



# IGF

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COVID-19  
RESPONSE  
SERIES



## FORCE MAJEURE AND COVID-19: LEGAL RISKS OF A DOUBLE-EDGED SWORD

### KEY MESSAGES TO GOVERNMENTS

1. Work with companies to assess individual cases and circumstances. Short-term responses and medium or long-term responses may be very different. Negotiated solutions to short-term issues can be fully designed and implemented without prejudice to whether *force majeure* applies or not.
2. Be careful making short-term arguments against force majeure as governments may want to argue in support of force majeure with respect to measures they have taken in response to COVID-19.
3. Try to undertake a risk assessment of government measures to claims of breach of contract (e.g., to maintain open trade for production throughout a contract period) or breach of their investment treaty obligations.

COVID-19 has caused the broadest and deepest health and economic impacts of any single non-war event since the Great Depression of the 1930s. The virus and the governmental measures related to it have now become woven into a singular event that cannot be easily or simplistically disaggregated for legal purposes. Both these components are unprecedented in scope and scale, and both will present challenges for companies and governments seeking to manage the impacts of the virus and government measures taken globally in response to it.

One issue that has quickly arisen is whether the COVID-19 event constitutes a *force majeure* under national or international law.

The notion of *force majeure* is easy enough to grasp: An event out of the control of an individual entity that is of such significance and impact that it makes the performance of the obligations of that entity (business or government) impossible as written. This may relate to the timeframe for the performance of the obligations, or the inability to perform certain types of obligations at all going forward. This inability to perform may be



permanent in some instances, or it can be temporary, depending on the circumstances. In practical terms, the concept of *force majeure* allows the impacted entities to stop performing their obligations without financial penalties being imposed by the other party, as the reason for doing so is both major and beyond their control.

China has declared *force majeure* to apply in relation to many commercial contracts signed by its companies, presumably to insulate them from claims by foreign companies for non-delivery of products or the non-purchase of product inputs that had been contracted. Both other governments and many companies are considering their positions in relation to invoking *force majeure*.

The particular challenge for governments is that they will be facing claims of *force majeure* by companies in relation to performing their operations, while also in many cases having to make similar legal claims to [defend measures they have taken in response to COVID -19](#). This defence by governments may arise in contract disputes or in the context of investor-state disputes (ISDSs) initiated by investors under international investment treaties.<sup>1</sup> **This makes force majeure, for many governments, a potential double-edged sword: companies will claim force majeure relieves them of certain obligations toward government; and governments will claim that it relieves them of certain obligations to private companies.**

This double-edged nature of the *force majeure* issues creates a conundrum for governments. Many international businesses have had to stop operations or massively adjust them. In some cases, this may be for direct health reasons: it is simply impossible to manage some operations and keep employees safe from COVID-19. In other cases, government measures will have forced business closures. And in other cases, government responses outside the jurisdiction of one business may have interrupted necessary supply chains or caused markets for products to collapse or become inaccessible due to transportation interruptions. The important point is that both governments and companies will be relying on *force majeure* to justify measures in relation to the potential health impacts of COVID-19 and in relation to the economic impacts related to addressing the virus. These issues are now so intertwined as to be inseparable.

Whether a contract or treaty allows for a *force majeure* claim to alleviate responsibility for any damages may be case-dependent. Some clauses on *force majeure* may expressly include epidemics or pandemics. Others will not but will rely on public law notions of *force majeure*. What seems clear in relation to COVID-19 is that the basis for *force majeure* will be grounded in both health and economics in a very intertwined way, making limitations of *force majeure* to earthquakes or typhoons or similar events inapt. We are, simply put, in unprecedented territory where acts of God and acts of humanity cannot be seen in watertight compartments.

<sup>1</sup> We are not arguing here that COVID-19 related measures taken by governments will inherently be in breach of contract or treaty obligations, but simply that governments should avoid making short term arguments against *force majeure* as a defense to non-compliance as they may well wish to make similar arguments in a year or two in defense of measures they took.



## WHAT SHOULD GOVERNMENTS DO?

- 1. Work with companies to assess individual cases and circumstances.** Short-term responses and medium- and long-term responses may be very different. Negotiated solutions to short-term issues can be fully designed and implemented without prejudice to whether *force majeure* applies or not.
- 2. Avoid making short-term arguments against *force majeure* considering that in the future governments may need to rely on *force majeure* to justify their own inaction or action.** Some governments are worried companies will use the COVID situation and *force majeure* claims as a pretext to avoid long-term contract obligations the companies were already seeking to avoid before COVID-19, but that in itself does not mean *force majeure* is not applicable on a temporary basis. It is important in this respect to separate the short-term and mid- to long-term issues.
- 3. Undertake a risk assessment of exposure of government measures to claims of breach of contract (e.g., to maintain open trade for production throughout a contract period) or breach of their investment treaty obligations.** An analysis of existing contracts and investment treaties and their terms will help governments better assess their legal exposure. With law firms and third-party funders already trolling for cases to take against states, most governments will face some level of risk of claims by companies that COVID-19-related measures are in breach of the government's contractual and international obligations.

Negotiating short-term solutions with companies can be done without addressing legal interpretations of *force majeure* or other issues. Short-term solutions and negotiations can be “without prejudice” to such issues. Separating the short- and longer-term issues will be critical.

To reinforce this cautious approach, governments should avoid broad public statements at present on *force majeure* and what it means or how it applies. They should also use techniques such as letters that are “without prejudice” when communicating with companies to avoid being bound by general arguments made in often very specific circumstances. Government lawyers should carefully vet public and non-public communications on these issues to avoid risks of misstatements of the law that might hurt the state in future litigations. What is important in the short term are pragmatic solutions to immediate health, safety, and employment issues. Legal arguments can, and should, be made more accurately and fully in the months that follow if short-term solutions are not found.

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