

Force Majeure: Is COVID 19 an Act of God?

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It depends. A force majeure clause typically refers to “acts of God,” defined generally as ‘an act occasioned exclusive by violence of nature without the interference of any human agency.’ Typically referring to earthquakes, typhoons, and similar events, is the COVID 19 outbreak also an Act of God? If so, will referencing a force majeure clause or right allow a party to wiggle out of a contract? With over half of its population subject to some form of travel restriction, Chinese productivity has struggled to rebound from the Chinese New Year vacation. Moreover, global supply chains, still hugely dependent on Chinese factories, are strained by the disruption caused both by this epidemic and sometimes heavy-handed government responses to it. Increasingly, foreign suppliers, particularly Chinese manufacturers, are digging through contractual boilerplate to review, perhaps for the first time, whether there is any force majeure relief.

The first level of analysis indeed involves a review of any contractual force majeure language itself.

Is an Act of God defined? Does it include an epidemic or a pandemic, and does it reference a particular standard (e.g. WHO or CDC)? Is there a distinction between naturally occurring disasters and governmental actions in anticipation or response? Does the force majeure provision cover supply chain disruptions? If there is explicit contractual coverage of an outbreak such as COVID 19, parties then need to pay particular attention to the remedies specified and any timing considerations; many force majeure clauses contain specific notice requirements and delineated remedies. If coverage is merely implied within a broad catch-all definition of an Act of God, counsel should be consulted to evaluate that catch-all language related to the business or industry involved, any course of dealing between the parties, and the forum and governing law of the dispute.

In the absence of a contract force majeure provision, the legal definition of an Act of God may be determined by the governing law of the contract. Force majeure is a recognized doctrine in civil law systems (China and the EU) but not in common law jurisdictions (the UK, the USA and Hong Kong).

Local Chinese firms are likely to get a more sympathetic hearing in Chinese courts; on February 10, 2020, a spokesperson of the Legislative Affairs Commission of the Standing Committee of the National People's Congress stated that the COVID-19 outbreak, and the government's mitigation measures, constitute force majeure to contracting parties that cannot perform a contract because of those measures. The China Council for the Promotion of International Trade – an official body – issued over 1,600 'force majeure certificates' to Chinese companies in February. The effectiveness of these force majeure certificates even under Chinese law is uncertain and untested. However, these certificates may help a party to a dispute in China to argue that the COVID-19 outbreak is force majeure. The Hubei Provincial High Court – at the epicenter of the outbreak – recently advised its lower courts that COVID 19 (and, importantly, related governmental measures) constitute force majeure. Of course, such determinations, and FM certificates, are likely to carry less weight with courts and arbitration tribunals outside China, which are more likely to focus on all the available evidence to determine whether an event of force majeure has occurred (in common law countries the principle of frustration may be the only 'Hail Mary' argument available).

COVID 19 is the largest supply chain disruption since the 2011 earthquake and tsunami in Japan. Firms are invoking force majeure with increased frequency as the outbreak expands and lingers. Although many contracting parties will gravitate towards joint mitigation strategies, rather than taking the matter to court or arbitration, now is certainly the time for companies to be assessing their legal rights under force majeure.

Few attorneys understand the opportunities and dynamics of global trade better than Nexsen Pruet's David Robinson, Special Counsel and International Business attorney. Based in Raleigh, N.C., he assists clients in cross-border transactions around the world. He helps global businesses integrate corporate compliance and operational programs into subsidiary operations, facilitate the transfer of personnel among operations, comply with export control and boycott regulations and negotiate commercial and joint venture relationships.

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