

Force Majeure Clauses and Contractual Nonperformance as a Result of COVID-19

By Eric R. Tubbs

In light of the novel Coronavirus (COVID-19), companies should assess their existing contracts to determine whether they contain a force majeure clause that may excuse or delay a party's nonperformance under the contract.

This includes not just companies that have been or may be affected by the pandemic directly, but also those affected indirectly as a result of the evolving federal, state and local governmental actions taken in response to the COVID-19 pandemic.

Does the COVID-19 pandemic constitute a force majeure event?

Force majeure is a contractual defense that permits a party to excuse or delay its contractual obligations if certain extreme and unforeseeable circumstances beyond the control of the party prevent its performance. What types of events constitute force majeure depend on the specific language included in the force majeure provision itself.

Because the WHO has classified COVID-19 as a global pandemic, COVID-19 may qualify as a force majeure event if the force majeure provision specifically calls out a "pandemic" or "epidemic" in the list of specific force majeure events. Additionally, if a company is unable to perform its contractual obligations due to a governmental action or order (such as a "shelter-in-place" order) this too may qualify as a force majeure event if the list of force majeure events includes "governmental actions or orders."

In the event the pertinent force majeure provision does not include these specific circumstances as force majeure events, the force majeure provision may include more general "catch-all" provisions such as "acts of God" or "acts beyond the reasonable control of the parties" that a party could try to assert to excuse or delay its performance under the contract, although there is currently a lack of case law as to whether COVID-19 would constitute a force majeure event under these broader provisions.

Other factors to consider in deciding whether to claim a force majeure event

In addition to determining whether the COVID-19 pandemic would constitute a force majeure event under the pertinent contract, there are additional factors the nonperforming party should consider, such as:

- Determining whether the force majeure event has made the nonperforming party's obligations impossible or extremely difficult to perform – courts typically refuse to excuse a party's performance under force majeure if the event merely increased a party's expenses or made it more difficult for a party to perform under the contract;

- Using best efforts to comply with all procedural requirements in the force majeure provision (such as delivering notice to the other party), as some contracts may make following such procedures a condition to claiming a force majeure, and courts may determine the nonperforming party may not rely on the force majeure clause if the procedural requirements were not followed;

- Showing that it has taken steps to avoid or mitigate the force majeure event (such as trying to find alternative means to perform its contractual obligations); and

- Considering the consequences of relying upon a force majeure clause (for example, if declaring a force majeure would permit the other party to terminate the agreement if the force majeure event is not resolved within a certain time period).

What if the pertinent contract does not include a force majeure provision?

Even if the applicable contract does not include a force majeure clause, there may be other provisions in the contract (such as dispute resolution or mutual cooperation provisions) or other legal doctrines (such as frustration of purpose, impossibility of performance or commercial impracticability) that may apply to excuse a party's nonperformance.

Obviously, each contract is unique and specific facts may dictate an outcome. Hopefully this general discussion is helpful, but it is not intended to serve as legal advice to be relied upon. If you have any questions or need assistance regarding force majeure provisions in your contracts or any other contractual or legal doctrines that could excuse a party's nonperformance due to the COVID-19 pandemic, please contact the author at etubbs@nyemaster.com.



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