Since January 2020 Elsevier has created a COVID-19 resource centre with free information in English and Mandarin on the novel coronavirus COVID-19. The COVID-19 resource centre is hosted on Elsevier Connect, the company's public news and information website.

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Legal Matters

Can I Get Force Majeure from a Novel Coronavirus?

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At the time of this writing, stay-at-home orders are mostly still in place and the total impact of the COVID-19 pandemic is unknown. Our healthcare systems are over stressed, and we are seeing worldwide challenges unlike any before. The lack of PPE, the hesitancy of many to seek appropriate medical care because of the fear of exposure, quarantine, the impact of travel bans and free assembly, work force disruptions and the impact of social distancing, facemasks and gloves as well as other restrictive measures have merged to wipe out revenue streams, interrupt global supply chains and interfere with many companies unable to fulfill contractual obligations.

There are many contractual clauses that can be relied upon to enforce the performance of a contract, but one protection that is often included, but rarely relied upon, is a force majeure clause. Force majeure attempts to remove liability for "natural and unavoidable catastrophes that interrupt the expected course of events and prevent participants from fulfilling obligations".[1] In practice, most force majeure clauses do not excuse a party's non-performance entirely, but only suspend it for the duration of the event[2] and only for non-performance if the non-performance is caused by an external, unforeseen and unavoidable event.[3]

COVID-19 itself may not be the force majeure event, but the consequences of the pandemic (i.e. manufacturing shutdowns, port closures, delays in transportation, etc.) all give rise to potential force majeure claims. Under a force majeure claim, failure to fulfill a contract has to be viewed as impossible and not just difficult or complicated. Even if a party can show non-performance is covered by the clause, it still must demonstrate that the nonperformance was unforeseeable and could not have been mitigated.

The most obvious way to determine if the contract is covered by the force majeure clause is to see if the events impacting performance have been explicitly mentioned in the writing like war, labor action, riot, crime, or an Act of God like earthquake, flood, tornado, hurricane, volcanic eruption, etc.. When it comes to coverage or for pandemics, epidemics, and quarantines it is not as well defined. The general rule is that if it's not in the contract, it isn't covered, however a court may have to make that decision.

A law professor told me "Contracts are made when you are friends and broken when you are enemies" suggesting that we create the terms of the contract in the most positive light but we need to ensure that the terms will hold up when the parties don't care to do business together any longer. Generally speaking, the three-prong test for a force majeure clause to prevail is:

1. the event is beyond the reasonable control of the affected party;
2. the affected party's ability to perform its obligations under the contract has been barred or obstructed by the event; and
3. the affected party must have taken all reasonable steps to seek to avoid or mitigate the event or its consequences.

Even when these three prongs are met, the court will focus on enumerated items that may trigger nonperformance.[4]

If a specific list of force majeure events includes "pandemics," "epidemics" or "diseases" it will make it easier to bring a force majeure claim in the COVID-19 setting but will still require the other criteria for a force majeure test to be satisfied. Not having specific "pandemic" language isn't the end of the inquiry. The effect of COVID-19 related contractual failures may fall under "Acts of God," "action by government" or the ever-popular catch-all provision "all events outside the reasonable control of the party affected".

A force majeure provision typically relieves a party from what would otherwise be a breach of contract. The party must establish the causal link between the event and its inability to perform. A provision that requires a party to be "prevented" by the force majeure event from performing its obligations will likely be more difficult to rely upon than one which only requires the party to be "impeded" or "hindered" in the performance of its obligations.

The third prong of the test is that a party seeking to rely upon a force majeure provision will have to demonstrate that it has taken reasonable steps to avoid or mitigate the impact of COVID-19 and its consequence and that there are no alternate means for performance. For example, if an earthquake interruption manufacturing in one area, it might be possible to shift production to another area, however the widespread disruption caused by COVID-19 may eliminate a production shift and other mitigation strategies,

A force majeure clause typically allows an extension of time to perform contractual obligations or may suspend contractual performance for the duration of the force majeure event. If the event extends over a long period of time, some provisions may entitle the parties to terminate the contract and find another company that can fulfill a similar obligation. Of course, there is not

Editor's Note: While the information in this article deals with legal issues, it does not constitute legal advice. If you have specific questions related to this topic, you are encouraged to consult an attorney who can investigate the particular circumstances of your individual situation. If you have an issue you would like to see addressed in a future issue of AMJ, please contact the author at clarkjrc@gwmail.gwu.edu to suggest a topic.

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one scheme to cover this and the reality is that the applicable legal standards vary by state, sometimes with very different outcomes. Legal counsel will have to decide if pursing a force majeure clause is the best strategy or to relay on common law principles.

A force majeure claim may not be necessary at all. Beyond legal remedies available, don't forget to evaluate another area to considered is to review any insurance policies and provisions, including business interruption and contingent business interruption insurance.

Business interruption insurance covers losses that result from direct interruptions to a business operations, and generally covers lost revenue, fixed expenses such as rent and utility, or expenses from operating from a temporary location.[5] Similarly, contingent business interruption insurance is intended to cover lost profits and costs that indirectly result from disruptions in a company's supply chain, including failures of suppliers or downstream customers.[6] While these policies usually address physical property damage, businesses have increasingly submitted claims for coverage of losses due to business interruptions resulting from COVID-19.[7]

In early 2000 when the Severe Acute Respiratory Syndrome (SARS) outbreak began, insurers started to specifically exclude viral or bacterial outbreaks from standard business interruption and contingent business interruption policies. In line with that, insurers have largely taken the position that communicable diseases not expressly defined in the policy are not covered.[8] Some insurers have released blanket statements regarding COVID-19 confirming that view. [9]

What are the next steps to help mitigate your issues related to contracts and related performance? The first step is to look at your contract and determine if it contains a force majeure provision.

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