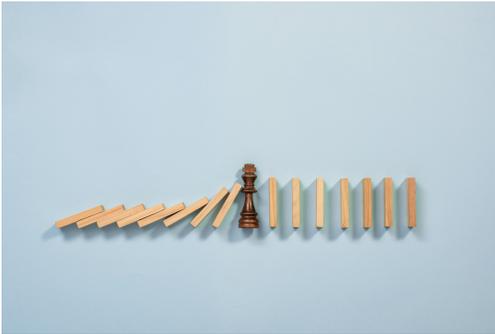


What Will Happen to My Contracts?

March 20, 2020



COVID-19 is a serious matter impacting all phases of our lives. Unfortunately, many business owners and executives now have to ask, what is going to happen to existing commercial contracts in light of the COVID-19 outbreak? 1

Why is Everyone Talking About Force Majeure?

Everyone is suddenly talking about force majeure. What is that?

Force majeure is contractual provision that identifies certain unexpected events that 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. If your contract has a force majeure provision, you must be careful to note that courts will look carefully at the language employed in the force majeure provision and the factual

circumstances alleged to have triggered the provision. Although there is much variation, commonly, force majeure provisions do identify events such as "Act of God" or government regulation.

What Does "Act of God" Actually Mean?

It is hard to believe that anyone needs to discuss "Act of God" in the context of legal decision making. But most force majeure provisions employ "Act of God" as an event that would relieve the duty to perform. So, it's time to consider - what does "Act of God" actually mean?

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. Think biblical plagues!

Why is "Legal Impossibility" Important?

Separate from force majeure, the doctrine of legal impossibility (or impossibility of performance) excuses performance of a contract when performance is rendered

objectively impossible either because the subject matter is destroyed or by operation of law. This is, of course, a narrowly applied legal doctrine that does not provide an easy out. Put another way, legal impossibility refers to those factual situations where one party to a contract finds that the purposes for which a contract was made have become impossible to perform on one side. The party claiming legal impossibility must be able to show the events or circumstances which he claims rendered his performance impossible and were not reasonably foreseeable at the time of contracting.

What Else is a Viable Defense?

Are you frustrated with everything that is going on with your business? Well, there is a legal doctrine for you. Frustration of purpose or commercial frustration is also viable defense to a breach of contract claim. Like impossibility of performance, it is a narrowly applied doctrine. Generally, frustration of purpose exists when: (1) the frustrating event was not reasonably foreseeable; and (2) the value of counter-performance has been totally or nearly totally destroyed by the frustrating event.

For more resources and LP's response to COVID-19, [visit this webpage.](#)

1 This document is not intended to be nor shall it be considered legal advice. You should rely solely on the advice of your legal counsel with consideration of the applicable law in the operative jurisdiction.