1st Dep’t 2002) (“The parties’ integrated agreement contained no force majeure provision, must less one specifying the occurrence that defendant would now have treated as a force majeure, and, accordingly, there is no basis for a force majeure defense.”).
- ¹⁸ See Restatement (Second) of Contracts § 261 (Am. Law Inst. 1981) (addressing the impracticability of performance). According to the Restatement (Second) of Contracts, “extreme impracticability of performance may properly be regarded as having the same effect as strict impossibility of performance,” and performance is impossible when “it can only be done at an excessive and unreasonable cost, for which the parties had not bargained.” 17A AM. JUR. 2D *Contracts* § 643 (2020).
- ¹⁹ See, e.g., *Korea Life Ins. Co., Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 269 F. Supp. 2d 424, 447 (S.D.N.Y. 2003) (holding that devaluation of foreign currency required for a transaction was a foreseeable risk that precluded defense of impracticability); *Davis v. Dawson, Inc.*, 15 F. Supp. 2d 64, 115 (D. Mass. 1998) (denying impracticability defense where risk of third party’s nonperformance, making defendant’s performance more difficult, was “reasonably foreseeable and one of the risks [defendant] undertook in the agreement”).
- ²⁰ Restatement (Second) of Contracts § 261 (1981).
- ²¹ *Id.*
- ²² See *id.* cmt. e (“[T]he rationale [behind impracticability and impossibility] is that a party generally assumes the risk of his own inability to perform his duty.”).
- ²³ See *id.* (describing the objective standard of the doctrine as, “if the performance remains practicable and it is merely beyond the party’s capacity to render it, he is ordinarily not discharged”).
- ²⁴ *Kel Kim Corp.*, 70 N.Y.2d at 902.
- ²⁵ *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga*, 175 Cal. App. 4th 1306, 1336 (Cal. Ct. App. 2009).
- ²⁶ HON. MICHAEL M. BAYLSON ET AL., 8 BUS. & COM. LITIG. FED. CTS. § 89:36 (4th ed. 2019).
- ²⁷ *Id.*
- ²⁸ E. ALLAN FARNSWORTH & ZACHARY WOLFE, FARNSWORTH ON CONTRACTS § 9.09 (4th ed 2019)
- ²⁹ *Id.*
- ³⁰ *Covering Losses with Business Interruption Insurance*, INSURANCE INFORMATION INSTITUTE (last visited Mar. 1, 2020), <https://www.iii.org/article/covering-losses-with-business-interruption-insurance>; Jing Yang, *Why Many Businesses will be on the Hook for Coronavirus Losses*, WALL ST. J. (Feb. 21, 2020 6:00AM), <https://www.wsj.com/articles/why-many-businesses-will-be-on-the-hook-for-coronavirus-losses-11582282802>.

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- ³¹ *Protecting your business against contingent business interruption and supply chain disruption*, INSURANCE INFORMATION INSTITUTE (last visited Mar. 14, 2020), <https://www.iii.org/article/protecting-your-business-against-contingent-business-interruption-and-supply-chain-disruption>.
- ³² Leslie Scism, *U.S. Businesses Gear Up for Legal Disputes with Insurers Over Coronavirus Claims*, WALL ST. J. (Mar. 6, 2020 10:00AM), <https://www.wsj.com/articles/u-s-businesses-gear-up-for-legal-disputes-with-insurers-over-coronavirus-claims-11583465668>.
- ³³ Jing Yang, *Why Many Businesses will be on the Hook for Coronavirus Losses*, WALL ST. J. (Feb. 21, 2020 6:00AM), <https://www.wsj.com/articles/why-many-businesses-will-be-on-the-hook-for-coronavirus-losses-11582282802> (“Now insurers across the board exclude epidemics in standard business-interruption policies, which mainly cover property damage from events such as fire, terrorism and natural catastrophes.”); Noor Zainab et al., *Many Global Firms, Excluded from Epidemic Insurance, Face Heavy Coronavirus Costs*, REUTERS (Jan. 29, 2020 6:30AM), <https://www.reuters.com/article/us-china-health-insurance/many-global-firms-excluded-from-epidemic-insurance-face-heavy-coronavirus-costs-idUSKBN1ZS1CU>.
- ³⁴ Leslie Scism, *U.S. Businesses Gear Up for Legal Disputes with Insurers Over Coronavirus Claims*, WALL ST. J. (Mar. 6, 2020 10:00AM), <https://www.wsj.com/articles/u-s-businesses-gear-up-for-legal-disputes-with-insurers-over-coronavirus-claims-11583465668>.
- ³⁵ Sian Barton, *Axa Confirms Position on Coronavirus Business Interruption Coverage*, INSURANCE AGE (Mar. 9, 2020), <https://www.insuranceage.co.uk/insurer/7500931/axa-confirms-coronavirus-business-interruption-coverage>.