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# Two Weeks into a Pandemic: A Fresh Look at Force Majeure

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While the new coronavirus disease (COVID-19) outbreak has already caused unprecedented and far-reaching negative consequences, foremost for many businesses is the difficulty or impossibility of carrying out contractual obligations. During a global crisis such as the COVID-19 pandemic,[1] is a party excused from performance under a contract? The short answer: It depends.

Many contracts contain a force majeure clause that limits damages or excuses performance when an "act of God" or circumstances beyond the parties' control prevent either party from fulling its obligations.[2] However, courts typically construe force majeure clauses narrowly, and will only fully excuse performance if the contract expressly includes the particular event.[3] In order for COVID-19 to more likely be considered an enforceable event excusing performance, a force majeure clause should explicitly contain a specific reference to a "pandemic," "epidemic," "virus," "disease," "quarantine," "travel restriction," or "state of emergency."

When parties attempt to rely on catchall clauses as opposed to specifying triggering events, courts will not typically enforce force majeure if the parties could reasonably have foreseen the event at the time of contracting.[4] Of particular importance to courts interpreting these force majeure clauses will be whether the parties entered into the contract (or relevant rider, statement of work, or subcontract) before the triggering event became foreseeable: here, the global spread of COVID-19. The timing and foreseeability of the pandemic will almost certainly be a hotly contested topic as these clauses are litigated.

Even without an enforceable force majeure clause, a party unable to perform its contractual obligations may be able to assert an impossibility or impracticability defense. Under New York law, for example, the doctrine of impossibility is also narrowly construed, and is only applicable when a party is objectively unable to perform.[5] The various COVID-19 government regulations prohibiting the operation of nonessential businesses may provide valid impossibility defenses to performance.

Likewise, proving impracticability of performance is a high bar. A party must be able to demonstrate that the event preventing performance was truly unforeseeable and could not have been prevented

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[1] The World Health Organization declared COVID-19 a pandemic on March 11, 2020.
[2] *See Beardslee v. Inflection Energy, LLC*, 25 N.Y.3d 150, 154 (2015) ("Generally, a force majeure event is an event beyond the control of the parties that prevents performance under a contract and may excuse nonperformance"); *see also Facto v. Pantagis*, 390 N.J. Super. 227, 231 (App. Div. 2007) ("Even if a contract does not expressly provide that a party will be relieved of the duty to perform if an unforeseen condition arises that makes performance impracticable, 'a court may relieve him of that duty if performance has unexpectedly become impracticable as a result of a supervening event.'" (quoting Restatement (Second) of Contracts § 261).
[3] *See In re Cablevision Consumer Litig.*, 864 F. Supp. 2d 258, 264 (E.D.N.Y. 2012) (stating that force majeure provisions are narrowly construed and "will generally only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically identified").
[4] *See Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 903 (1987) ("The principle of interpretation applicable to [catch-all] clauses is that the general words are not to be given expansive meaning; they are confined to things of the same kind or nature as the particular matters mentioned"); *Seitz v. Mark-O-Lite Sign Contractors, Inc.*, 210 N.J. Super. 646, 650 (Law Div. 1986) ("Under this principle, the catch-all language of the *force majeure* clause relied upon by defendant is not to be construed to its widest extent; rather, such language is to be narrowly interpreted as contemplating only events or things of the same general nature or class as those specifically enumerated").
5 *See, e.g., Urban Archaeology Ltd. v. 207 E. 57th St. LLC*, 34 Misc. 3d 1222(A), 951 N.Y.S.2d 84 (Sup. Ct.), *aff'd*, 68 A.D.3d 562, 891 N.Y.S.2d 63 (2009) (collecting New York cases interpreting impossibility doctrine).

by the obligated party. It is typically not enough to claim that performance is inconvenient or more expensive than anticipated at the time of contract.

Small and large businesses alike with contracts impacted by the COVID-19 crisis should promptly take the following steps:

- Analyze contractual rights and responsibilities to determine the potential impact of the global outbreak on performance.
- Determine contractual notice obligations, as many contracts require that a party seeking to rely on a force majeure clause provide prompt notice to its counterparty. In some cases, the failure to provide notice may constitute a waiver of rights.
- Assess alternatives to performance before invoking a force majeure clause.
- Document all decisions and actions, and maintain any corresponding documentation.
- Communicate with the counterparty as soon as possible to discuss the impact of COVID-19 on performance, potential delays, or alternatives to performance as written under the contract, and to hopefully craft a mutually agreeable solution.

While much remains unknown about the COVID-19 pandemic, it is essential for businesses to understand their own abilities to invoke and defend against force majeure arguments if contractual performance becomes impracticable or impossible.

***To see our prior alerts and other material related to the pandemic, please visit the Coronavirus/ COVID-19: Facts, Insights & Resources page of our website by clicking here.***

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