

Coronavirus (COVID-19) and Force Majeure Clauses

By Michael J. O'Brien

In the past week, the S&P 500 has seen an 11% drop in stock prices as the international economy struggles to grapple with the impact of Covid-19. According to the World Health Organization (WHO), the virus is now in in at least 56 countries and poses a “very high” global risk, which is the most serious in the WHO’s four-stage alert system. In the United States, government officials are warning the American public that a significant rise in domestic cases is increasingly likely. In this climate of economic and political uncertainty, attorneys should be prepared to counsel clients as to the impact the coronavirus may have on their contractual rights and responsibilities, specifically as to whether they or another contracting party may appropriately invoke a force majeure clause to excuse non-performance.

“Force majeure” is a phrase of French origin, translated literally to mean “superior force.” A force majeure clause in contract law is a provision within a contract that releases the parties from their respective obligations in the event that a catastrophic or unexpected occurrence prevents one or more parties from performing the duties and responsibilities contained therein. A force majeure provision seeks to fairly apportion risk in the event performance becomes impossible or impracticable because of an extraordinary event outside the control of the parties and which could not be avoided by exercise of due care. If properly invoked, it may allow for termination or suspension of contractual obligations in some circumstances. Circumstances that warrant the invocation of force majeure may be wars, rioting, social unrest, a catastrophic weather event, or, in some cases, viral outbreak. Importantly, it must be the force majeure event, and not some other factor, which caused non-performance. A sample force majeure clause may excuse performance for:

Any causes or circumstances beyond the reasonable control and without fault or negligence of the party affected thereby or of its subcontractors or carriers, such as, acts of God, governmental regulation, war, acts of terrorism, weather, floods, fires, viral outbreak, accidents, strikes, major breakdowns of equipment, shortages of carrier's equipment, accidents of navigation, interruptions to transportation, embargoes, order of civil or military authority, or other causes, whether of the same or different nature, existing or future, foreseen or unforeseeable, which wholly or partly prevent the production, processing, shipment and/or loading of the subject goods by Seller, or the receiving, transporting and/or delivery of the goods by any carrier, or the accepting, utilizing and/or unloading of the goods by Buyer, but specifically excluding economic factors alone.

As it relates to Covid-19 and contractual non-performance, clients that depend on international supply chains are particularly vulnerable. Approximately 780 million people in China have been subject some form of quarantine in the past month. South Korea, Japan, Italy, Iran, and a growing number of countries have seen a sharp spike in infection rates and, in the coming days and weeks, more governments are likely to direct that people and goods remain in place until a cure or containment plan can be developed. As this occurs, the adverse effect on international trade will become more magnified.

While it is unclear whether the current epidemic can be classified as a force majeure event, attorneys and clients should initiate the following review:

- 1) Identify commercial relationships that are particularly vulnerable to global supply chains;
- 2) Review any contracts in place and determine whether a force majeure provision is included in any or all of the impacted agreements;
- 3) Determine whether such agreements provide for a 30, 60 or 90 day notice period prior to the invocation of a force majeure provision; and
- 4) Evaluate the likelihood of invocation by one or more parties and plan for the probable consequences.

By taking these proactive steps, we can prepare our clients for the effect this outbreak may have on their commercial and legal interests.