

Force Majeure and Coronavirus 2020

The Coronavirus pandemic has disturbed nearly every aspect of daily life, including global commerce. Governmental restrictions imposed to slow the spread of the virus have led individuals and entities to suspend, reduce, and/or cancel contractual obligations citing the difficulties these restrictions created as an excuse for performance. But can they? Should you take similar action? And, more importantly, what are the legal ramifications for the party taking such a position or for the party receiving such a request or declaration? This alert addresses those concerns and provides a primer on the initial considerations you and your attorneys should make when grappling with force majeure issues spurred by Coronavirus.

Most contracts include a force majeure clause. The purpose of a force majeure clause is, when a force majeure, or an unanticipated and uncontrolled event, occurs, the performance of a party's obligation(s) is/are excused in whole or in part, for a limited time. Classically, these events include fires, earthquakes, other acts of God, wars, or other acts of government. After the terrorist attacks of September 11, terrorist attacks and/or terroristic threats became a common inclusion in force majeure clauses. Before deciding to invoke a force majeure clause as an excuse to performance, or before responding to a request from another party seeking to invoke the same, you should consider the following:

- **First and foremost – be reasonable.** Millions of people are deeply affected by this pandemic and, quite literally, people are dying. The health and safety of the persons involved in the underlying dispute should be the first and primary consideration driving your decisions.
- **Second, read the whole contract or agreement, as opposed to just the force majeure clause.** This is an important step as the bedrock principle of contract law, *pacta sunt servanda*, or “agreements must be kept” still applies. Even under the current world pandemic, courts will be reluctant to let a party avoid their legal duties if a cognizable legal excuse to performance does not exist and it is important to be aware of all that is at stake.

Reading the entire contract or agreement will also assist in conducting a choice of law analysis. What law controls the contract or agreement is a critical consideration as each state or nation will treat each scenario differently.

In addition, reading the entire contract will clarify whether the contract is for the sale of goods or a service contract. If the contract is for the sale of goods, it is likely that the Uniform Commercial Code will apply and additional considerations will be at play.

Finally, a read of the entire contract will reveal whether the parties had previously allocated the risk at issue. If the risk of the underlying cause of the inability to perform was allocated between the parties through the bargained for terms of the contract, a party cannot rely on force majeure to excuse performance. In other words, a party cannot use the force majeure clause to override its obligations if it has contractually agreed to assume the risk causing its inability to perform. For example, if the contract allocates the risk of a specific product becoming

unavailable, and inability to obtain that specific product due to Coronavirus is the underlying reason for invoking the force majeure clause, it is highly unlikely a court will excuse performance.

- **Next, reread the force majeure clause.** Just because a contract or agreement includes a force majeure clause does not necessarily mean that the difficulties caused by Coronavirus are covered by the force majeure clause. Some force majeure clauses generally state that any act of God or other circumstance beyond the control of the parties excuse performance. Others expressly state which events, such as fires, floods, or earthquakes are considered force majeure. And, some may even include an epidemic – but is Coronavirus an epidemic or a pandemic? Is epidemic close enough if it is a pandemic? All of these questions could be answered differently depending on what law applies.
- **Understand the factual basis which you intend to rely on to declare force majeure as an excuse to performance or which another party intends to rely upon.** Provide or ask for written explanations and/or evidence to verify the reason for nonperformance. You want to ensure that a party is not using Coronavirus for ulterior purposes if you are on the receiving end and you want to be able to defend against such accusations if you are declaring nonperformance pursuant to the force majeure clause.
- **Be aware that a party's financial inability to perform, itself, is almost never an excuse to performance.** However, economic downturn/financial inability to perform *caused by* an unforeseen event (i.e. Coronavirus) may trigger impracticability of performance and excuse performance.
- **If the contract is for the sale of goods, consider Section 2-615 of the Uniform Commercial Code.** Under the U.C.C. the critical question: “is not whether the promisor could not have performed his undertaking but whether the nonperformance should be excused because the parties, if they had thought about the matter, would have wanted to assign the risk of the contingency that made performance impossible or uneconomical to the promisor or to the promisee; if to the latter, the promisor is excused.” *Northern Indiana Public Service Co. v. Carbon County Coal Co.*, 799 F.2d 265, 276 (7th Cir. 1986).
- **Is the contract or agreement controlled by a foreign country's law?** If so, Article 79 of the United Nations Convention on Contracts for the International Sale of Goods may apply. Pursuant to Article 79, if the failure to perform was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequence, performance may be excused.
- **Lastly, consider other legal excuses for nonperformance that may apply.** For instance, impossibility or impracticability of performance and frustration of purpose may provide other avenues to excuse performance under the contract in light of Coronavirus.

While the above points create a starting block for addressing force majeure clauses in the midst and aftermath of Coronavirus, each contract or agreement, and the underlying facts for each case will differ. These individual facts will drive the outcome for whether you properly invoke the protection afforded by a force majeure clause (or other legal excuse for nonperformance) or whether you are breaching the agreement.