# Is COVID-19 or a Declaration of a State of Emergency, a Force Majeure Event? It Depends on Your Contract

COVID-19 is disrupting U.S. businesses as well as global supply chains. Buyers and suppliers dependent on foreign parts, supplies, and materials may fail to meet contractual obligations or decline to purchase goods. Business events such as conventions, galas, or other gatherings have to be cancelled. What happens when your business cannot deliver products or materials? What happens when the convention, gala, meeting, or event is cancelled, but the venue or vendor who organized the event insists on payment? Your contract's *force majeure* clause is intended to protect your company and typically allows for a termination or modification of the contract. However, the *force majeure* clause only protects against the "events" described in the clause. Is your contract's *force majeure* clause expansive enough? Does it allow for termination of the contract if there is a declaration of a "state of emergency" or a government declaration against all public gatherings? Can your company refuse to perform due to COVID-19 disruption or government actions under a *force majeure* provision?

For example, New York Governor Andrew Cuomo has deployed the National Guard and created a one-mile containment zone to address the COVID-19 outbreak in New Rochelle, canceling large gatherings and closing schools. Other states, such as New Jersey, have also declared a state of emergency and are implementing other restrictions. Are these considered an "act of God" under your *force majeure* clause?

A disease outbreak and/or pandemic and a government's response to these types of outbreaks can be a *force majeure* event, typically defined as:

- An unforeseeable event or circumstance; and
- Beyond the control of and without the fault or negligence of the non-performing party.

Acts of God include wars, riots, hurricanes, floods, epidemics, and natural disasters. A serious, widespread pandemic can qualify as an act of God sufficient to invoke *force majeure* protection, but in some states, the definition in the clause needs to be more expansive.

A party seeking to invoke *force majeure* protection should carefully examine the contract. Some courts construe *force majeure* provisions narrowly and may require the clause to explicitly list the *force majeure* event. Some contracts may also have exclusions or provisions that address pandemics and epidemics.

COVID-19 can be a *force majeure* event excusing contractual performance. The analysis is fact-sensitive. It depends on the severity of the outbreak and its impact. A party seeking to enforce a *force majeure* provision should gather information to prove the *force majeure* event meets contract requirements.

If your company does not have a *force majeure* clause in its contracts, you should proceed to add such a clause to your future contracts and make sure the *force majeure* provision explicitly addresses pandemics, epidemics, and government actions resulting from the pandemic or epidemic. Consider adding a *force majeure* provision explicitly permitting your company to cancel, terminate, or modify contracts if there is an epidemic or when the government declares a state of emergency, shuts down a city, creates a containment or quarantine zone, or otherwise restricts individuals' ability to attend large gatherings or travel. We are available to assist in a review of your contracts to ensure your company is protected. Contact Rose Suriano at rsuriano@bracheichler.com or 973-403-3129 for further review of your contract provisions to determine if your contract protects against unforeseen events and circumstances.