



COVID-19
COMMERCIAL CONTRACT CHECKLIST

The following checklist is designed to assist companies when reviewing commercial contracts for provisions that are likely relevant to minimizing business disruptions and losses related to the COVID-19 pandemic.

1. Force Majeure/Act of God Clause

- Does the contract have a specific force majeure or Act of God clause?
- Does the clause specifically mention a pandemic/infectious disease/epidemic/outbreak or does the clause have language that encompasses a pandemic?¹
- Is performance of the contract impossible because of the pandemic?² Consider:
 - Was performance attempted and failed?
 - Does a government order prohibit or inhibit performance (*i.e.*, travel or import restrictions)?
- If contract performance is possible, is it prohibitively difficult or impracticable?
- Was the pandemic unforeseen at the time of contracting?³
- What governing law applies to the contract?

¹Force majeure clauses are routinely narrowly construed by most courts and depending on the language of the clause may be limited to the events listed on the face of the contract. Catch-all language in a force majeure clause will only bring into the clause events that are of a similar type or nature as the specific events mentioned in the clause. Common law notions of force majeure, including unforeseeability, are generally considered when a party has not protected itself by specifically listing an event in the force majeure clause. Whether unforeseeability is an implicit requirement of express force majeure clauses and, if so, whether unforeseeability applies only to events specifically listed in the clause, only to events within the clause's catch-all provision, or both differs depending on jurisdiction.

²The force majeure must be the reason that it is impossible for your company or the counterparty to perform under the contract.

³Meaning, the pandemic could not have been foreseen during the negotiations and guarded against in the contract.



2. Purpose of the Contract Clause

- Does the contract specify that performance obligations are contingent upon a party's ability to meet the purpose(s) stated in the contract without acts or occurrences outside of that party's control materially frustrating or preventing successful performance?

3. Contingency and Extension of Time Clauses

- If performance of a third party (or some other contingency) is critical to the success of a contract, is the contingency stated in the contract?
- Does the contract provide an extension of time for performance due to a superseding event?
- Does the contract or any provision therein have a specified term and, if so, should the term be extended to last for an adequate duration in light of the pandemic?
- Does the contract provide for compensation if a superseding event occurs?

4. Limitation of Liability, Indemnity Agreements, and Insurance

- Does the contract include a "Limitation of Liability" provision that limits your company's or the counterparty's remedies (either with respect to the type of available damages or the maximum dollar amount at risk)? If so, what are the limitations?
- Are there indemnity rights under the contract that provide relief from claims arising from commercial disruptions?
- If nonperformance is resulting in a breach, is your company or the counterparty obligated to indemnify the other party for resulting claims/losses? If so, how does the scope of the indemnification compare to the potential losses?
- Does the contract require any party to carry a specific type or certain limit of insurance coverage with respect to contract performance or add the other party as an additional insured under the policy?
- Is there insurance coverage that would cover losses arising out of your company's or the counterparty's inability to meet its contractual obligations?



5. Anticipatory Breach & Notice of Inability to Perform

- Has the counterparty to the contract demonstrated its intent not to perform under the contract such that your company may be excused from its own performance obligations?
- Does the contract require your company or the counterparty to provide notice of its anticipated breach or failure to perform?

6. Contractual Termination Prerequisites

- If the pandemic is preventing either party from performing its obligations but is not otherwise excused by force majeure, etc., does the nonperformance trigger the contract's termination for cause/material breach clause? If so, is there a cure period?
- Does the contract permit either party to terminate the contract for convenience/without cause?
- Has your company taken all reasonable steps to avoid or mitigate against the pandemic and its effects, including securing alternative means of performing under the contract or of securing the benefits of the contract?
- Has each party acted in good faith under the contract?
- Has your company documented the specific effects/circumstances surrounding business disruption, the impact of any counterparty's failure to perform and any declarations from government/other third parties or other evidence relied upon in making decisions with respect to terminating contracts?
- Is there any time bar or limitation to exercising a right to terminate (all or part) of the contract?
- Have all notices required for termination/cancellation been delivered to the proper parties?

7. Documentation & Communication

- Has your company documented and preserved its communications with the counterparty regarding the pandemic?



- Are your company's reporting processes adequate to inform management of performance issues?
- Are steps being taken to maintain attorney/client privilege regarding internal communications regarding performance concerns (to the extent possible)?

8. Other Items to Review

- Have you reviewed the contract in full? Other clauses may contain important obligations, restrictions or prerequisites. Some examples include the following clauses: representations/warranties, covenants, conditions precedent, "change in law", material adverse change/effect, termination and dispute resolution provisions.
- Have you considered what other agreements may be impacted by your baseline commercial agreements (e.g. financing and debt agreements and other documents potentially requiring disclosure obligations)?

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Our team of experienced practitioners is standing ready to assist with contract reviews, analysis, customer and supplier notifications, and dispute resolution.

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