Impact of COVID-19 on Supply Chain Contracts and Responding to Force Majeure Claims

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Has COVID-19, the coronavirus, caused supply chain problems for your business? Review your contracts for a "force majeure" clause. A force majeure clause is a common provision in contracts. It is a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event that the parties could not have anticipated or controlled.

A force majeure event is one that "can be neither anticipated nor controlled." It is an unexpected event that prevents someone from doing or completing something that he or she had agreed to do. The term includes both acts of nature (*e.g.*, floods and hurricanes) and acts of people (*e.g.*, riots, strikes, and wars). However, does the term also include an epidemic, such as COVID-19?

Force majeure clauses are generally narrowly construed. Economic hardship or drop in consumer demand do not constitute force majeure.

Courts have previously held that epidemics are force majeure events. The term force majeure originates from French civil law, meaning "superior force." In 1869, a French court held that an epidemic of typhoid fever in a particular city was a force majeure event that prevented an actor from performing in that city. The threat of the danger, the degree of probability of harm, and the extent of the feared injury must be taken into account.

On the contrary, French courts have held that an epidemic of cholera was not regarded as force majeure where there was a failure to perform a contract for the sale of food. In addition, an epidemic of influenza was held not to be a valid excuse for a failure to perform an obligation to deliver fabrics.

American courts—under the common law system—have also held that a contagious disease excused, or delayed, performance under a contract. A Maine court held that a neighborhood outbreak of a contagious disease, cholera, excused performance under a labor contract. In an 1874 case, the consignees of granite blocks were permitted reasonable delay for shipping cargo due to an epidemic among horses.

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Whether a force majeure clause covers an epidemic, such as COVID-19, depends on the language of the contract.

Generally, a force majeure clause must include the specific event that is alleged to have prevented performance under the contract. Parties negotiate which specific events qualify as force majeure events such as, acts of God (*e.g.*, natural disasters or fires), wars, terrorism, riots, labor strikes, embargos, acts of government, epidemics, pandemics, plagues, quarantines, and boycotts. If the specific event, such as an epidemic, is included in the force majeure clause and the event occurs, then the parties may be relieved from performance.

If your contract does not specifically list epidemics as a force majeure event, the next language to look for is an act of God. Many force majeure clauses list an act of God as a qualifying event. An act of God is defined as "[a]n overwhelming, unpreventable event caused exclusively by forces of nature . . . ." The definition has been broadened to include all natural phenomena that are exceptional, inevitable, and irresistible, the effects of which could not be prevented or avoided by the exercise of due care or foresight. Most courts hold that a person's illness or death is an act of God. COVID-19 may be considered an act of God because it is a natural phenomenon that continues to spread even with individuals and governments undertaking reasonable—and in some cases beyond reasonable—precautions. On the contrary, COVID-19 may not be considered an act of God because the spread of a global virus, or some variation thereof, was foreseeable in light of recent global health events, such as SARS, H1N1, and Zika Virus, and therefore should have been addressed in the contract.

The next language to look for is a catch-all phrase. Many force majeure clauses also contain a catch-all phrase that is in addition to specific events. A catch-all phrase may have similar language to "including, but not limited to." If the force majeure clause contains a catch-all phrase, the legal maxim of *ejusdem generis* may be applicable. *Ejusdem generis* is a canon of contract construction in which the catch-all phrase will be interpreted to include only items of the same class as those listed. Accordingly, if it is determined that the epidemic is similar enough to the other events listed in the force majeure clause, the epidemic may be considered a force majeure event.

Business owners should review their contracts to determine which party bears the risk of loss if performance becomes impracticable due to an event, such as an epidemic. First, it should be determined whether the contract contains a force majeure clause. Second, it should be determined whether the force majeure clause specifically identifies an epidemic, or similar term, that explicitly excuses performance under the contract. Third, if the clause does not specifically identify an epidemic as a force majeure event, it should be determined whether the clause identifies an act of God as a force majeure event. Fourth, if the clause does not identify an epidemic or act of God as a force majeure event, it should be determined whether the clause contains a catch-all phrase that might apply to an epidemic. Force majeure clauses are not all boilerplate provisions and can

differ significantly based on the leverage of the parties during negotiation.

China is issuing force majeure certificates to businesses impacted by COVID-19 in an attempt to provide evidence of force majeure, excuse performance, and limit liability for breach of contract. All of the foregoing is not to say that a force majeure clause is a "free pass" not to perform. The doctrine is construed narrowly and application will require a showing of the impact of the event. However, the doctrine does exist to offer protection for genuine events that prevent a party from performing.