



Uniondale, New York  
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**FREQUENTLY ASKED QUESTIONS ABOUT  
FORCE MAJEURE UNDER NEW YORK LAW**

**What is Force Majeure and how does it apply to the current pandemic?**

Force majeure is a legal term that is contained in many contracts and insurance policies. The literal translation of Force Majeure is “superior force” or “superior strength.” Clauses mentioning and defining Force Majeure have been included as “boilerplate” in contracts for decades (perhaps centuries), mostly out of habit, without drawing much sustained interest or attention from the contracting parties or their attorneys. That has all been changed by a microscopic virus that never existed in humans until recently.

**Is Force Majeure the same as an “Act of God”?**

No. Force Majeure includes the concept of an Act of God; however, Force Majeure is broader than an Act of God.

An Act of God is an uncontrollable natural force that can’t be predicted or prevented, such as an earthquake or tornado. Force Majeure, on the other hand, includes not only natural forces but also non-natural forces such as wars, riots and governmental action.

Is an illness an Act of God? New York courts have generally found that illness is not an Act of God. It is, of course, possible that this view might change, given the severity and truly global nature of the current pandemic.

**Is the doctrine of Force Majeure the same in every country?**

No. The concept of Force Majeure differs from country to country and this invariably creates unpredictability in a world of global commerce. Force Majeure is recognized as an independent legal doctrine in countries that apply civil law. This includes the European Union, as well as China, to name just a few jurisdictions. However, in New York, which has a common law legal system, Force Majeure is only applied if a Force Majeure clause has been included in a contract between two parties.

To put it another way, courts in New York (and other states) will not apply Force Majeure to a legal dispute absent a contractual clause setting forth the nature and extent of

Force Majeure for that contract. The New York judicial system construes contracts narrowly, to respect the intent of the parties. These courts therefore construe Force Majeure clauses narrowly, as well.

### **When is Force Majeure applied?**

In New York, Force Majeure comes into play if a party is prevented from performing contractual obligations due to certain events beyond its control, as defined in the contractual Force Majeure clause. If that happens, then that party is excused from its contractual duties without being deemed to have breached the contract. If there is no Force Majeure clause, there is no Force Majeure defense to a breach of a contract. Conversely, if a Force Majeure clause exists, the parties and, if required, a court will look to the precise wording of the Force Majeure clause.

Parties which find themselves unable to perform on contracts should first review the Force Majeure clause. What circumstances are listed as being beyond the parties' control? If the clause includes mention of epidemics, pandemics or medical health emergencies, then such a clause would clearly encompass the inability to fulfill contractual obligations due to the outbreak of the novel corona virus.

### **What if the Force Majeure clause does not mention medical emergencies?**

Many Force Majeure clauses do not specifically mention pandemics or similar health emergencies. However, that does not necessarily mean that Force Majeure does not apply to the circumstances created by the current pandemic. Many Force Majeure clauses include the actions of governmental authorities as circumstances beyond the control of the contracting parties.

Therefore, governmental directives to “shelter in place,” “self-quarantine,” “stay-at-home” or otherwise “lock-down” are clearly subsumed under the governmental authority section of a Force Majeure clause which contains such wording.

If you find that “governmental directives” or similar term is not included in a Force Majeure clause, look to see if there is “catch-all” language in the clause. Some contracts include terms such as wars, riots, embargoes and other similar occurrences. If that is the case, a party may have an argument that a governmental shelter-in-place order is similar to an embargo or other civil disturbance.

### **What circumstances does Force Majeure cover?**

To invoke Force Majeure, a party must show that performance of the contract is physically impossible, not just inconvenient or financially unrewarding. For example, just

because a manufacturer can now sell a product at a higher price, due to the pandemic, this does not excuse that manufacturer from refusing to sell the product at a previously agreed upon contractual price.

Also, there must be a physical block to performance, not just fear of performance. If a trucking company cannot make deliveries because all of its drivers have been quarantined, Force Majeure would come into play. But if the trucking company does not want to make deliveries to a certain customer because of general fear of illness, Force Majeure may well not apply.

### **What if a contract lacks any Force Majeure clause?**

If a contract lacks a Force Majeure clause, normal contractual law applies, including concepts such as the impossibility of performance.

Uniform Commercial Code Section 2-615 provides that non-delivery by a seller is not a breach of contract: “if performance as agreed has been made impractical by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order . . .”

This language may encompass many of the situations likely to be raised by the inability to fulfill contracts due to the pandemic.

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