

# Force Majeure in a COVID 19 World

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# Force Majeure - General

- What is force majeure?
  - “Force majeure” is a contract provision that excuses a party’s performance of its obligations under the agreement when certain circumstances beyond that party’s control arise, making performance inadvisable, commercially impracticable, illegal or impossible.

# Force Majeure - General

- No universal language
  - There is no one phraseology for this clause, and subtle differences in the specific language may impact its application to a given situation, the level of protection that it affords, and other requirements attendant to it being invoked.
- Key elements:
  - use of a generic description followed by a non-exclusive list of specific circumstances
  - mutuality/bilateral availability
  - time-specific constraints
  - positioning as a preface to negotiation and compromise versus outright contract termination.

# Force Majeure – AmFam Template Language

- “Neither party will be liable for failure or other delay in performance of the obligations under this Agreement and such failure or delay will not constitute a breach under this Agreement to the extent such failure or delay is due to circumstances beyond its reasonable control, including acts of God (fires, floods, storms, hurricanes, earthquakes, tornadoes, etc.), epidemics, pandemics, acts of public enemy, war, civil disturbance, sabotage, accidents, insurrections, blockades, embargoes, acts of any governmental or quasi-governmental authority, threat or act of terrorism, labor strikes, lock-outs or other labor disturbance or interruption, government warnings or advisories or any other force majeure (collectively, “Force Majeure Events” and individually, a “Force Majeure Event”). If a Force Majeure Event prevents Contractor from fulfilling any of its obligations to American Family set forth in this Agreement, then the performance of such will be excused and the parties will attempt in good faith to remedy the failure or delay. Notwithstanding the preceding sentences, if a Force Majeure Event results in the failure or delay which cannot be rectified to the parties’ satisfaction within 60 days of the Force Majeure Event, then American Family will have the option, in American Family’s sole discretion, of either extending the Term of this Agreement for a reasonable time period to be mutually agreed upon by the parties or terminating this Agreement and receiving a pro rata refund of compensation paid.”

# Force Majeure – COVID Threshold Questions

- Which party is invoking force majeure?
- COVID impacts on supplier performance:
  - Cancellation
  - Temporary suspension of services
  - Alteration of performance standards
- For COVID purposes, the keys with respect to a given force majeure clause are:
  - What language is used in the performance standard and how high is the bar set?
  - Is epidemic/pandemic included in the list and has there been a formal government/other authority declaration in a location that impacts the asserting party?

# Force Majeure – COVID Threshold Questions

- Base standard
  - Can range from very forgiving to extremely stringent
- Contract A:
  - “Either party may terminate its performance obligations without liability to the extent its performance is affected by acts or occurrences beyond its control **that makes it impossible** to hold the Program or for [Supplier] to provide the services specified herein.”
- Contract B:
  - “The performance of this Agreement is subject to any circumstance making it **inadvisable**, illegal or impossible to provide or use the Hotel facilities, **or creating a significant risk to participant health or safety**, including [...] or any other extraordinary occurrence in either the program destination or the Customer’s point of origin that are outside the control of the canceling party.”

# Force Majeure – COVID Threshold Questions

- Specific circumstances
  - “Epidemic or pandemic” language is important but not determinative
    - Such language is now fairly standard, even before COVID
  - “Government shutdown” language can also help here
  - If no specific references, is there other applicable “catch all” language?
- Government/other authority declaration
  - Federal
  - State
  - Local
  - WHO

# Force Majeure – All or Nothing Application?

- For some contracts, a party may be seeking to use force majeure to terminate the agreement outright and recoup pre-payments or avoid future committed payment obligations to the extent possible.
  - Example: Event-related contracts, with associated travel, lodging, and catering needs
- For other agreements, the asserting party may be seeking to either excuse temporary non-performance, or to “pause” or suspend the contracted services until such time as the services may be safely resumed.
  - Example: Facilities maintenance contracts in current work-from-home environment

# Force Majeure – Using as Negotiating Tool

- Force majeure language rarely determinative on its face.
  - Often difficult to predict how court would rule, and strong “proximate cause” evidence will be required
  - Underdeveloped body of law specific to COVID and force majeure
  - One component of a larger overall discussion with supplier
  - Favorability of the force majeure language impacts leverage
  - Negotiated compromise is always optimal result
- Examples

# Force Majeure – Additional Considerations

## ■ Notice

- What requirements does the clause contain, if any, around notification being provided in proximity to awareness of the force majeure event?
- Example: “This Agreement may be terminated without liability for any one of such reasons by written notice from one party to the other within ten (10) days from the Force Majeure act or occurrence.”
- Problematic application to COVID

## ■ Governing Law

- Separate section of agreement that may impact parties’ respective amounts of leverage
- Example: China “force majeure permits” to attempt to shield Chinese shippers from contractual liability
- Different jurisdictions apply different standards to force majeure

# Force Majeure – ISM Template Resources



MEMBER ONLY

## Contract Extension Letter

This is sent to the other side when you want to continue to use their services.



MEMBER ONLY

## Purchase Order for Goods

These terms are intended for inclusion on a standard purchase order for Goods.



MEMBER ONLY

## Purchase Order for Services

These terms are intended for inclusion on a standard purchase order for Services.



MEMBER ONLY

## Breach Letter

This is sent to the others side when they are not performing according to the contract terms and conditions.



MEMBER ONLY

## Master Supply Agreement

This template is a good start for a Master Supply Agreement which can operate as a starting point for your business.



MEMBER ONLY

## Termination Letter

This is sent to the other side when they are no longer acceptable to you as a supplier and have breached your contract terms and conditions.



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## Statement of Work

This Statement of Work template will give you a starting point and outline the topics that should be covered in an SOW



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## Service Level Agreement

This will be included in a Services Agreement with a Statement of Work. Once drafted serves as a very useful tool.



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## Contract Review Letter

This is sent to the other side when they have been reviewed by your company and you are notifying them of the outcome of that review.



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## Purchase Order Terms and Conditions

This template contains good basic terms and conditions which can operate as a starting point for your business.



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## Supplier Evaluation Form

This template of a Supplier Evaluation Form contains Key Performance Indicators and once drafted serves as a very useful too. This should be tailored by your team to be a standard form.



MEMBER ONLY

## Master Agreement for Purchase Orders

This template envisions an ongoing relationship between the purchasing entity and the supplier in which this document forms the basis for their agreement, establishing the type or types of goods to be purchased over the term of the agreement and their price.



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## Language Comparison Matrix

By using this Matrix, it will allow you to compare clauses and standardize them among the various agreements. It will also allow you to understand, at a glance, what is in your documents.



MEMBER ONLY

## Unilateral Confidentiality Agreement

This template is a basic NDA. It is unilateral and protects only the Buyer's company, but can be modified to become bilateral.

# Force Majeure – ISM Template Resources

<https://www.ismworld.org/for-individuals/tools-resources/resources-templates/>

# Questions?