

The background of the top half of the page is a photograph of an older man with a white beard and a younger woman sitting at a desk with a laptop, engaged in a conversation. The man is on the left, looking towards the woman on the right. They are both wearing light blue shirts. The setting appears to be a modern office with large windows in the background.

FORCE MAJEURE CLAUSES CONSIDERATIONS OF CONTRACT LANGUAGE WHEN DEALING WITH CORONAVIRUS

Coronavirus has had an impact on the ability of businesses to perform obligations under many different contracts. It is prudent for businesses to review the contracts underlying their commercial relationships impacted by this pandemic. One of the most prevalent contractual clauses that may influence rights, remedies, and obligations of businesses is the force majeure clause.

WHAT IS FORCE MAJEURE?

A *force majeure event* refers to the occurrence of an event which is outside the reasonable control of a party and which prevents that party from performing its obligations under a contract. A *force majeure clause* is a contract provision that outlines the obligations, rights, and remedies of parties to a contract when a force majeure event occurs and prevents or delays full or partial performance of obligations under the contract.

DOES THE CORONAVIRUS OUTBREAK CONSTITUTE A FORCE MAJEURE EVENT?

Whether the coronavirus outbreak constitutes a force majeure event under a particular contract will depend on the language of the contract at issue, the relationship between the epidemic and nonperformance, and the applicable law.



WHAT SHOULD I BE AWARE OF WHEN REVIEWING FORCE MAJEURE CLAUSES?

- 1. Is there is a force majeure clause?** If NO, there still may be rights by other means including the doctrine of frustration/impossibility. Furthermore, there may be other pertinent provisions in the agreement which provide rights, remedies, or obligations. Other pertinent provisions could include, but not be limited to termination provisions, cancellation provisions, any breach of contract considerations, and the indemnification obligation.
- 2. Does the outbreak of the coronavirus constitute a force majeure event under the contract?** Typically, a force majeure event is defined in the agreement. A force majeure clause may be very specific and contain relevant language which would determine that coronavirus was a force majeure event, including "disease," "epidemic," "pandemic," "quarantine," or "acts of government." A force majeure clause may also be very broad and define a force majeure event as an event beyond the parties' control, leaving more room for interpretation.
- 3. Did the coronavirus cause the non-performance?** There may be some question about other factors causing the non-performance and the applicability of the force majeure clause. Force majeure clause may have qualifications regarding direct vs. indirect cause of non-performance.
- 4. What extent of non-performance is required?** The force majeure clause may detail the level of interference a party must experience prior to invoking the force majeure. The language within the clause may specifically outline that any delay or prevention of performance caused by a force majeure can effectively triggers the clause. The clause may also require absolute inability to perform prior to triggering of a force majeure event.
- 5. Is notice required?** Force majeure clauses may be conditional upon notice requirements. If so, determine when notice is required, and how notice must be provided to a counterparty.
- 6. What are the implications of a force majeure event?** Consider the various outcomes that may follow a force majeure event. This may include total relieving of liability, pause of performance, ability to renegotiate, or even termination. There may also be time element considerations, whereby rights may be triggered if the force majeure event continues for a specific length of time. Another large consideration is if there are alternatives to performance or the requirement to mitigate damages. There may be requirements that parties are required to take reasonable steps to perform through such other means and will not be relieved of its contractual obligations.





RECOMMENDATIONS FOR CLIENTS

EXECUTED AGREEMENTS

Review your contract to determine if there is a force majeure provision.

Review the definition of "Force Majeure" and determine if there is language which expressly addresses pandemics, epidemics, disease, etc. If there is no specific language, determine if the language is broad enough to include coronavirus.

Review the qualifications for triggering a force majeure event.

Determine what performance obligations may be affected because of coronavirus. Review procedures and what steps are being taken to continue to perform obligations under the agreement.

Determine if there are any notice requirements.

Determine whether insurances, such as business interruption insurance or force majeure insurance, may cover any of the expected losses.

FUTURE AGREEMENTS

Ensure that an appropriate force majeure clause is in the agreement. The following considerations should be made when drafting a force majeure clause:

- The outbreak of coronavirus should be defined as a force majeure event.
- The force majeure event should be defined and include the following: "disease," "epidemic," "pandemic," "quarantine," or "acts of government".
- Consider what extent of non-performance would be allowable. This would mean implications if there is a delay or reduction in performance vs. if the clause is only triggered through inability to perform.
- Determine what are the implications of a force majeure event. If there is a force majeure event, the remedies of the parties can vary from contract to be terminated, allow for delayed performance, or allow for renegotiation.
- Properly outline notice requirements.
- Insert any timing considerations.

The interpretation of contract language considering the coronavirus will be evolving as claims continue to arise. The best way to move forward with business in the current environment is to have a clear understanding of responsibilities, rights, and remedies between the parties and to properly have the language reflect the intent between the parties. If there are any concerns about executed or future agreements, it is advisable to consult with an attorney.



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