

# “Your Options When The Coronavirus Impacts Contractual Performance,”(March 2020).

Articles

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The legal ramifications of the coronavirus outbreak could have been taken out of many law examinations or Hollywood scripts. But the fact is, they are all too real. So if you are currently working from home because your office is closed, wondering how the world has changed, how things will evolve, and what the playbook for today, next week, and next month look like, know this: you are not alone.

One issue you may be considering, among many other things, is what the impact of the coronavirus outbreak will be on your commercial contracts and obligations. Of course, contracts are usually enforceable under ordinary circumstances. But what happens when there is no more “ordinary?” We discuss part of the legal framework that may govern your agreements in the wake of the coronavirus

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outbreak and some suggestions for the path forward.

### **Force Majeure and Frustration of Purpose:**

#### **Two Infrequently Invoked, but Important Contractual Doctrines**

Most commercial contracts contain a “force majeure” clause. A force majeure provision in a contract may specifically provide for impossibility of performance due to “an act of God.” Force majeure clauses in commercial contracts generally list specific events outside of the contracting parties’ control that, upon occurrence, would excuse or delay the invoking party’s performance of its contractual duties.

Unforeseeable circumstances—such as the outbreak of coronavirus—that prevent a party from fulfilling its contractual duties may fall under the force majeure clause of a contract. Force majeure clauses are specific to each contract and operate as a risk allocation mechanism to govern situations that are beyond the parties’ control, such as the outbreak of war or natural disasters. The party seeking to invoke force majeure usually must notify the other party and show a causal connection between the event—the outbreak of coronavirus—that made it effectively “impossible” to perform its contractual duties.

The “frustration of purpose” doctrine, on the other hand, can come into play when there is an event (without either party’s fault and that the contract does not address) which causes such a major disruption in the parties’ relationship that could not reasonably have been anticipated, that it would be unjust to hold the parties to the contract. Because courts are loathe to undo the parties’ benefit of the bargain, this doctrine is rarely successfully invoked.

#### **Does the Coronavirus Fit Either Category?**

Coronavirus is or likely will disrupt some of your contractual relationships. If a country (including the United States) stops transportation of goods or imposes a quarantine such that a

materials supplier cannot fulfil its supply obligation to a subcontractor, that *might* be a frustrating or force majeure event under the supply contract.

Contracts are generally about allocating risk, so one key question is whether the party asserting frustration of purpose or force majeure assumed the risk of being unable to source the materials needed to fulfill its contractual obligations. If it did (something a court will ultimately have to decide), there is no frustration and, depending on what the contract says, there may be no force majeure. Some of the key considerations, include:

- Was it legally impossible to perform?
- How materially did coronavirus impact performance?
- Did the force majeure clause include reference to a pandemic or health epidemic?

### **Addressing the Path Forward in the Wake of the Coronavirus**

Looking ahead (whether that means tomorrow, next month, or next year), we recommend the following steps:

- Stay current. The situation is evolving and WTO will attempt to keep you apprised of any legal developments or strategies for dealing with this fluid situation.
- Take a look at your contracts and make sure you know the potential impacts of your decisions.
- Have someone review your insurance policies to determine if there may be coverage.
- Keep close track (and close records) of how the coronavirus has impacted your business so you can justify non-performance (if any).
- Talk to your business teams to determine whether there are different ways to meet your contractual terms.

- Talk to your contractual partner to find ways to move the obligations out into the future or negotiate a resolution.

For more information, contact WTO partner Joel Neckers.