

Ten Tips for Safeguarding Against Contract Performance Risks Related to COVID-19

by Daniel J. Brown

As COVID-19 (Coronavirus) continues to exact a significant toll on economies and supply chains globally, how can your business protect its contracts and mitigate risks? Here are the top 10 things your business can do immediately to better guard against contract performance risks related to the COVID-19 pandemic.

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1. **BEFORE performance is interrupted (right now) assess and document COVID-19's impact on your ability to perform obligations under your contracts.** As the number of confirmed COVID-19 cases multiplies each day, it is likely that global supply chain disruptions have yet to peak. Thus, it is possible that the interruptions your business is currently experiencing may intensify in the coming weeks. Take time now to institute a policy for evaluating disruptions to your supply chain and the delays/failures of your upstream and downstream partners.
2. **Retain counsel, or ask in-house counsel, to review relevant contracts for force majeure provisions.** Far too often parties agree to boilerplate force majeure language with little negotiation. Do not wait until you or your contract partner invokes force majeure to determine if your business's relevant contracts offer sufficient protection in the event of a COVID-19 performance failure.
3. **Determine the "best" governing law at the outset of contract (re)negotiations.** A single force majeure provision may have different interpretations, and thus different levels of protection, depending on its governing law. Be sure to pick the jurisdiction that provides the most shelter based on your business needs. Also, review existing contracts to determine if any conflicts exist between their governing law provisions. Pay careful attention to tensions between the governing law for contracts with upstream versus downstream partners.
4. **Consider revising your "standard" contracts to include a detailed force majeure clause that anticipates labor and supply shortages related to "disease", "illness", or "epidemic."** Although many contracts address performance failures related to an "act of God", case law suggests this language alone is not sufficient to guard against liability for performance disruptions related to diseases or illness unless such events are contemplated by the contract. Also, while the media may use "pandemic" and "epidemic" interchangeably, remember that the threshold for a pandemic, a global event, is much higher than that of an epidemic or outbreak. For example, the World Health Organization did not designate the COVID-19 outbreak as a pandemic until March 11th, although it was an epidemic impacting China's

workforce months before WHO's declaration.

5. **Consider amending current contracts to explicitly outline notice requirements and “triggering” events.** Whether or not you are the non-performing party, clear notice and trigger requirements are integral to minimizing loss in the face of a force majeure event. Consider including a timeline that gives your business flexibility to attempt to seek alternate performance if you or your partner are unable to satisfy the terms of the agreement. Think critically to identify categories of foreseeable events that might impact the parties' ability to fulfill their obligations.
6. **Consider drafting notice letters now if you anticipate delayed or disrupted performance.** Prompt notice is critical, even if your force majeure clause does not have a notice provision. Indeed the Uniform Commercial Code instructs sellers to notify a buyer of delays “seasonably”ⁱⁱ and the United Nations Convention on Contracts for the International Sale of Goods requires notice “within a reasonable time after the party who fails to perform knew or ought to have known of the impediment.”ⁱⁱⁱ Although you may not need to send notice letters immediately, drafting them in advance of an anticipated delay will ensure that your business has properly evaluated (and perhaps attempted to mitigate) performance interruptions before they occur. Further, many contracts set forth a specific deadline by which the delayed party must give notice. Drafting the letter in advance will help your business fulfill its notice requirements in a timely manner.
7. **Keep detailed centralized records related to (potential) non-performance.** Consider instituting a policy that outlines when and how you plan to document potential delays/failures when you anticipate that you or a contract partner may invoke a force majeure provision. Records should include descriptions of the performance/delay timeline, anticipated and actual losses, progression of the force majeure event and its impact on the locations relevant to your business, efforts to mitigate loss and disruption, and efforts to negotiate extensions and alternate performance.
8. **If you have contracts governed by the laws of the People's Republic of China or partner with Chinese corporations take time to learn about the China Counsel for the Promotion of International Trade's newly instituted policy for issuing Force Majeure Certificates.** Since CCPIT's January 30th announcement that it would offer force majeure certificates to Chinese companies struggling to cope with the impact of the COVID-19 outbreak, the organization has issued more than 3,325 certificates covering contracts worth a combined Rmb270bn (\$38.5bn).ⁱⁱⁱ Those seeking a certificate can apply online by submitting supporting documentation that may include export/import, cargo, freight, and customs agreements and notices of delay or cancellation, and relevant announcements issued by governments or regulatory agencies.^{iv} CCPIT has advised that it will issue certificates to companies even if the agreement in question was never documented in a written contract. It is important to note that the sufficiency of a CCPIT force majeure certificate has not yet been tested before the courts in China and that CCPIT has stated that a certificate alone is not sufficient to bar liability.^v The certificate is not a declaration that a force majeure event prevented satisfactory performance. Rather, it serves as proof of objective facts, such as quarantine directives, travel restrictions, and shipping delays, that may impact a company's ability to perform. Thus, in the event of litigation the applying party must still show that there has been an objective circumstance that was unforeseeable, unavoidable, and insurmountable such that it rendered performance impossible. If you are eligible for a CCPIT Force Majeure Certificate, or if you receive/anticipate receiving a notice of CCPIT Certificate from a contract partner, consider contacting counsel familiar with the CCPIT Force Majeure Certificate application process to discuss ways to mitigate loss and better position yourself should litigation become necessary.

9. **Monitor relevant government and regulatory announcements, notices, and policies.** As government and regulatory responses to the COVID-19 pandemic are ever evolving, be sure to regularly review mandates, warnings, and recommendations from the jurisdictions relevant to you and your business partners.
10. **Negotiate with your contract partners to reach an agreement on possible waivers, substitute performance, and extensions.** Even if your negotiations are unsuccessful, courts will often look favorably upon efforts to determine alternate means of performance.

In the event that you are involved in litigation due to COVID-19 related performance disruptions, your chances of success may likely hinge on the actions your company takes **right now** to prepare for anticipated delays. If you have any questions about the tips above, ways to apply them to your business to mitigate contract risk related to the COVID-19 pandemic, or any other legal needs, please feel free to [contact us](#).

If you are interested in viewing or sharing the video recording and materials from our March 6th webinar on Coronavirus and Contract Performance, they are available [here](#). Please visit Dorsey's [Coronavirus \(COVID-19\) Resource Center](#) for additional information about upcoming webinars.

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ⁱ See Uniform Commercial Code § 2-615(c).

ⁱⁱ See Contracts for the International Sale of Goods Art. 79(4).

ⁱⁱⁱ Zhong Nan, *Force majeure certificates issued for companies affected by epidemic*, ChinaDaily.com, Feb. 21, 2020, <https://www.chinadaily.com.cn/a/202002/21/WS5e4fe598a31012821727967f.html>.

^{iv} <http://www.rzccpit.com>.

^v <https://www.rzccpit.com/company/infomationdetails.html?id=041bd1e08b0e4bc6bc9da5742cde4b37>.