

Drafting Force Majeure Clauses to Provide for Pandemic-Related Contingencies



ALERT | March 19, 2020

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While our economy has slowed, it has not stopped. Businesses that continue, even if in a less robust fashion, will continue to make deals and contracts. This article provides guidance on how those new contracts can address the impacts of epidemics and pandemics on parties' ability to perform.

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Parties often attempt in their contracts to provide for uncertainties that may affect performance. Nevertheless, as the recent coronavirus (COVID-19) outbreak has made clear, unforeseen contingencies can always intervene to hinder a party's ability to perform its contractual obligations. To provide for these uncertainties, many contracts contain a "force majeure" clause excusing performance in the face of certain events beyond the parties' control. But — as detailed in our colleagues' recent article "Your Contracts in a Coronavirus World" (available at: <https://www.pepperlaw.com/publications/your-contracts-in-a-coronavirus-world-2020-03-16/>) — courts interpret these provisions narrowly, often refusing to excuse performance unless the contingency is specifically provided for within the agreement. Moreover, given the current pandemic, courts interpreting force majeure clauses in the future may take an even more restrictive approach, refusing to excuse a party's pandemic-related nonperformance unless the force majeure clause specifically provides for pandemics and similar events.

It is therefore important not only to clearly define force majeure events when negotiating and drafting contractual provisions, but also to ensure that the contract's force majeure clause adequately allocates the risks faced by the parties — including the threat of non-performance due to pandemic-related contingencies. The following language, adapted from the International Chamber of Commerce's model clause (available at: <https://iccwbo.org/content/uploads/sites/3/2017/02/ICC-Force-Majeure-Hardship-Clause.pdf>), provides a template for contracting parties seeking to include pandemics, such as the current coronavirus outbreak, as performance-excusing events:

Unless otherwise agreed in the contract between the parties expressly or impliedly, where a party to a contract fails to perform one or more of its contractual duties, the consequences set out in this Clause will follow if and to the extent that that party proves: (a) that its failure to perform was caused by an impediment beyond its reasonable control; (b) that it could not reasonably have been expected to have taken the occurrence of the impediment into account at the time of the conclusion of the contract; and (c) that it could not reasonably have avoided or overcome the effects of the impediment.

A party invoking this Clause shall be presumed to have established the conditions described in the preceding paragraph in the case of the occurrence of one or more of the following impediments: war (whether declared or not), armed conflict or the serious threat of the same (including but not limited to hostile attack, blockade, military embargo), hostilities, invasion, act of a foreign enemy, extensive military mobi-

lization; civil war, riot, rebellion, revolution, military or usurped power, insurrection, civil commotion or disorder, mob violence, act of civil disobedience; act of terrorism, sabotage or piracy; **plague, epidemic, pandemic, outbreaks of infectious disease or any other public health crisis, including quarantine or other employee restrictions**; act of authority whether lawful or unlawful, compliance with any law or governmental order, rule, regulation or direction, curfew restriction, expropriation, compulsory acquisition, seizure of works, requisition, nationalization; act of God or natural disaster such as but not limited to violent storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tidal wave, tsunami, flood, damage or destruction by lightning, drought; explosion, fire, destruction of machines, equipment, factories and of any kind of installation, prolonged break-down of transport, telecommunication or electric current; general labor disturbance such as but not limited to boycott, strike and lock-out, go-slow, occupation of factories and premises; shortage or inability to obtain critical material or supplies to the extent not subject to the reasonable control of the subject Party (“Force Majeure Event”).

This provision shall become effective only if the Party failing to perform notifies the other party within a reasonable time of the extent and nature of the Force Majeure Event, limits delay in performance to that required by the Event, and takes all reasonable steps to minimize damages and resume performance.

In allocating the risk associated with force majeure events, the parties should also detail the affected party’s obligations in the face of these events. For example, the clause could be drafted with a provision giving the affected party additional time to perform its obligations upon the occurrence of a force majeure event, or suspending the party’s performance, or excusing the party’s performance altogether. These provisions will differ based on the needs and goals of the parties, as well as the case law of the jurisdiction governing the contract. But the current coronavirus pandemic reminds us that boilerplate force majeure clauses may not adequately encompass the risk allocation intended by the contracting parties. These provisions should instead be carefully thought out and negotiated to anticipate specific contingencies that may arise during performance. Given courts’ strict interpretation of force majeure clauses, if contracting parties intend for events like the current coronavirus pandemic to excuse contractual obligations, they should consider including language like the above in future contracts.

This sample language provides only one example of a pandemic-responsive force majeure provision. No contract can adequately anticipate for every possible contingency, but this is one that may now be explicitly included. Contract enforcement will also depend on a court's applications of the contract defenses of impossibility and of frustration of performance, no matter the force majeure clause. See Angelo A. Stio, Matthew H. Adler & Jason J. Moreira "Your Contracts in a Coronavirus World," <https://www.pepperlaw.com/publications/your-contracts-in-a-coronavirus-world-2020-03-16/>.

Given the disruptive effect the coronavirus pandemic has had on contractual performance around the globe, however, contracting parties should be prepared to discuss how pandemics and similar events should impact future performance obligations. If the parties intend for future pandemics to be performance-excusing events, their force majeure provisions should both anticipate and provide for these contingencies.

If you have further questions or would like to discuss specific facts, Pepper Hamilton's attorneys are available to assist you.