



# A U.S. Guide on Force Majeure and Other Defenses to Nonperformance Due to COVID-19

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This outline discusses whether force majeure, material adverse change or effect, impossibility, or frustration of purpose can be used in the United States to excuse contractual performance based on the effects of COVID-19.

## 1. Force Majeure

- a. The phrase “force majeure” means a “superior” or “irresistible” force or power. Contracting parties include force majeure clauses in their agreements to protect themselves from unforeseeable or uncontrollable events that prevent or delay performance. Force majeure clauses excuse nonperformance in such circumstances.
- b. Unlike many civil law countries, in the United States force majeure is not implied in contracts. Hence, the ability to claim force majeure depends upon the existence of an express force majeure provision in the contract. Contract parties can negotiate for broad force majeure terms or narrow ones. In the United States, contract law matters such as force majeure are governed by state law.
- c. Courts in the United States look to several factors when considering whether a force majeure clause excuses performance: (1) whether the event qualifies as a force majeure event under the contract, (2) whether the risk of nonperformance was foreseeable and able to be mitigated, (3) whether performance is truly impossible, and (4) whether it was the force majeure event that rendered the performance impossible.

### i. Does the event qualify as a force majeure event under the contract?

1. The primary focus is whether the clause encompasses the type of event a contractual party claims is causing its nonperformance. *See* 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.”).
2. Most courts construe force majeure clauses narrowly. *See Kyocera Corp. v. Hemlock Semiconductor*, 886 N.W.2d 445, 451 (Mich. Ct. App. 2015) (“Force-majeure clauses are typically narrowly construed.”).
3. Therefore force majeure clauses ordinarily excuse performance only if the event is specifically identified on the face of the contract. *See Kel Kim Corp. v. Cent. Mkts., Inc.*, 70 N.Y.2d 900, 902 (1987); *Mitsubishi Int’l Corp. v. Interstate Chem. Corp.*, No. 08-cv-194, 2008 WL 2139137, at \*3 (S.D.N.Y. May 20, 2008) (“[O]rdinarily, only if the *force majeure* clause specifically includes

the event that actually prevents a party's performance will that party be excused.").

4. An event is specifically identified on the face of the contract if it qualifies as an event enumerated in the force majeure clause or is brought into the force majeure clause by a catchall provision. See *Kel Kim Corp.*, 519 N.E.2d at 296-97.
5. Many force majeure clauses set out specific triggering events, which vary by contract. The following triggering events, if listed in a force majeure clause, may be implicated by events caused by COVID-19:
  - a. A pandemic, epidemic, or outbreak of viral or communicable disease;
  - b. Inability to obtain fuel, power, components, or materials;
  - c. Disruption of supply chains, transportation systems, or labor force;
  - d. National emergency;
  - e. Act, order, or requirement of government, including but not limited to quarantines;
  - f. "Act of God," generally understood to include unpreventable events caused by forces of nature. See *Act of God*, BLACK'S LAW DICTIONARY (11th ed. 2019); or
  - g. A "catch-all" phrase such as "or other similar causes beyond the control of the parties."
6. Although contracts rarely identify specific viruses, they often reference "acts of God." They sometimes expressly reference epidemics, pandemics, disease, illness, or quarantine. Even where such events are not expressly included in a force majeure provision, a pandemic such as COVID-19 could trigger other events that are identified in the contract, including, for example, an inability to obtain fuel, power, components, or materials, or an act, order, or requirement of a governmental authority that renders performance illegal or impossible.
7. Not every state in the U.S. takes the same approach to interpreting force majeure clauses. Therefore whether a court will

conclude that COVID-19 is covered by a force majeure provision may depend on the governing law of the contract. For example:

- a. New York courts generally require that an unlisted event must be similar in type to the listed events in order to qualify as a force majeure event. For example, in *Kel Kim* the court declined to apply a force majeure clause to excuse the performance of a party that lost its contractually required insurance coverage and could not obtain insurance from any insurer. *Kel Kim Corp*, 519 N.E.2d at 295-96. The contract's force majeure clause included broad catch-all language covering "other similar causes beyond the control of such party." *Id.* But the court construed this as relating only to day-to-day operational concerns, which it found did not include the ability to obtain sufficient liability insurance. *Id.* at 297. In explaining its interpretation of the catch-all language, the court explained, "[t]he principle of interpretation applicable to such clauses is that the general words are not to be given expansive meaning; they are confined to things of the same kind or nature as the particular matters mentioned." 519 N.E.2d at 296-97. In other words, New York courts do not give the most expansive meaning possible to general language of excuse. Accordingly, if an event does not clearly fall within an expressly listed category, it must still be of the same general kind as the enumerated events in order for the catch-all clause to have its intended effect. Therefore even if a pandemic is not covered by the enumerated force majeure events, the affected party could argue that it is of the same kind or nature as those mentioned, and therefore is covered by the force majeure clause.
- b. Similarly, a court in Alabama declined to excuse performance based on a change in environmental regulations even where a force majeure clause included "without limitation . . . interventions . . . by government or governmental authorities." The court reasoned that although the provision contained broad and inclusive "catchall" language, this language is "qualified by the surrounding terms." *Drummond Coal Sales, Inc. v. Kinder Morgan Operating LP*, No. 2:16-cv-00345-SGC, 2017 WL 3149442, \*9 (N.D. Ala. July 25, 2017).

- c. California courts not only limit the application of catch-all provisions to events similar to those specifically listed, but also require that an event not specifically identified must have been unforeseeable at the time of contracting. *Free Range Content, Inc. v. Google Inc.*, No. 14-cv-02329, 2016 WL 2902332, at \*6 (N.D. Cal., May 13, 2016) (applying California law). California courts thus may find that although a pandemic like COVID-19 might have been unforeseeable in respect to prior contracts, that is not the case for future contracts.
- d. Texas courts, however, broadly interpret the terms of a force majeure clause with an eye toward the entire contract, its purpose, and the expectations of the parties. *TEC Olmos LLC v. ConocoPhillips Co.*, 555 S.W. 3d 176, 194 (Tex. App. 2018). Courts do not “myopically scrutinize the contract’s single force majeure provision to identify a qualifying event.” *Id.* Rather, “they view the entire contract to determine whether the parties intended the disruptive event to be within the body of risk assigned to a party or if, instead, it may excuse performance through the force majeure provision.” *Id.*

ii. **Was the force majeure event foreseeable?**

1. If an epidemic is not listed in a force majeure clause, but is only captured through catchall language, some courts require an additional showing that the event was unforeseeable. *Watson Labs. v. Rhone-Poulenc Rorer*, 178 F. Supp. 2d 1099, 1111–14 (C.D. Cal. 2001) (applying a foreseeability requirement where parties relied on the boilerplate language of “regulatory, governmental...action” rather than a specifically listed contractual event); *see also TEC Olmos*, 555 S.W.3d at 183–84 (concluding that a foreseeability requirement attaches to force majeure events not specifically enumerated in the force majeure clause).
2. Not all courts agree, however. *See, eg., Perlman v. Pioneer Ltd.*, 918 F.2d 1244, 1248 (5th Cir. 1990) (“Because the clause labelled ‘force majeure’ in the Lease does not mandate that the force majeure event be unforeseeable or beyond the control of Perlman before performance is excused, the district court erred when it supplied those terms as a rule of law.”); *Sabine Corp. v. ONG W., Inc.*, 725 F. Supp. 1157, 1170 (W.D. Okla. 1989)

("Plaintiff's argument that an event of force majeure must be unforeseeable must be rejected. Nowhere does the force majeure clause specify that an event or cause must be unforeseeable to be a force majeure event.").

iii. **Was performance made impossible, and not just impracticable?**

1. A party seeking to excuse its nonperformance because of the COVID-19 pandemic will generally be required to establish that performance is truly impossible rather than merely impracticable. *See In re Cablevision Consumer Litig.*, 864 F. Supp. 2d 258, 264 (E.D.N.Y. 2012) (noting that force majeure clauses "will generally only excuse a party's nonperformance that has been rendered impossible by an unforeseen event"); *Hemlock Semiconductor Corp. v. Kyocera Corp.*, No. 15-CV-11236, 2016 WL 67596, at \*7 (E.D. Mich. Jan. 6, 2016) ("[C]ourts refuse to apply contractual force majeure clauses where 'governmental action affects the profitability of a contract, but does not preclude a party's performance.'"); *Great Lakes Gas Transmission Ltd. v. Essar Steel Minnesota*, 871 F. Supp. 2d 843, 852 (D. Minn. 2012) (applying Michigan law) ("Michigan courts have recognized that a force majeure clause relieves a party from termination of the agreement 'due to circumstances beyond its control that would make performance untenable or impossible.'").
  - a. Example: A trade war between China and the United States was not a force majeure event despite steep price drops because the force majeure provision applied to "events that give rise to an actual, physical inability to perform, not those that only make performance inconvenient." *Hemlock Semiconductor Corp. v. Kyocera Corp.*, No. 15-cv-11236, 2016 WL 67596, at \*2, \*7 (E.D. Mich. Jan. 6, 2016).
2. Some jurisdictions, however, may only require that performance be impracticable, and some contracts may set a different standard (e.g., performance is "inadvisable"). *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"); *Jin Rui Grp., Inc. v.*

*Societe Kamel Bekdache & Fils S.A.L.*, 621 F. App'x 511, 511 (9th Cir. 2015) (holding that, under California law, “a promisor invoking a force majeure clause [must] show that, in spite of skill, diligence and good faith on his part, performance became impossible or *unreasonably expensive*”) (emphasis added).

- a. Example: A court excused an oil supplier’s delay in performance after a destructive hurricane. The court held that the delay was justified because performance was prohibitively difficult. *Toyomenka Pac. Petroleum v. Hess Oil Virgin Is. Corp.*, 771 F. Supp. 63, 66-67 (S.D.N.Y. 1991).
3. A party must mitigate any foreseeable risk of nonperformance. See 30 WILLISTON ON CONTRACTS § 77:31 (4th Ed.) (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); see also *Pacific Vegetable Oil Corp. v. C. S. T., Ltd.*, 174 P.2d 441, 447 (Cal. 1946) (“The test is whether under the particular circumstances there was such an . . . interference [with performance] as could not have been prevented by the exercise of prudence, diligence, or care.”)

- a. Examples:

- i. Although a foreign coast guard detained a ship en route and prevented shipment, the buyer could not invoke force majeure where the seller had fulfilled its obligation to deliver the shipped goods to the carrier and the only remaining obligation was buyer’s payment. *Phillips Puerto Rico Core v. Tradax Petroleum Ltd.*, 782 F.2d 314, 319 (2d Cir. 1985). The court reasoned that “the non-performing party must demonstrate its efforts to perform its contractual duties despite the occurrence of the event that it claims constituted force majeure.”
- ii. An alleged drop in demand for cage-free eggs fell outside the scope of a force majeure clause because “a change in purchaser demand—even a substantial change—is a foreseeable part of doing business.” *Rexing Quality Eggs v. Rembrandt Enter., Inc.*, 360 F. Supp. 3d 817, 841 (S.D. Ind. 2018).

4. Some courts will not excuse performance unless the nonperforming party shows that it actually attempted to perform. *See, e.g., Route 6 Outparcels v. Ruby Tuesday*, 931 N.Y.S.2d 436, 437 (App. Div. 3d Dep't 2011) (“[T]he nonperforming party has the burden of proof as well as a duty to show what action was taken to perform the contract, regardless of the occurrence of the excuse.”); *Great Lakes Gas Transmission Ltd. v. Essar Steel Minnesota*, 871 F. Supp. 2d 843, 852 (D. Minn. 2012) (“[A] force majeure clause may not be invoked to excuse performance where the delaying condition was caused by the party invoking it or could have been prevented by the exercise of prudence, diligence, and care.”).
  - a. Even if a state requires this showing, ultimately the language of the contract controls. *See Sun Operating Ltd. v. Holt*, 984 S.W.2d 277, 284 (Tex. App. 1998) (holding that, under the language of the agreement, a court erred in instructing that the nonperforming party had to exercise diligence to avoid, remove, and overcome the effects of force majeure).
5. Typically, performance that is later prohibited by a government order is impossible and therefore excused. *See, e.g., Harriscom Svenska v. Harris Corp.*, 3 F.3d 576, 580 (2d Cir. 1993) (holding that a party’s obligation to ship radio parts to a supplier of the Islamic Republic of Iran was rendered impossible and was therefore excused after the United States government banned the sale of military equipment to Iran).
6. Generally, nonperformance will not be excused if it is merely financially or economically more difficult to satisfy contractual obligations. *See* 30 WILLISTON ON CONTRACTS § 77:31 (4th Ed.) (“Nonperformance dictated by economic hardship is not enough to fall within a *force majeure* provision.”); *Kyocera*, 313 Mich. App. at 451 (“[F]inancial hardship and unprofitability do not constitute the type of delay or failure in performance sufficient to warrant relief under a force majeure clause”).
  - a. Examples:
    - i. In 2006, a tenant agreed to construct and open a restaurant on a landowner’s property by March 2009. The global financial crisis of 2008 hit and tenant argued that its performance was impossible because it needed its limited funds to meet debt

obligations. The court, however, refused to excuse performance because “financial hardship” is not grounds for invoking force majeure. *Route 6 Outparcels v. Ruby Tuesday*, 931 N.Y.S.2d 436, 438 (App. Div. 3d Dep’t 2011) (“Economic factors are an inherent part of all sophisticated business transactions and, as such, while not predictable, are never completely unforeseeable.”).

- ii. A poultry farmer sought to cancel his order for equipment he no longer needed due to the 2015 avian flu outbreak. The court refused to excuse his nonperformance because the language of the contract did not allow him to “terminate performance of the contract for market-based reasons.” *Rembrandt Enterprises v. Dahmes Stainless*, No. 15-cv-4248, 2017 WL 3929308, at \*2, \*12 (N.D. Iowa Sept. 7, 2017).
- iii. On the other hand, where a company was forced to close its stamping plant after the 2008 financial crisis, the court excused the owners’ nonperformance because the force majeure clause included “change to economic conditions.” *In re Old Carco*, 452 B.R. 100, 119–20 (Bankr. S.D.N.Y. 2011).

- iv. **Was it the force majeure that rendered performance impossible?** A party seeking to excuse its nonperformance because of the COVID-19 pandemic must also show that the force majeure event, and not some other cause, is what made performance impossible. *See, e.g., Gulf Oil Corp. v. F.E.R.C.*, 706 F.2d 444, 453-55 (3d Cir. 1983) holding that the party seeking to excuse its nonperformance under a force majeure clause must show a “correlation” between the alleged force majeure event and the “obligation of the nonperforming party); *In re Old Carco*, 452 B.R. 100, 119–20 (Bankr. S.D.N.Y. 2011) (holding that a change in economic conditions would only excuse a party’s breach pursuant to a force majeure clause if that party’s nonperformance was caused by the change in economic conditions).

- 2. **Material Adverse Change or Effect:** Some M&A agreements contain provisions that permit the buyer to terminate the agreement on the occurrence of a material adverse change or event. A party should consider the following in determining whether to invoke a material adverse change or material adverse effect provision:

- a. **Were the relevant conditions known at the time of contracting?** If so, depending on the wording of the contract a party might nonetheless be able to terminate the agreement based on the material adverse change or material adverse effect clause. For example, in *Akorn v. Fresenius*, the Delaware Chancery Court terminated a deal, acknowledging that although the buyer may have known of the risks it specifically contracted for the material adverse change to avoid taking on those risks. *Akorn, Inc. v. Fresenius Kabi AG*, No. CV 2018-0300-JTL, 2018 WL 4719347, at \*60-62 (Del. Ch. Oct. 1, 2018) (declining to impose a foreseeability requirement but considering whether or not the risks were known).
  - b. **What is the duration of the material adverse change?** Buyers that seek to invoke COVID-19 as a material adverse change will need to prove that its effects are not merely short term. *Id.* at \*53. Although courts are unlikely to be persuaded by “seasonal fluctuations” in business performance, they might be persuaded by significant downturns over a sustained period of time. *Akorn, Inc. v. Fresenius Kabi AG*, No. CV 2018-0300-JTL, 2018 WL 4719347, at \*56 n.591 (Del. Ch. Oct. 1, 2018); *In re IBP, Inc. Shareholders Litig.*, 789 A.2d 14, 68–69 (Del. Ch. 2001) (holding that a party failed to show a material adverse effect where financial data showed that a company was “a consistently but erratically profitable company”).
  - c. **Does the pandemic affect everyone the same?** Courts are reluctant to find that an industry-wide downward trend constitutes a material adverse change warranting termination of the agreement. *See Akorn, Inc. v. Fresenius Kabi AG*, No. CV 2018-0300-JTL, 2018 WL 4719347, at \*3 (Del. Ch. Oct. 1, 2018).
  - d. **Was it the material adverse change that caused the downturn in performance?** Courts will consider evidence that the reason for the downturn is unrelated to the material adverse change. Courts likewise might be influenced by the lack of evidence suggesting that the downturn and the material adverse change are related. *See, e.g., In re IBP, Inc. Shareholders Litig.*, 789 A.2d 14, 69–70 (Del. Ch. 2001) (“Tyson’s arguments are unaccompanied by expert evidence that identifies the diminution in IBP’s value or earnings potential as a result of its first quarter performance. The absence of such proof is significant.”).
3. **Impossibility:** Where the parties’ contract lacks an applicable force majeure or material adverse change provision, nonperformance may still be excused if performance is impossible.
    - a. Under the Uniform Commercial Code (adopted by most U.S. states and applicable to contracts involving the sale of goods) nonperformance is excused where performance “has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made.” U.C.C. § 2-615.

- b. At least two elements must be present:
- i. Performance of the contract must have been rendered impossible. *See, e.g.*, U.C.C. § 2-615. In some cases—such as under New York common law (which applies to contracts not subject to the U.C.C.)—performance must be “objectively impossible.” *Kel Kim Corp. v. Central Mkts., Inc.*, 70 N.Y.2d 900, 902 (1987) (emphasis added). But in others, performance that is not reasonably possible may be excused. *See Int’l Minerals & Chem. Corp. v. Llano, Inc.*, 770 F.2d 879, 886 (10th Cir. 1985) (“Although earlier cases required that performance be physically impossible before the promisor would be excused, strict impossibility is no longer required.”). It is therefore important to determine the impossibility standard applicable to the particular contract.
  - ii. The event causing impossibility must have been unforeseeable—that is, not something the parties could have negotiated around. *See, e.g.*, U.C.C. § 6-215 cmt. 8 (“[T]he exemptions of this section do not apply when the contingency in question is sufficiently foreshadowed at the time of contracting to be included among the business risks which are fairly to be regarded as part of the dickered terms.”); *Kel Kim Corp. v. Cent. Markets*, 519 N.E.2d 295, 296 (N.Y. 1987) (“[I]mpossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract.”).
- c. California law recognizes impossibility as a defense to a breach of contract claim when the breaching party’s performance was prevented or delayed by an “irresistible, superhuman cause.” Cal. Civ. Code § 1511. The California Supreme Court has interpreted “irresistible and superhuman cause” to mean “those natural causes, the effects of which cannot be prevented by the exercise of prudence, diligence, and care.” *Fay v. Pac. Imp. Co.*, 93 Cal. 253, 28 P. 943 (1892). For a party seeking to excuse performance under a contract governed by California law, the analysis should take into account this common law doctrine in addition to the contract’s force majeure provision, if any.
- d. Examples:
- i. A homeowner contracted to build an addition on his home shortly before it was flooded in one of the deadliest hurricanes in United States history. After the hurricane, the homeowner needed the money to rebuild the house instead of expanding it. The court held that because the hurricane did not make it impossible to build the addition the homeowner could not cancel the contract. *Schenck v. Capri Construction Co.*, 194 So. 2d 378, 379-80 (La. App. 1967).

- ii. In another case, a contractor that could not find labor in the aftermath of a hurricane was not excused from performance. *Popich v. Fidelity & Deposit Co.*, 245 So.2d 394, 396 (La. 1971) (“The fact that conditions after the hurricane presented difficulties to the contractor in the performance of his obligations is remote, and will not relieve him or the surety from their contractual obligations.”).
  - iii. In yet another case, however, a court allowed a landowner to pursue a claim that increased construction costs and other problems caused by hurricanes “made it impractical to proceed” with the construction of a parking lot. *Citadel Builders v. Transcon. Realty Inv'rs*, No. 06-cv-7719, 2007 WL 1805666, at \*1 (E.D. La. June 22, 2007). The court reasoned that no one predicted that the damage from the hurricanes would be so extensive.
  - e. Although courts would likely view COVID-19 as unanticipated with respect to a contract signed prior to its outbreak, the applicable impossibility standard (e.g., objectively impossible, or reasonably impossible) and the particular facts should be carefully reviewed to determine the viability of an impossibility defense to non-performance.
  - f. A party seeking to avoid performance should also consider whether a *governmental order* relating to COVID-19 might make performance impossible. For example, a contractual obligation to perform a live concert might be excused based on a government order prohibiting gatherings of more than a few people.
4. **Frustration of Purpose:** Even in the absence of a force majeure or material adverse change provision, a party might still be able to avoid contractual obligations under a frustration of purpose defense “when a change in circumstances makes one party’s performance virtually worthless to the other, frustrating his purpose in making the contract.” *PPF Safeguard v. BCR Safeguard Holding*, 924 N.Y.S.2d 391, 394 (App. Div. 1st Dep’t 2011) (citing RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981)).
- a. Frustration of purpose involves three requirements:
    - i. There must be a mutually-understood “basis of the contract” without which “the transaction would have made little sense.” *Id.*
    - ii. The basis of the contract must be fully and completely frustrated through no fault of the party claiming frustration of purpose. *City of Savage v. Formanek*, 459 N.W.2d 173, 176 (Minn. Ct. App. 1990). This does not mean performance is *impossible*, just that the contract has become pointless to one party because the contract’s purpose can no longer be fulfilled. But it is not enough if the contract has simply become less

profitable for that party. RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. A (1981).

- iii. Similar to impossibility (discussed in paragraph 3 above), a basic assumption of the contract must be that the frustrating event would not occur. RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a. A contract can meet this requirement even where the frustrating event was foreseeable. *Id.*

b. Examples:

- i. One party contracts to rent an apartment on a specific date for \$1,000 in order to view a parade. The parade is cancelled because an important official fell ill. The party refuses to use the apartment or pay the \$1,000. The party's nonperformance is excused. RESTATEMENT (SECOND) OF CONTRACTS § 265, illus. 1 (based on *Krell v. Henry*, 2 K.B. 740 (1903))
- ii. A business contracts with a publisher to print an advertisement in a yacht race program for \$10,000. The race is cancelled when war breaks out. The publisher has already printed the programs, but the business refuses to pay the \$10,000. The business' nonperformance is excused. RESTATEMENT (SECOND) OF CONTRACTS § 265, illus. 2 (1981) (based on *Alfred Marks Realty Co. v. Hotel Hermitage Co.*, 156 N.Y.S. 179 (1915)).

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