

## Force Majeure Contract Considerations Related to COVID-19

With widespread business disruption caused by federal, state and local shelter-in-place and social distancing guidelines due to the novel coronavirus (COVID-19), companies are trying to determine if the *force majeure* clause in their commercial contracts applies in this circumstance. The clause can excuse a party's performance under the contract for certain unforeseeable circumstances that are not under the performing party's control. However, *force majeure* clauses come in many shapes and sizes, may require notice, and may or may not completely cancel a party's obligations under a contract. Economic difficulty and hardship are not sufficient to excuse performance.

Saul Ewing Arnstein & Lehr's corporate attorneys can help companies determine how the COVID-19 outbreak may affect obligations and performance of each party in existing contracts. Some key considerations that we address with clients include:

- Does your contract **include a force majeure clause**?
- What are the **identified events** in your *force majeure* clause?
  - Does it include a pandemic, epidemic, serious illness, plague, disease or outbreak?
  - Does it include governmental actions, government emergencies, national emergencies or the like?
  - Do not assume that "Acts of God" will cover COVID 19.
- If the *force majeure* clause includes events such as the above, you may be able to **claim an excuse from performance**, if, for example:
  - The inability to perform can be linked to the disease or a governmental order or action. Does the state you are performing in consider the business vital? If yes, you may not be able to show that the pandemic resulted in an inability to perform.
  - The inability to perform is not foreseeable. If you are dependent on a supply chain that procures product from China and you signed a contract in December, was it foreseeable in December that your supply chain could be compromised? If yes, you may not be able to show that the event was unforeseeable.

- The interpretation of “Act of God” differs from state to state. For example, in Maryland, an “Act of God” can only be used to excuse performance if “God” is the only reason for non-performance. Other states may only permit the excuse of “Acts of God” if the event is not foreseeable. And in states such as New York and Illinois, if a party could demonstrate that COVID-19 or a similar pandemic was foreseeable based on the recent history of the 2009 H1N1 pandemic and similar public health crises, then an “Act of God” as a defense may not be permitted.
- In the United States, the excuse of performance for a *force majeure* event must be **evoked contractually, not statutorily** or under common law.
- Some states, such as New York and Delaware, do not interpret “including without limitation” or “causes beyond the reasonable control” to **broaden the clause beyond the identified events**. However, they have permitted clauses such as “any cause similar or dissimilar” or “any reason whatsoever” to broaden the meaning of the cause.
- Does the contract or state law require you to **mitigate damages** in order to take advantage of the excuse? Does the contract require that the party invoking *force majeure* expend unlimited funds to mitigate the damages?
- **Who is permitted to terminate?** Often, the *force majeure* clause allows only the affected party to terminate.

If you have a significant number of contracts to review that all contain *force majeure* clauses, we can discuss deploying sophisticated technologies that can review these contracts and their force majeure provisions in a fast, efficient and cost-effective manner. Please contact us directly to discuss this technology if you have this need.

**For information on how we can help you address these and related issues, please contact:**



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