

Force Majeure Events and Contracts During the COVID-19 Pandemic

In light of the COVID-19 pandemic, many businesses are confronting circumstances that may excuse or delay their obligations to perform under existing contracts due to the occurrence of a force majeure event. Force majeure refers to a contractual provision that limits liability due to unforeseen events outside the control of the parties that delays performance of the contract or prevents the performance entirely.

What constitutes a force majeure event is determined on a case-by-case basis and depends upon the terms of the relevant contract, applicable law and other relevant facts. Historically courts have narrowly interpreted the scope of events that may trigger a force majeure provision. However, a global pandemic such as COVID-19 will likely qualify as a force majeure event if the contractual provision specifically includes references to a "disease," "epidemic" or "pandemic." If the provision does not contain such specific disease references, other more generic provisions relating to "disasters," "acts of God," "national emergencies," "governmental regulations" or "acts beyond the control of the parties" may constitute a force majeure event.

Companies seeking to utilize force majeure provisions should carefully consider any reasonable measures that can be taken in the alternative to effectuate the agreed-upon contractual performance before utilizing a force majeure provision. However, if it is necessary to utilize the provision, firms and businesses should carefully review their important agreements to determine the requirements for declaring a force majeure event. Often agreements require that the party seeking to declare a force majeure event to provide prompt written notice. Agreements may also require that the notice include an estimate of how long the force majeure event may last and a description of steps that are being taken to mitigate its effects. In addition, it is important to consider whether providing a notice under a force majeure provision may constitute an anticipatory breach of the agreement, thereby providing grounds for the counterparty to terminate the agreement and sue for breach.

Therefore, giving notice of force majeure and inability to perform under the contract should not be done through a short, nondescript communication; rather, the notice should detail why a party cannot perform and why that party has not been able to find another way to fix the problem. Keep in mind that some agreements may require notice of a potential force majeure even if an inability to perform has yet to occur. Therefore, even if it is not expressly written in the contract, it is generally a good idea to communicate with customers and suppliers regularly regarding potential interruptions in supply so that all parties may prepare and plan accordingly. Communicating clearly and often with your business partners and customers will help alleviate potential contract disputes.

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