Stradling

Force Majeure

Key Takeaways

- Contract terms that indicate that COVID-19 would qualify as a force majeure event are references to a "pandemic," "epidemic" and/or "disease." Alternatively, if the force majeure provision does not contain specific disease references, other more generic catch-all provisions pertaining to "disasters," "acts of God," "national emergencies," "government regulations" or "acts beyond the control of the parties" may be asserted to allege that COVID-19 is indeed a force majeure event
- Even in the absence of a contractual provision, there may be a statutory basis for delaying performance or excusing it entirely. Article 2 of the Uniform Commercial Code is likely to govern a number of supply chain contracts, although it is subject to interpretation and thus, disagreement.
- An important factor to assess in determining whether performance might be excused or at least postponed is the distance—in both time and place—between the performance and the extraordinary event disrupting the performance.
- Many force majeure provisions contain specific notice requirements which must be followed to ensure the right to suspend or terminate performance under a contract is effectively asserted.

In light of the Coronavirus (COVID-19) pandemic, many businesses are facing circumstances that **may** excuse or delay their obligations to perform under existing contracts due to the occurrence of a *force majeure* event.

Force majeure is a contractual defense that allows a party to suspend or terminate performance of its contractual obligations under specific circumstances. It may also limit a contract party's liability. What constitutes a *force majeure* event is determined on a case-by-case basis and depends upon the terms of the relevant contract, applicable law and other relevant facts.

Many *force majeure* contract clauses include a list of specific events that are not "reasonably foreseeable "and that are also beyond the parties' control. COVID-19 (or its downstream effects and consequences) will likely qualify as a *force majeure* event if:

- The contract specifically includes references to a "pandemic," "epidemic" and/or "disease."
- The *force majeure* provision does not contain such specific disease reference, other more generic catch-all provisions pertaining to "disasters," "acts of God," "national emergencies," "government regulations" or "acts beyond the control of the parties" may be asserted to allege that COVID-19 and its downstream effects or consequences are indeed *force majeure* events.

Even in the absence of a contractual provision, however, there may be a statutory basis for delaying performance or excusing it entirely. Article 2 of the Uniform Commercial Code, for example, is likely to govern a number of their supply chain contracts. Under Article 2, a seller of goods may have its performance excused where the "performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance . . . with any applicable . . . governmental regulation . . . ." U.C.C. § 2 615(a).

What constitutes "impracticable" or a "basic assumption," however, is subject to interpretation and, thus, disagreement. Additionally, the UCC allows parties to a contract to override its default provisions through contractual force majeure clauses. Moreover, many American businesses have contracts with international suppliers and customers, and such contracts often specify that they are governed by the law of a foreign territory.

Separately, the California Civil Code provides:

The want of performance of an obligation, or of an offer of
performance, in whole or in part, or any delay therein, is excused
by the following causes, to the extent to which they operate:
* * * *

2. When it is prevented or delayed by an irresistible, superhuman
cause, or by the act of public enemies of this state or of the United
States, unless the parties have expressly agreed to the contrary
. . . Cal. Civil Code § 1511.

An important factor to assess in determining whether performance might be excused or at least postpone is the distance—in both time and place—between the performance and the extraordinary event disrupting the performance. Generally speaking, a party seeking to claim that its performance is excused should consider the objective reasonableness of the cancellation given the known facts at the time of suspension or interruption in performance.

For example, after the September 11 attacks, courts heard a number of cases where parties attempted to invoke *force majeure* clauses in response to a perceived threat of terrorism. *See, e.g., OWBR LLC v. Clear Channel Commc'ns, Inc.*, 266 F. Supp. 2d 1214 (D. Haw. 2003). In those cases, the courts found that the actual threat posed by terrorism did not justify canceling events that were scheduled several months after September 11. The cases held that even if fears of terrorism might have diminished the economic profit from performance, heightened fears and diminished profits were insufficient to excuse performance.

Another important factor to consider is notice. Many *force majeure* provisions contain specific notice requirements which must be followed to ensure the right to suspend or terminate performance under a contract is effectively asserted.

As companies work to mitigate the financial downside from the coronavirus, they will also need to preserve their ongoing business partnerships that will help them grow and prosper once this crisis is over. In other words, the coronavirus epidemic will require businesses to not just manage risk but also relationships. Thus, whether a *force majeure* clause is ultimately enforced may depend on what steps your company has taken to mitigate the losses and, as best as possible, keep people employed.

Author:

Jason Anderson
949.725.4233
janderson@sycr.com