# COVID-19: IMPACT ON SUPPLY CHAIN AND TRANSPORTATION CONTRACTS

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**U.S. Alert**

The coronavirus (COVID-19) pandemic has impacted, and will continue to impact, supply chains and transportation contracts. Those impacted will include the supplier/shipper, the carrier, and the purchaser/receiver. A common question is: will performance be excused because of COVID-19 under force majeure or otherwise? This alert will focus on what you can and should do now to help address these issues, including how to document the position you will ultimately take, whether to support or to challenge a claim of contract avoidance.

Whether performance will be excused under a given contract will depend on a variety of factors, the most important is the contract terms. The outcome in a given situation will depend on those terms and the facts of the particular situation. Here is a road map for your consideration:

## REVIEW YOUR CONTRACT TERMS

### Questions to ask are:

Does the contract include a force majeure clause? If so, does the COVID-19 pandemic trigger its application?[1] If your force majeure clause includes “pandemic” or “epidemic,” it would appear to apply. However, there are many other terms typically included in a force majeure clause that may also be triggered, such as: act of God, act of government, quarantine, closure, or even a catch-all clause addressing any event that prevents performance.

If a force majeure clause is triggered, what exactly does it allow for: complete termination of the contract, temporary relief from performance, relief from specific deadlines, relief from minimum quantity requirements, etc.?[2]

Does the contract include any other clauses that might excuse performance? If so, what do those clauses require?

## REVIEW YOUR ENTIRE CONTRACT AND THE CONTRACTUAL RELATIONSHIP

Review all related documents and your course of dealing under the contract. Your agreement or related documents may contain other clauses that can impact (or excuse) performance obligations. Examples include:

- Is there an exclusivity clause that might impact your ability to use alternative sourcing or transportation
- Are there multiple applicable contract documents that perhaps contain contradictory clauses? Which prevails?
- How have any prior performance issues been addressed?

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- Is there a dispute or “escalation” clause that dictates how you must first raise an issue under the contract?

## LOOK FOR NOTICE PROVISIONS

Be sure to identify and comply with any notice provisions. For example, a typical notice clause requires the party claiming force majeure to provide “prompt” notice or notice within “x” days of becoming aware of the event giving rise to the force majeure invocation.

## CONSIDER THE COMMERCIAL SOLUTION

### As Well as the Legal Solution:

Be sure to view your situation from a legal and a commercial perspective. If you are in an important “partner-type” relationship with your counterparty, you may be able to achieve a commercial resolution through renegotiated terms. However, at the same time, you should be developing and protecting your legal position for use should the commercial approach fail to resolve the issues fully. It is crucial that the legal and commercial teams work together on this. A purely commercial solution now may require proper legal documentation to protect longer-term company interests. You might consider:

- Form a team to develop your position, and include legal, commercial, and insurance/risk management personnel.
- Keep the team in the loop on all developments so that your plan is comprehensive and coordinated and can easily evolve as circumstances change. Have the team meet periodically.

## ADDRESS INSURANCE AND RISK MANAGEMENT ISSUES

Be sure to keep your insurance/risk management team involved. You must be careful that the positions you take in one area do not adversely impact you in another area. For example, correspondence with your counterparty addressing a commercial solution could affect an insurance claim.

## CONSIDER OTHER PERFORMANCE-AVOIDANCE DOCTRINES BEYOND FORCE MAJEURE

There is no force majeure recognized at common law, but there are other doctrines under common law that can excuse performance. The facts of each situation (and the law of the involved jurisdiction) will determine whether a given doctrine will excuse performance and to what extent. These doctrines include:

- Commercial impracticability
- Illegality
- Unconscionability
- Impossibility

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- Frustration of Purpose

## MITIGATE YOUR LOSSES

As a general rule, parties are required to mitigate damages. This might require that you "cover" the impacted performance under the contract even if it is more costly than provided for in the contract. While that would appear to apply more on the "inbound" situation (where you purchase what you need at increased costs), it can also apply in the "outbound" situation (where you are not completely excused from performance or where performance is not truly impossible, you might be required to perform even if it is more costly to do so). Again, the contract terms may impact whether and what type of mitigation is required.

## DOCUMENT THE FACTS OF YOUR SITUATION AS YOU PROGRESS

A best practice is to collect evidence of relevant facts as you proceed. That is much more effective than attempting to recreate the facts many months (or years) later when they may be needed. Examples include:

- Collect press releases, news articles, government proclamations, and the like regarding impacts on a given area, industry, plant, port, or other transportation hub. Be prepared to prove later that a particular area or facility was closed and how and why it was closed.
- Start tracking and capture company data regarding impacts on your business. Has a "stay at home" or "shelter in place" order closed or impacted your business? Was it mandatory (having the force of law) or merely recommended or voluntary? What portion of your workforce was impacted, and at which locations? Was working remotely possible in your business, or was physical presence required?
- You may have to address later whether a confounding event caused or contributed to the inability to perform. Here, ask this question: had the COVID-19 pandemic not occurred, would the other event have impacted or prevented performance (and to what degree)? Collect evidence to address this issue as it develops.

## ADDRESS POTENTIAL COVID-19 IMPACTS IN FUTURE AGREEMENTS

For any new agreements, amendments, extensions, etc., be sure to adequately address potential COVID-19 impacts.

# FOOTNOTES

[1] On 11 March 2020, the World Health Organization characterized COVID-19 as a pandemic.

[2] The applicability of force majeure clauses can require a lengthy discussion in itself. For a more detailed discussion of such clauses, see: COVID-19: Applicability of Force Majeure Clauses in the United States, 18 March 2020.

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