

# CLIENT ALERT

## Business Disruption and Commercial Contracts (Part 4): How To Assert Force Majeure

Apr.01.2020

The COVID-19 pandemic is causing widespread business interruptions with inevitable ramifications on commercial relationships. It is tempting to focus elsewhere and plan to deal with the legal issues when the smoke clears. This could be a mistake.

Companies that address the legal issues with their commercial relationships early may, in many instances, have significant advantages down the road by mitigating harm, preserving relationships, and optimizing the outcome of disputes and future litigation. If performance of your commercial contracts will be impacted, consider taking the following actions soon. Each of these considerations can be relevant whether you are the party seeking to suspend or cancel performance under contract or are receiving such a notice.

### 1. Provide Appropriate Notice.

If you decide to invoke a force majeure provision or other excuse for nonperformance, ensure that you comply with any notice requirements in the agreement. Depending on the contract, this can include:

- Providing notice at the required time.
- Providing notice to the appropriate parties and representatives, using the correct contact information.
- Invoking agreed-upon dispute resolution procedures.

Courts may deem failure to provide timely and proper notice a partial or total bar to your position. Prompt notice may also serve as a necessary trigger for other parties' duty to mitigate.

Carefully craft the language of your notice, including your descriptions of the nature, scope, and impact of the pandemic on your performance of contractual obligations. Keep in mind that your terms of notice may be used later not only to determine the legitimacy of any excuse from performance, and damages, but as evidence in other disputes in which your role as supplier or customer is reversed.

The terms of your notice may also inform when the pandemic has ended for the purposes of your ability to perform. Indeed, notice of the force majeure's end may be required by your contract. Even if not required, you may want to tell counterparties that you plan to provide such notice. Otherwise, counterparties may remain uncertain of your ability to perform and make other plans, and your return to normal operations under the agreement may be delayed or extinguished altogether. Additionally, the credibility of your inability to perform during the pandemic may come into question if you never acknowledge its end.

### 2. Assess Other Relevant Provisions.

Examine other contract provisions that may speak to and limit damages from the business interruption. This may include provisions on:

- Termination and dispute resolution.
- Representations, warranties, and covenants.
- Indemnification, limitations on liability, and compensation for superseding events.
- Anticipatory breach and extension of time for performance.
- Conditions precedent, changes in law, and material or adverse changes or effects.

To the extent any contractual rights and protections require that you take or refrain from certain actions, now is the time to consider them.

### **3. Allocate Performance Wisely.**

To the extent you are able to partially perform a contract, or are able to perform some but not all of your contracts, carefully consider how to allocate your performance. There are significant risks in allocating performance in ways that may be considered unfair, unreasonable, or as profiteering or self-dealing. Also, some agreements may call for a priority in allocation of scarce resources. Document your efforts to allocate performance and the reasoning behind your allocations.

### **4. Mitigate.**

The party unable to perform generally owes a duty to act reasonably to mitigate the extent and duration of its non-performance. The counterparty likewise may be expected to mitigate damages as best it reasonably can. Map out your mitigation steps. Review your contractual obligations in case they speak to mitigation. Mitigating conduct may include finding alternate means of performance, ceasing the acceptance of new orders, and other containment steps. Also explore non-obvious forms of damages that may be mitigated, such as impacts on other contracts or on financing or debt agreements.

### **5. Record The Event.**

This is a period of great uncertainty that may be scrutinized later. During the period of business interruption, be sure to document the impacts on your business and your contractual relationships. Documentation of at least the following may be useful:

- The conditions of the pandemic and its impact on your business.
- The allocation of performance by you and counterparties.
- Mitigation efforts by you and counterparties.
- Indications of counterparties' intent not to perform (since an anticipatory breach may excuse you from performance).
- Damages caused by counterparties' conduct, nonperformance, failure to mitigate damages, breach of contractual obligations, or bad faith.

As always, remember the attorney work-product and attorney-client privilege doctrines, and be careful not to waive either.

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