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***Force Majeure*: Frequently Asked Questions**

As the novel Coronavirus (COVID-19) sweeps across the United States, businesses are evaluating whether they, or their counterparties, will be able to perform their obligations under existing contracts. If they are unable to perform, they wonder whether such non-performance may be excused. To excuse their performance, many parties are turning to *force majeure* provisions. As discussed below, *force majeure* clauses may allow a party to suspend or discontinue the performance of certain contractual obligations under some circumstances; however, there are limits to such relief.

Contract Interpretation

The interpretation of a contractual *force majeure* provision will be governed by the applicable state law. While there are some variations amongst the states, the general analysis is fairly consistent.

First, a party will need to consider whether events related to COVID-19 fall within any specifically-enumerated *force majeure* events identified in the contract. If not, the party will need to look for “catch-all” language in the provision (e.g., “other events beyond the reasonable control of the impacted party”), which may capture COVID-19 if COVID-19 is considered to be of the same general kind or nature as the items that have been specifically enumerated.

Next, if relying on the “catch-all” language and, in some states, even if the event was specifically-enumerated, the party will need to establish that the event was not foreseeable.

After establishing those elements, the party will then need to show that the *force majeure* event was the direct cause of such party’s inability to perform and that the impact of such event could not have been mitigated by actions within the reasonable control of the party.¹

It should be noted that it is particularly difficult to invoke the protection of a *force majeure* provision where the impact of the event is purely economic (i.e., performance is not impossible, but would impose an economic hardship), as courts often find that economic hardship is a foreseeable risk that could have been addressed in the contract and/or that non-performance due to economic hardship is merely an indirect consequence of the force majeure event or an effect that could have been avoided (albeit, at a cost or loss) by the party seeking to avail itself of the provision.

Finally, the party will need to confirm that the performance sought to be excused is within the scope of the *force majeure* provision and provide any required notice and satisfy any other specified conditions precedent as and to the extent set forth in the contract.

¹ Most courts will allow performance to be excused only where the inability to perform is directly caused by the *force majeure* event and the impact of the force majeure event could not reasonably have been avoided. However, in at least one instance, a court applying New York law has excused performance in a case involving indirect causation that could have been avoided (i.e., where a delay in accepting shipments was due to congestion in the shipping port caused by a hurricane, rather than the hurricane itself, and the party seeking to have its performance excused had prioritized other shipments ahead of the shipments in question).

The following questions and answers illustrate when a force majeure clause may permit contractual performance to be excused:

Q: If the *force majeure* provision in my contract specifically mentions epidemics or pandemics, does that mean I automatically have the right to suspend or discontinue performance?

A: No, the enumeration of an applicable event does not end the *force majeure* analysis. Instead, you still need to consider whether the event in question is the direct cause of your inability to perform, whether you could have mitigated the impact of such event by taking actions within your reasonable control, and whether you have fulfilled all conditions precedent to invoking the provision (the most common of which is a notice requirement). Additionally, in some states, you will need to show that the event was unforeseeable, even if the event was specifically enumerated in the force majeure provision of the agreement.

Q: If the *force majeure* provision in my contract does not specifically mention epidemics or pandemics, are there other commonly listed items that may apply to circumstances related to COVID-19?

A: Yes, certain other events commonly included in the *force majeure* provision might apply to COVID-19. For example, the language may include other applicable events such as quarantine, governmental orders, or acts of God.

Q: If none of the listed items in my force majeure provision apply to circumstances related to COVID-19, does that mean that I cannot invoke the provision?

A: If your *force majeure* provision includes “catch-all” language, you may still be able to establish a *force majeure* event. “Catch-all” language may include wording such as “including without limitation,” “including but not limited to,” “other acts beyond a party’s reasonable control,” or “similar events beyond the reasonable control of the impacted party,” to name a few.

If you are seeking to rely on “catch-all” language, you will need to consider whether COVID-19 is similar to the other items that are specifically enumerated, as a court will typically apply “catch-all” language only when the existing event is of the same general kind as the other items specifically mentioned. Additionally, when relying on “catch-all” language, you will be required to show that the event was unforeseeable.

Finally, as with a specifically enumerated event, you will need to establish that the event in question is the direct cause of your inability to perform, whether you could have mitigated the impact of such event by taking actions within your reasonable control, and whether you have fulfilled all conditions precedent to invoking the provision.

Q: I am still able to operate my business, but reduced demand for my product is decreasing sales and causing the price for my products to decline. If I perform under the contract, it will be unprofitable. Are those economic consequences of COVID-19 sufficient to enable me to invoke my *force majeure* provision?

A: Most likely not. Most courts require the inability to perform to be directly caused by the *force majeure* event (*but see* footnote 1, recognizing where at least one court has applied a *force majeure* clause to the indirect effects of a *force majeure* event). Economic hardship is generally considered to be an indirect consequence of a *force majeure* event, rather than a direct consequence. In other words, if you are able to perform, but doing so would be unprofitable, it is unlikely that the circumstances would be sufficient to invoke the *force majeure* clause.

Q: We had a conference scheduled during the late fall, but due to the economic uncertainty and general concerns about travel, we would prefer to cancel the conference, including all of the hotel rooms and catering. Can we utilize the *force majeure* provision in the agreement to do that?

A: Most likely not. Even if the underlying reasons for cancelling the conference relate to COVID-19, the direct cause of the cancellation would be economic conditions, not COVID-19 itself. Even when such economic conditions are the product of a *force majeure* event, the lack of direct causation will typically prevent the performance from being excluded. Similarly, if general concerns about travel (as opposed to a travel ban imposed by government authority) resulted in the decision to cancel, it is likely that the direct causation requirement has not been met. It should be noted that similar arguments were made, and rejected, with respect to events cancelled in the wake of September 11, 2001.

Q: One of the items my company uses in production is also used in the medical field. My current supplier is having trouble delivering items to me because such supplier has been ordered by the government to first fulfill orders from hospitals. Without those items, I cannot produce my products. I could obtain the items from a different supplier; however, the cost will be significantly more and could cause me to lose money. Can I use the *force majeure* clause in my customer contracts to excuse my obligation to fulfill orders?

A: Most likely not. Parties are generally required to take all actions within their reasonable control in order to mitigate the impact of a *force majeure* event before having their performance excused. In this case, the impact of the pandemic could be mitigated by ordering product from a different supplier. Although the higher cost might result in the subsequent sale of products at a loss, such economic hardship is generally not considered to be directly caused by the *force majeure* event and, therefore, will not excuse performance.

Q: The *force majeure* provision contained in my contract only permits suspension of performance obligations other than obligations to make payments. Since my business was forced to close by government order related to the pandemic, I cannot pay my vendors when due. Can I use the *force majeure* provision in my contract to delay payment?

A: No. Courts will review the specific language in your contract to determine the scope and applicability of the *force majeure* provision. In this instance, because payment obligations have been expressly excluded from the provision, you cannot rely on the provision to permit you to delay payments.

Q: The governor of my state has ordered my business to close due to COVID-19 and, as a result, I cannot perform the services required under my customer contracts. Governmental actions and orders are specifically listed within the *force majeure* provision contained in my standard customer contract. What else do I need to do to invoke the *force majeure* provision in my contracts?

A: You should carefully review your *force majeure* provision for any conditions precedent to having your performance excused. For example, if notice is required to be given, you should deliver such notice within the time frame and in the manner required in order to avail yourself of the *force majeure* provision.

Additional Information

If you have additional questions about *force majeure* provisions or notices, please contact your Kutak Rock attorney, or any of the attorneys in the [Business, Corporate and Securities Group](#).