

## COVID-19 & CONTRACTS

Given the outbreak of coronavirus disease 2019 (“COVID-19”), businesses are following governmental orders and directions and, in some cases, are taking unilateral actions, some of which may result in non-performance of their contracts. Events are canceled or postponed – sporting events, concerts, Broadway shows, weddings, conferences and meetings – to prevent spreading the virus. In addition, many businesses are suspending operations for a period of time in an effort to combat the spread of COVID-19. In some cases, a contract may provide protection via a “force majeure” provision. While this is a developing situation, below are a few thoughts for your consideration.

### Force Majeure

Contracts often include a force majeure clause that excuses nonperformance when it is caused by unforeseen events beyond the control of both parties that either make contract performance impracticable or frustrate the purpose of such performance. These are sometimes known as “Acts of God” provisions and typically excuse nonperformance of a contract for events such as “natural disasters such as floods, tornadoes, earthquakes and hurricanes and acts of people such as acts of terrorism, riots, strikes and wars. In some contracts, pandemic events are specifically included as force majeure events.

To invoke a force majeure clause, there must be a causal link between the force majeure event and the affected party’s failure to perform. A party claiming excuse or escape by force majeure may be required to show a reasonable effort to mitigate the effects of the force majeure event. However, the failure to perform need not rise to the level of impossibility – performance must be commercially impracticable, unreasonable, or fundamentally at odds with the business of a party. If a force majeure provision does apply, the affected party is excused from its obligations under the contract for at least as long as the force majeure event continues, and termination of the contract may be possible if the force majeure continues for an extended time. As with many legal questions, the answer of what is a force majeure event is not always clear and depends on many different circumstances.

### *Does COVID-19 qualify as a Force Majeure Event?*

Depending on the wording of the contract’s force majeure provision, COVID-19 likely qualifies as a force majeure event. Some force majeure clauses reference broader categories that qualify as force majeure events, and thereby excuse nonperformance such as, “acts of God,” “acts of government,” or “other circumstances beyond the parties’ reasonable control”. Under this sort of broad language, COVID-19 would likely qualify because the current outbreak contains “a naturally occurring component” – the virus – and governmental actions – quarantines, which were outside the parties’ expectations or control. Other force majeure provisions may specifically list “epidemic” or “pandemic” or “natural disaster” as qualifying events. Typically, even when qualifying events are listed, there will be a catchall provision at the end. It is possible that a court reviewing such a list may narrowly interpret the catch all to include only events or things of the same general type as those specifically listed. In other words, if illness or epidemic are not listed, there is no clear answer.

On January 31, 2020, Health and Human Services Secretary Alex M. Azar II declared a U.S. public health emergency; the WHO has labeled the coronavirus outbreak as a pandemic, and President Trump declared a State of Emergency on March 13. Many Governors have issued executive orders. Michigan's Governor issued a Declaration of Emergency on March 11th and has since issued a number of Executive Orders shutting down schools and places of public accommodation, under threat of penalties.

While many force majeure clauses contain an "acts of government" provision, and a government directive would be expected to trigger the clause, such actions are not required to enforce a force majeure clause if the event in question qualifies under other language of the force majeure clause. As discussed above, COVID-19 will likely qualify as a force majeure event under most force majeure clauses.

*What if your contract has no force majeure provision?*

If your contract does not contain a force majeure provision, nonperformance may still be excused. For example, if the performing party's principal purpose of the contract has been frustrated, the party may seek to suspend its performance under the frustration of purpose doctrine. Additionally, a party may seek excuse from performance under the doctrine of impracticability as the virus has made performance unfeasible. Under the Uniform Commercial Code, a person seeking to be excused from performance under a theory of impracticability must demonstrate that performance "has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made". Finally, a party may attempt to get its performance excused under the theory of impossibility, which allows a party to suspend or delay its performance if "a change of circumstance renders it impossible". Very few circumstances will render performance literally impossible for situations involving an outbreak.

*What should I be doing now?*

Review your existing contracts. If yours contains a force majeure clause, what does it say and what is defined as a force majeure event? Depending on the language, you should think about invoking the force majeure provision. Is formal notice required? In what timeframe? If your contract does not contain a force majeure provision, consider a conversation with the other side in your contract, possibly to discuss impracticability or impossibility. You are not likely going to be able to claim force majeure as to new contracts being entered into since the virus' emergence as a national and international issue.

For questions, please reach out to:

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