



CLIENT ALERT

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THE CRISIS LURKING WITHIN: *FORCE MAJEURE* AND THE CORONAVIRUS

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Since doctors first identified a new strain of the coronavirus (COVID-19) in China last December, the virus has rapidly spread throughout the world leaving government officials, non-governmental organizations, health care workers and the general population scrambling.

By January 30, 2020, the International Health Regulations Emergency Committee of the World Health Organization (WHO) had declared the outbreak a "[public health emergency of international concern](#)." And, as of March 26, 2020, over 160 countries, including the United States, have reported cases of the coronavirus, with the death toll climbing.¹

Due to these unprecedented times, government and non-governmental organizations have implemented state and nationwide quarantines as well as shelter-in-place orders and travel restrictions in an attempt to contain the virus. These massive disruptions to transportation and supply chains have created economic turbulence and caused substantial disruption to normal course operations in nearly every industry and market sector.

Businesses are faced with difficult choices in this challenging and evolving environment. Working with an attorney to examine your contractual and legal rights and obligations is critical to safeguarding yourself from the chaotic and potentially damaging impacts of these unpredictable and unprecedented disruptions.

Many businesses will be forced to invoke contractual *force majeure* clauses – a legal term commonly buried deep in business contracts that offers parties a potential escape clause if an event beyond their control prevents fulfilling their contractual obligations. We have provided a summary of some of the common issues relating to *force majeure* provisions with emphasis on the current market disruption due to COVID-19.

What is a *force majeure* clause?

Force majeure clauses are contractual defenses that may be invoked when a party is forced to suspend or discontinue its performance under certain unusual circumstances. Generally, the affected party must not have reasonably been able to foresee or avoid the precipitating event and must take appropriate steps to mitigate its impact where possible. The affected party must also provide timely notice to its counterparty.

These clauses are creatures of contract law. As such, the state law that governs the contract will apply to their interpretation. Courts will generally enforce a *force majeure* provision in accordance with its stated terms, similar to any other contractual provision. It should be noted, though, that the tendency is to construe these provisions narrowly as courts consider them to be somewhat extraordinary relief. It is also important to note that the party seeking to invoke the *force majeure* provision as a defense to non-performance must have otherwise been

capable of performing. *Force majeure*, in other words, will not excuse non-performance unless such non-performance was directly caused by the precipitating event.

Does the coronavirus pandemic count as *force majeure*?

While a health crisis is not typically included expressly in a *force majeure* clause, for some companies the coronavirus epidemic may qualify due to the rapid spread of the virus and associated worldwide labor shortages, factory closures and significant supply chain disruptions. Even if a contract does not include an explicit *force majeure* exception for pandemics, these clauses may be applied to an array of unusual and extreme circumstances and it is certainly within a business's right to turn to the legal system for assistance during these arduous times.

Does *force majeure* go beyond commodity markets?

Force majeure clauses can be applied to almost any business situation. The havoc wrought by the coronavirus, for example, extends beyond goods and materials and most definitely affects services and events as well. Whether it be the cancellation of an event, loss of attendance or disruption to other services provided, a legal team can help you determine how to proceed in a way that minimizes losses and provides solutions that work for all interested parties.

What if I receive a *force majeure* notice?

The COVID-19 disruption has launched nearly every business into uncharted territory. If you are concerned with invoking the *force majeure* clauses in your contracts, it is likely that your contractual counterparties are considering doing the same. In the event that you receive a *force majeure* notice, the basic principle is to consider whether the disruption caused by COVID-19 fits within the express language of the *force majeure* clause, whether there are steps the counterparty could have taken to mitigate the disruption and whether the counterparty provided adequate notice. It is also worth noting that if you provide a *force majeure* notice to your counterparty in order to excuse your non-performance, that may provide grounds for your counterparty to claim the same defense to its own non-performance.

What if a contract does not contain a *force majeure* clause?

A *force majeure* provision is a contractual device used to protect parties from unusual circumstances that are beyond their control. There are, however, common law doctrines that may apply to the same effect under similar circumstances, and these doctrines might provide protection even in the absence of a *force majeure* clause.

The Uniform Commercial Code ("UCC") provides standard rules that apply to sales of goods. Under the UCC, a seller of goods may be excused from performance under certain circumstances. Circumstances where this doctrine might be invoked during the current crisis are outlined below.

- If the seller must suspend operations due to a governmental regulation or order, it may be excused pursuant to UCC § 2-615.

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- Similarly, if certain contingencies occur that render the seller's performance impracticable due to unforeseen events beyond its control, its obligations may be excused pursuant to UCC § 2-615.

Note that, under each of these circumstances, the customer may terminate or modify the contract by agreeing to take any allocation of production and deliveries available by the supplier pursuant to UCC § 2-616. In addition, a seller also has an obligation under the UCC to equitably allocate production and deliveries if the impracticability allows for partial performance.

There are common law and equitable principles that may similarly apply to the sale of services. These are state-specific and would require a detailed analysis of the common law and equitable principles applicable in the subject jurisdiction.

How can business owners chart this unprecedented territory?

Beyond taking basic steps to alleviate the effect of coronavirus on their day-to-day dealings, there are several actions business owners can take to ensure that they stay ahead of the unknown. These are highly fact-driven inquiries and depend upon the specific language of the contract at issue.

- Review your contract and determine what provisions it makes regarding delayed performance due to *force majeure*.
- Provide timely notice of a *force majeure* event.
- Seek to mitigate or avoid the *force majeure* event if at all possible.
- Document everything.
- Prepare for potential litigation.
- If possible, update *force majeure* clauses to include phrasing that allows for modern risks.
- When signing new contracts, consider explicitly stating that the parties are unaware of any potential *force majeure* events (see UCC § 2-615).
- If signing new contracts in the coming days and weeks, consider adding language allowing for each party to take reasonable measures to suspend or slow down operations as necessary to protect the health of its employees and comply with legal requirements implemented to confront the COVID-19 pandemic.

As always, Dickinson Wright attorneys stand ready and available to answer any questions and assuage any legal concerns as the coronavirus pandemic continues to evolve. Please don't hesitate to reach out to us today.

This client alert is published by Dickinson Wright PLLC to inform our clients and friends of important developments in the field of corporate law. The foregoing content is informational only and does not constitute legal or professional advice. We encourage you to consult a Dickinson Wright attorney if you have specific questions relating to any of the topics covered.

¹https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/world-map.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Flocations-confirmed-cases.html (accesses March 25, 2020).

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