

Force Majeure in Contracts: What is it and does Coronavirus Qualify?

Insights

March 20, 2020

A “force majeure” provision in a contract describes the conditions under which a party’s obligations may be modified because of circumstances beyond such party’s control. These provisions are especially important during the current COVID-19 pandemic because the occurrence of a force majeure event can result in an exemption from a party’s performance of its contractual obligations or, in some cases, the ability to terminate the contract completely.

Due to the severity and prevalence of the COVID-19 pandemic, many contracts may warrant review for force majeure provisions. However, force majeure clauses generally only excuse performance if the force majeure event makes such performance impossible or prohibitively difficult, not simply inconvenient or *more* difficult.

If you have any questions regarding this topic, please reach out to a Gunderson team member for further assistance.

FAQs

- **What if a contract is silent as to a force majeure? Is performance still excused?** If a contract does not include a force majeure or similar clause, a party may still be able to avoid contractual obligations if the change in circumstances makes a party’s performance of the contract virtually worthless, or if performance of the contract is impossible and the event causing impossibility was unforeseeable.

- **If I have a force majeure provision in my contract, does the current pandemic automatically trigger it?** The language of each provision matters and it must be analyzed on a case-by-case basis. For example, a provision listing an “act of government” preventing performance may be applicable to the extent performance is required to take place in California, where movement is limited by government order, but it may not apply to the extent performance could instead take place in other areas of the world. Although in many cases, courts interpret these clauses narrowly, broad language such as “any events that cannot be predicted and are unpreventable and unavoidable by the affected party” may be more likely to be triggered in our current situation.
- **What are some best practices to consider implementing if I’m not sure whether a force majeure provision would apply in a contract?**
 - Document escalating circumstances carefully and note the effects it has on *your* ability *specifically* to fulfill contractual obligations. Don’t rely on the fact that people and industry, globally, are inconvenienced. Consider whether you can come to an agreeable adjustment to the timing or deal price through private negotiations.
 - Most commercial relationships are not adversarial; there is no reason the present pandemic should change that. If necessary, be creative in proposing potential solutions. For example, if there is a future opportunity where working with the same provider might be beneficial, ask whether non-refundable amounts can be credited against such future opportunity or whether a discount can be offered on such future opportunity.
 - Keep in mind that if you wish to take advantage of a force majeure provision to excuse your non-performance, the applicable agreement may require you to notify the other party and wait a certain period of time before employing force majeure as an excuse.
 - There is an implied covenant of good faith and fair dealing in every contract – act accordingly.

Related Services

Strategic Transactions & Licensing

Featured Insights

CLIENT NEWS

Brazilian Carbon Capture Company Mombak Announces \$30M Financing

CLIENT NEWS

Africa B2B OmniRetail Announces \$20M Financing

CLIENT NEWS

Glacier Announces Series A Financing to Expand Robot Recycling Fleet

CLIENT NEWS

Dataminr Announces \$100M Investment Led by Fortress Investment Group

CLIENT NEWS

Omnidian Announces \$87M Series C for Renewable Energy Performance

INSIGHTS

Splitting the Pie: How Savvy Founders Divide Ownership and Navigate Other Founder Equity Decisions

CLIENT NEWS

Chainguard Announces \$356 Million Series D Led by Kleiner Perkins and IVP

INSIGHTS

Client Insight: California AI Transparency Act

INSIGHTS

Client Insight: Prepare for BE-10 Benchmark Survey of US Direct Investment Abroad

INSIGHTS

Tech Brew Interviews Aaron Rubin in “Where the legal battle stands around copyright and AI training”

CLIENT NEWS

Latin America Fintech Belvo Announces \$15M Funding

INSIGHTS

