Please note, this guide is to provide information to aid in decision making relevant to contract terminations/obligations. For legal advice specific to your individual situation, please consult your legal counsel.

The COVID-19 pandemic has profoundly impacted our economy, shutting down many businesses and triggering problems up and down the food supply chain, especially for farmers and ranchers.

What happens with contracts in times like these? During a pandemic, are contracts enforceable? What does a producer do if a buyer backs out of a contract? What recourse does a farmer or rancher have if a buyer won’t take delivery of their market ready cattle, hogs, or grain contracted for delivery?

FORCE MAJEURE
In these unprecedented times, some parties to contracts are suggesting that the pandemic and ensuing government actions qualify as triggering events to invoke a force majeure clause found in contracts. A clause that alleviates them from their contractual responsibilities.

Generally, force majeure refers to a superior force or unavoidable accident that is so unexpected and beyond reasonable human foresight that they prevent someone from fulfilling a contract. Some refer to these as “Acts of God”, such as floods, earthquakes, and volcano eruptions. But they can also be acts of government, wars, and riots.

Whether a force majeure clause applies depends on the specific facts, contractual language, and jurisdiction for each situation. The decision of whether the COVID-19 outbreak is a force majeure event will be determined by the courts on a case-by-case basis. In the end, it all depends on the definitions of words and facts presented to the court.

DEFENSE OF IMPOSSIBILITY
Force majeure is not the only legal theory a party may pursue to avoid its contractual obligations. Another is the defense of impossibility, which excuses one’s contractual obligations when the performance is rendered objectively impossible by operation of law or because the subject matter has been destroyed.

For instance, if a governor’s executive order makes performance impossible, a party may be able to avoid its contractual obligations. Generally, in these situations, a party’s performance is not excused but delayed.

FRUSTRATION OF PURPOSE
Another defense a party may try to use is frustration of purpose. For this, there must be a change in circumstances that makes one party’s performance virtually worthless to the other.

OPTIONS FOR PRODUCERS
If a contract is breached without lawful reason, there are remedies a farmer or rancher may pursue.

1. Breach of Contract
   First, you must be able to establish a contract existed, it was broken, you lost money, and the other party was responsible.
   Second, you need to know there are different types of breached contracts and different criteria for each.
   • Minor breach – You hire someone to do something. They finish it. But there are errors.
   • Anticipatory breach – Allows a party to declare the contract is broken when it becomes evident the other
party does not intend to perform their obligations in the contract.

- **Actual breach** – Straightforward failure to perform one’s contractual obligations.
- **Material breach** – Where a party ends up with something materially different than what the contract called for.

2. Remedies

Common monetary remedies in breach of contract cases include:

- **Compensatory damages** – Money paid to compensate for losses and reimburse costs.
- **Liquidated damages** – Damages specified in the contract.
- **Consequential and incidental damages** – Costs and expenses incurred by the non-breaching party to avoid other losses caused by the breach.
- **Attorney’s fees** – Recoverable when included in the contract or authorized by statute.

Sometimes remedies can be more than money.

- **Specific performance** – Court orders each party to follow through with the agreement.
- **Rescission** – Contract canceled, money returned, and matter dropped.
- **Reformation** – Contract is re-written to more accurately reflect the intentions of the parties.

3. Mitigation

Courts can consider the fact that some losses may not be the responsibility of the party who breached the contract. Even the non-breaching party should take reasonable steps to ensure the loss does not increase. The calculation of damages aims to put the innocent party in the same position as if the contract had been properly performed, not to unjustly enrich them.

**CONCLUSION**

The COVID-19 pandemic and the actions of many have had a significant impact on agricultural contracts. Whether a party can be excused from performance depends on the facts, contract language, and the jurisdiction. Farmers and ranchers who find themselves in contract termination situations are advised to seek legal counsel.

For more information about handling contracts during the COVID-19 pandemic, contact Bruce Rieker, J.D., vice president of governmental affairs at brucer@nefb.org or (402) 421-4405.