

# Is COVID-19 a Force Majeure?

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Graydon has been inundated with inquiries from clients seeking to understand their obligations in light of COVID-19. Our counsel has involved event cancelations, real estate agreements, insurance, loans, and contracts for the delivery of goods.

The analysis often focuses on force majeure clauses (“FMCs”) that are typically included as boilerplate in contracts. So, if you’re seeking to compel performance of a contract or to avoid an obligation you can no longer afford, it’s time to review and understand the impact and limits of the FMCs that may be included in your contracts. Also, if there is no explicit FMC in a contract of concern you are not necessarily without a remedy. Some extra-contractual doctrines can potentially excuse performance (e.g., the doctrine of frustration of purpose and legal impossibility). A thorough review of the contractual relationship is needed so you can get reliable advice can be offered on any of these doctrines.

FMCs come in all shapes and sizes and are not always clear. The analysis of their impact is driven by: (1) precisely how the FMC is defined in the contract; (2) the applicable state law (states vary in their interpretation and enforcement of FMCs), and (3) how COVID-19 has impacted ability to perform.

Beyond the contract language itself, an important consideration is also whether COVID-19 has sufficiently impacted ability to perform. That analysis includes whether performance is actually rendered impossible or substantially hindered. Negative impact on profitability may not be sufficient to prevent enforcement and courts may be unwilling to uphold invocation of an FMC where the invoking company could have taken measures to lessen the damage associated with COVID-19 but failed to do so.

In sum, an analysis of the specific facts—including the contract in question—is crucial. And even if you don't appear to have an option under an FMC, you should review your insurance policies to determine whether your coverage may extend to losses arising from COVID-19.

**[Graydon's Covid-19 Team](#)** is ready to help with questions related to FMCs, contract interpretation, and negotiation strategies certain to arise in the coming weeks.