

Interpreting the Force Majeure Clause in Your Contract

Description

As businesses contend with the uncertainty caused by the novel coronavirus (COVID-19), evidenced by warnings of an imminent recession and empty grocery store shelves, one potential source of relief is the force majeure clause found in many contracts. Force majeure provisions are included in contracts to excuse a party's failure to perform due to unforeseeable events outside the party's control. Not all force majeure provisions are created equal, and the coronavirus may trigger some, but not others.

Because force majeure clauses are often included as part of contract "boilerplate" language, parties to an agreement often do not spend significant time negotiating the substance of these provisions. Simply having one in your contract may not be enough to excuse nonperformance due to current circumstances created by the coronavirus. For example, take the following force majeure provision:

No party shall be liable for any default or delay in the performance of its obligations under this Agreement if and to the extent such default or delay is caused, directly or indirectly, by (i) fire, flood, elements of nature or other acts of God, (ii) any outbreak or escalation of hostilities, war, riots or civil disorders in any country, (iii) any act or omission of the other party or any governmental authority, or (iv) any labor disputes.

This language limits the applicability of the provision to triggering events specifically described by its terms. A party trying to justify nonperformance under its contract due to the coronavirus would need to successfully argue that the coronavirus qualifies as one of the triggering events. This would likely be an uphill battle and not an argument we'd like to make.

Consider another example: The parties to this Agreement are excused from performance and shall not be liable for any delay in performance caused by the occurrence of any event or contingency beyond the control of the parties including, but not limited to, riots, rebellions, natural disasters, acts of God, and acts of war or terrorism.

Although this provision also lists force majeure events, it is clear from reading the provision that the list of examples is not intended to be exclusive. A business looking to have its nonperformance excused due to coronavirus-related circumstances would have a better chance of successfully arguing that the spread of the coronavirus is beyond its control, although its ultimate success in doing so depends on the jurisdiction. Assuming that the parties intended to address events like the coronavirus, then the best provisions would include phrases like "outbreak," "epidemic," or "pandemic."

Understanding whether force majeure provisions will be interpreted to include the coronavirus as a force majeure event is a critical first step, but it is far from the only one. It is equally important to determine the available remedies, the timing and form of any required notice, and the legal consequences of declaring a force majeure event. As businesses try to minimize financial losses in the face of the coronavirus, it is critical to understand the nature and scope of the force majeure provision at issue.

Partridge Snow & Hahn's [Business Law Group](#) is ready to answer questions and to provide advice on how to address general and specific business risks posed by the coronavirus.

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