

UNDERSTANDING MY CONTRACTS DURING COVID-19

WHAT IS FORCE MAJEURE?

Generally, force majeure is a contractual provision that identifies certain unexpected events that may relieve a contracting party from liability for failure to perform.

It is important to remember that force majeure terms are not required in commercial contracts, not all contracts contain a force majeure provision, and there is a great amount of variety in the events identified as constituting a force majeure as well as the required triggering condition.

WHAT IF MY CONTRACT HAS AN "IMPOSSIBILITY" TERM?

Some contracts use the title "impossibility" almost as a synonym for force majeure. Typically, "impossibility" provisions use virtually identical language as force majeure provisions.

DOES THE FORCE MAJEURE PROVISION ALLOW FOR TERMINATION OF THE CONTRACT?

Many force majeure provisions provide that upon a triggering event and condition, and upon appropriate notice, the contract can be terminated.

However, other force majeure provisions state that upon a triggering event and condition performance is merely suspended.

HOW DO COURTS VIEW FORCE MAJEURE PROVISIONS?

Courts interpret force majeure provisions strictly and narrowly according to the specific contractual language.

WHAT EVENTS ARE TYPICAL OF FORCE MAJEURE PROVISIONS?

Typically, force majeure provisions list a litany of predetermined events constituting force majeure events.

While there is not one universal force majeure provision, these provisions often include some or all of the following: (1) acts of God; (2) epidemic; (3) government laws or regulation; (4) curtailment of transportation facilities or services; (5) war; (6) acts of terrorism; (7) civil disorder; (8) strikes; (9) work stoppages; (10) fire; (11) flood; (12) severe weather; (13) earthquake; (14) hurricane.

WHAT IS AN "ACT OF GOD"?

As a general matter, "act of God" means exactly what you would think. It is something not caused by humans but is something superhuman. In other words, something that is caused entirely by nature and that was not expected and capable of being avoided by precaution.

WHAT IF THE FORCE MAJEURE PROVISION USES A "CATCH-ALL" PROVISION?

Some force majeure provisions provide a list of triggering events, such as the above, but also include a "catch-all," such as "an emergency of a comparable nature." Of course, the analysis is easier if the force majeure event is specifically listed, avoiding the need for anyone to decide whether the catch-all covers the claimed force majeure event.

DO ALL FORCE MAJEURE PROVISIONS REQUIRE PERFORMANCE TO BE IMPOSSIBLE?

No, not necessarily. Many force majeure provisions do require the inability to perform due to the triggering event, i.e., impossibility. Others say, among other things, that the event must be one of the following: "commercially impracticable," "impeded," "hindered," "delayed," or "inadvisable."

Of course, these other conditions are broader than simple "impossibility" and may provide easier grounds to claim the benefit of the force majeure provision.

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HOW DO I KNOW A FORCE MAJEURE EVENT AND CONDITION HAS OCCURRED? WHAT ABOUT COVID-19?

This can be difficult, particularly in the context of a virus outbreak such as COVID-19. However, because force majeure provisions apply when a triggering event causes the required condition, pinpointing when COVID-19 affected your ability to perform or other required condition is critical, though not an easy task. But as soon as you believe a triggering force majeure event and resulting required condition occurs, you should comply with any notice requirement set forth in the force majeure provision.

WHAT HAPPENS IF THE EVENT DOES NOT YET INHIBIT PERFORMANCE OR CAUSE THE REQUIRED CONDITION?

This is a real concern under the circumstances, particularly for events occurring beyond the immediate future.

For example, in certain locations in the United States there is not evidence of significant COVID-19 contractions nor is there government regulation or law inhibiting the gathering of people for private events. Nevertheless, it may be reasonable to assume that the COVID-19 outbreak will intensify and change the circumstances. For this reason, you should stay apprised of the facts and circumstances of the location of your event and be prepared to give notice as things evolve.

WHAT SHOULD I BE LOOKING AT TO DETERMINE IF THERE IS A FORCE MAJEURE EVENT?

USEFUL RESOURCES INCLUDE THE FOLLOWING:

- Executive Orders of the President of the United States;
 - Orders, acts, directives, and guidance of the United States Centers for Disease Control and other relevant federal departments and agencies;
 - Executive Orders of the Governor of the state where the event is planned;
 - Orders, ordinances, directives, and guidance of local and municipal governments and public health agencies, e.g., shelter-in-place orders; and
 - The local news for the state where the event is planned.
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IS THERE A LIMITED TIMEFRAME TO PROVIDE NOTICE OF A FORCE MAJEURE?

This will depend on the contractual language. However, typically, force majeure provisions have a tight timing requirement, requiring notice to the other contracting party within just days after the force majeure event causing the required condition. But each force majeure provision is different and must be reviewed to carefully determine the notice deadline.

WHAT STEPS SHOULD I TAKE TO ADDRESS A POSSIBLE FORCE MAJEURE ISSUE?

Identify the force majeure provision in the contract;

Determine the state law that applies to the force majeure provision. There are variations in the interpretation and/or application of these provisions from state to state;

Determine if facts support a triggering event and required condition;

Be cognizant of the notice and timing requirements of the contractual provision, this is critical;

Send notice of force majeure where required by the applicable agreement.

WHAT SHOULD THE FORCE MAJEURE NOTICE SAY?

It should follow the requirements of the force majeure provision, which will usually, at the very least, require identification of the specific force majeure event and required condition. You may also want to provide a factual basis for the notice based on the extreme facts and circumstances, including government pronouncements, orders, actions, guidance, and directives as well as relevant news reporting.

WHAT IF MY AGREEMENT DOES NOT CONTAIN A FORCE MAJEURE PROVISION?

If the agreement does not contain a force majeure provision, determine whether the state providing the governing law provides for force majeure by statute.