

Client Alert

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COVID-19: Excusing Performance of Commercial Contracts due to 'Force Majeure'

On March 11, the World Health Organization identified as a “pandemic” the novel coronavirus outbreak that causes COVID-19. Businesses around the globe and in all sectors have felt the impact as operations and supply chains have been disrupted. These disruptions have left some businesses unable to fulfill contractual obligations or concerned that their contract partners will be unable to fulfill theirs. Clients should think about contractual force majeure clauses or the common law doctrine of frustration of purpose if they find themselves in one of these situations.

What is a Force Majeure Clause?

Force majeure clauses define circumstances beyond the contracting parties' control that can render contractual performance too difficult or even impossible. The theory behind the clause is that at the time of contracting, neither party reasonably anticipated and priced into the agreement the risk of the “force majeure” event. The clause may operate to suspend performance by, or release from further performance, the party timely invoking it. The following sample is typical of language you may see in a force majeure clause:

Force Majeure. In no event shall XYZ Corp. be responsible or liable for any failure or delay in the performance of its obligations hereunder arising out of or caused by, directly or indirectly, forces beyond its control, including, without limitation, strikes, work stoppages, accidents, acts of war or terrorism, civil or military disturbances, nuclear or natural catastrophes or acts of God, and interruptions, loss or malfunctions of utilities, communications or computer (software and hardware) services; it being understood that the XYZ Corp. shall use reasonable efforts which are consistent with accepted practices in the industry to resume performance as soon as practicable under the circumstances.

These clauses can come in many varieties and should be carefully reviewed. For agreements without force majeure clauses, the common law doctrines of frustration of purpose or impossibility of performance may provide similar relief.

Invoking and Interpreting the Force Majeure Clause

Many contracts require that the party invoking a force majeure clause provide prompt written notice of same to its contract partner. The failure to send such notice in a timely manner may result in waiver of the rights provided by the clause. Some contracts provide surprisingly strict notice provisions.

If parties to a contract dispute whether COVID-19 constitutes a force majeure event under their agreement, the issue will have to be decided by litigation or arbitration under the law applicable to the contract. Most jurisdictions in the United States construe force majeure clauses narrowly and according to their plain language. If the clause does not contain a catch-all provision like the sample clause above, the clause will likely be interpreted only to apply to the specifically enumerated list of events contained in the clause. Where clauses do contain a catch-all provision, courts may restrict the catch-all to events very similar to those specifically enumerated.

Generally, the party seeking to invoke the clause and suspend or avoid its contractual obligation must demonstrate the existence of a qualifying force majeure event, that the event directly caused its inability to perform, and that it was unable to fulfill its contractual obligation despite reasonable efforts to do so. Normally, the protections of a force majeure clause cannot be invoked simply because performance of contractual obligations has become more expensive or more difficult because of the occurrence of the force majeure event. For example, if Party A agreed to supply Party B with olives, but Party A's olive supplier in Italy was no longer able to ship because of COVID-19, Party A would have to try to source its olives from another location, even if that increased its costs. If the parties' agreement, however, required Italian olives specifically, and none could be had from any source, then Party A's performance obligations may be excused or suspended.

Force Majeure Checklist for COVID-19

- Review critical contracts to assess what force majeure rights, remedies and requirements may apply if your or your contract partner's operations are disrupted.
- Identify the law applicable to those contracts and understand whether it has unique characteristics or requirements related to the application of force majeure clauses.
- Review relevant force majeure notice requirements under your agreement and apply them strictly.
- Assemble and retain documentation of the basis for your force majeure claim or the rejection of your counterparty's claim.
- Document efforts to comply with contract obligations or to identify alternative means of satisfying those obligations.
- Coordinate communications with your contract partners concerning force majeure claims so that the messages emerging from your business to counterparties are consistent, vetted and ideally reviewed in advance by counsel.

Evaluate whether a force majeure invocation by you or your major contract partners may trigger public reporting requirements or affect loan covenants or other agreements outside of the contract containing the clause.

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