

A Potential Remedy for Businesses during the COVID-19 Pandemic: *Force Majeure*

As COVID-19 continues to impact businesses around the world, it is important to review your contracts in order to be prepared for what may arise. Before taking action under an existing contract or entering into a new one, you should consider your own legal rights and responsibilities, and those with whom you are contracting. One potential source of relief for businesses impacted by COVID-19 may be the invocation of *force majeure*.

WHAT IS *FORCE MAJEURE*?

A contract's *force majeure* clause is designed to protect contracting parties from breach due to circumstances that are unpredictable or beyond their control. A party may be able to avoid liability for nonperformance by declaring *force majeure*. Commonly referred to as "Acts of God," the extraordinary events that constitute a *force majeure* event are rare and are not reasonably foreseeable. *Force majeure* clauses are found in all types of contracts, including leases, supply contracts, and commercial loan agreements.

The first step in thinking about *force majeure* is to determine whether your contract(s) have such a clause. If so, you should determine whether it covers an event such as COVID-19.

IS THE COVID-19 PANDEMIC A *FORCE MAJEURE* EVENT?

If your contract contains a *force majeure* clause and defines *force majeure*, the courts will defer to the definition agreed upon by the parties. Many contracts contain *force majeure* clauses which outline the circumstances under

which a party may be relieved from liability if its nonperformance is due to a *force majeure* event. Such clauses typically define what events qualify as *force majeure*, address or limit the remedies available to the contracting parties, and state the actions required of a party seeking to take advantage of those remedies. A *force majeure* clause may limit its application to circumstances which render performance impossible, or expand its application to circumstances which render performance impractical.



Oftentimes, a contract will include a non-exhaustive list of *force majeure* events, including natural disasters such as floods, tornadoes, hurricanes; war; acts of terrorism; and government actions which prevent performance. In the absence of specific contractual language addressing epidemics or pandemics, parties may turn to catchall provisions, which frequently include "Acts of

God” or circumstances beyond a party’s control in the definition of *force majeure* events.

WHAT IF THE CONTRACT DOES NOT CONTAIN A *FORCE MAJEURE* CLAUSE?

If the contract does not contain a *force majeure* clause, Louisiana Civil Code articles 1873, *et seq.*, may provide relief to the parties. These articles establish that a party is not in breach of contract if a “fortuitous event” makes performance under the contract “impossible.” A fortuitous event is one that could not have been reasonably foreseen. When a fortuitous event has made the entire performance impossible, the contract may be dissolved. If a fortuitous event has made only part of the performance impossible, a court has discretion either to modify or dissolve the contract. Whether the COVID-19 Pandemic has made a party’s performance “impossible” depends on the nature of the performance owed under the contract.

ACTIONS YOU CAN TAKE NOW:

If the COVID-19 outbreak has impacted your ability to perform obligations under contract, we recommend proactively reviewing your commercial contracts to assess your *force majeure* rights. Particularly, review whether *force majeure* is addressed and/or defined in the contract and whether the clause may include a global pandemic. Before declaring *force majeure*, you should objectively analyze the possibility of rendering full or partial performance of your obligations using reasonably available alternatives, and it might be prudent to memorialize the information and efforts that went into making that determination. Review your notice and response requirements in the event it is impossible to render performance. If you have any questions or need advice, our team is available to help review and interpret the provisions of your contract to determine whether they may still be enforceable in these uncertain times.



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