

What's in Your Contract: A Primer on Force Majeure Provisions

Coronavirus Legal Advisory

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Since its insurgence in China's Hubei province in December 2019, the novel coronavirus ("COVID-19") has wreaked havoc on human health and life globally. With federal, state, and local governments in the United States and abroad now restricting travel and ordering mandatory shutdowns of all non-essential shops and businesses in an attempt to contain spreading, the impact on worldwide business and commercial relations cannot be overstated. Indeed, as a result of government measures taken to address the epidemic, transportation has been heavily restricted, supply chains have been disrupted, facilities and production have been suspended, and demand for "non-essential" goods and services has cratered.

Given this cataclysmic economic disruption, it is imperative for businesses worldwide to fully understand their contractual rights, remedies and obligations with respect to their customers and/or business partners. Of particular importance in the current climate are force majeure provisions, which have become common in commercial contracts following the September 11, 2001 terrorist attacks and Superstorm Sandy in 2012. Force majeure – French for "superior force" – refers to an unforeseeable event beyond the control of the parties that prevents a party from fulfilling its contractual obligations in a timely and/or complete manner. To the extent an agreement includes a force majeure clause, it will generally operate to relieve one or both parties of some or all of their contractual obligations if the unforeseeable event impairs performance of that contract. Whether COVID-19 constitutes a force majeure event that relieves a party's obligations under a particular contractual agreement will depend largely on the following factors:

1. **The specific language of the agreement at issue.** In addition to defining a force majeure event by setting forth certain requirements that must be established – such as an event that is not within the reasonable control of the parties, that was not reasonably foreseeable, the effects of which cannot be avoided through reasonable efforts or due diligence, and that materially affects the ability to perform contractual obligations – many force majeure clauses go one step further and provide examples of force majeure events. The most common examples in such lists are natural events (such as acts of God, floods, fires, explosions, tornadoes, earthquakes, and hurricanes) and geopolitical events (such as acts of war, civil strife, riots, and invasions). Other clauses may specify disease, epidemic, pandemic, acts of government, and national or

regional emergencies. In such instances, it is of paramount importance to determine whether the enumerated events are intended to be exhaustive or non-exhaustive.

Some force majeure provisions may also detail the level of interference a party must experience before invoking such provision. Force majeure clauses often require that contractual performance be impossible in light of the event, and not simply more burdensome; however, some provisions may include broader relief where performance is simply hindered or delayed.

Other force majeure clauses may set forth still additional requirements on the party declaring force majeure, such as a duty to mitigate damages and an obligation to provide notice to the counterparty. As an example, the operative provision may require immediate notice of the force majeure event and may include an obligation to keep the counterparty informed until it is able to resume its contractual obligations. The provision may also require reasonable efforts to resume performance as soon as reasonably practicable. Strict compliance with such notice and mitigation requirements is critical to preserving the rights of the party declaring force majeure.

2. **The relationship between the outbreak and the party's nonperformance.** As previously noted, force majeure clauses often require that contractual performance be impossible in light of the event, and not simply more burdensome. Thus, a mere increase in the cost of labor or supplies, without more, would generally be insufficient for invoking force majeure. Moreover, if other factors contributed to the party's nonperformance beyond the coronavirus outbreak, a force majeure clause may not fully protect the nonperforming party.
3. **Applicable law.** While the law regarding force majeure clauses differs from jurisdiction to jurisdiction, most courts tend to construe such clauses narrowly. The language of the operative contract is thus often of primary importance as the party must establish that the incident falls within the contractual definition of a force majeure event.

Nonetheless, even if a contract does not include a force majeure provision, similar concepts such as the doctrine of impossibility or frustration may be implicated under applicable state law. Depending on the jurisdiction, a party may be relieved from a contractual duty if performance is made impracticable, through no fault of that party, by the occurrence of an intervening event that had not been anticipated to occur when the contract was executed. The frustration of purpose doctrine may also excuse contractual performance in some jurisdictions if performance remains possible but the expected value of performance to the party seeking to be excused has been destroyed by the intervening event.

In sum, the applicability of force majeure clauses must be determined on a case-by-case basis. Businesses are encouraged to consult legal counsel for a full assessment of their rights, remedies and obligations during this widespread epidemic.