

Force Majeure and the Coronavirus Pandemic: What Does Your Company Need to Know?

If you are on a law firm mailing list, it is likely that you have seen emails or alerts in the last few weeks that discuss the concept of “force majeure.”

Why has the concept of force majeure suddenly become a favorite topic of law firms around the country? Well, over the month of March, many state and local governments have imposed stay-at-home orders on businesses and their employees. In addition, there have been mass cancellations and closings, all as a result of the coronavirus pandemic. The economic damage arising from these events is already affecting many contractual relationships, rendering parties unable to perform. For this reason, the boilerplate force majeure clause included in many contracts is now anticipated to take on new significance.

If you are unclear on what exactly a force majeure clause is, this is the clause routinely included in many contracts that specifically addresses what happens if one party cannot perform a contractual obligation due to the occurrence of an event beyond that party’s control. Such clauses generally provide that the force majeure event will not constitute a material breach provided that certain requirements are met.

So, do the events of the last month automatically permit the nonperformance of an obligation by a party to a contract if a force majeure clause exists? As is the case with most contract interpretation issues, the answer is not so black and white.

Since this particular set of circumstances has not happened in the lifetime of most practicing lawyers, it is unlikely that the average force majeure clause specifically contemplated the possibility of a pandemic or a widespread, stay-at-home order over an extended period affecting most businesses and workers across an entire city, county, or state. So, the first question will be: is the force majeure clause in the relevant contract drafted broadly enough to apply to specific circumstances causing the failure to perform? A force majeure clause that specifically addressed "acts of government" may be broad enough to apply. However, a force majeure clause that only contemplated "acts of God" or "acts of nature" may not. So, the specific wording of the force majeure clause will be critical. Also, the application may be subject to interpretation, if the applicability depends on words like "beyond the reasonable control of either party" or "epidemic."

Assuming that the definition of force majeure is defined broadly enough to apply to the particular circumstances many businesses and workers have faced over the last month, then the next question to determine will be whether the conditions were met for the force majeure clause to apply. Many force majeure clauses impose requirements on the affected party that must be met for the force majeure clause to apply. Have these requirements been strictly followed? Is that answer subject to interpretation?

Then, assuming that the force majeure definition applies and the conditions were met, then the next question is whether or not there were any carve-outs for the particular obligation that has not been performed, which render the clause inapplicable? One carve-out that I see from time to time is failure to make a payment.

Finally, assuming that the force majeure definition applies, the conditions were met, and there were no carve-outs that apply, the question will be whether the continuation of the event for an extended period then enables the other party to

terminate. It is not uncommon for a force majeure clause to specify that if the event continues for more than thirty or sixty days, then the performing party will be able to terminate.

Of course, there may be other clauses in a particular contract beyond just the force majeure clause that may apply to excuse or simply address a failure or delay in performance. Additionally, if a party is facing the likelihood of not being able to perform, that party always has the option of simply approaching the other party directly and attempting to renegotiate the contract to specifically address the changed circumstances and contemplate a particular resolution. In many cases, this may actually be the preferred way to tackle an unforeseen situation along the lines of what many businesses are facing as a result of the coronavirus pandemic. However, if the other party is not open to renegotiation or other options are just not available, a force majeure clause may provide the contractual answer to the deal with the current circumstances of your business.

If you have questions or concerns about a force majeure clause and how it might apply to your circumstances, please schedule a consultation today at <https://calendly.com/prinzlawoffice>.