

CLIENT ALERT

Business Disruption and Commercial Contracts (Part 5): Once Force Majeure Is Asserted, What Are Our Rights And Obligations?

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If it is your counterparty that invokes force majeure to excuse its performance, it is important that you understand what your own obligations and rights are, how to enforce those rights, and how to challenge the assertion of force majeure if you do not believe it is justified. The declaring party must be able to defend the invocation of the force majeure notice and justify whether all or just part of the performance should be excused. The analysis will be highly fact and contract-specific, and this guide provides a starting point to evaluate next steps and build your strategy after a force majeure event is declared.

1. Do I have to keep performing once Force Majeure is declared?

Just because you declared a force majeure event under a contract that does not always mean your performance will be excused in its entirety, or that there are not additional actions you will need to take to fulfill your unexcused contractual obligations under the contract. On the other side, if a counterparty has declared a force majeure, that does not necessarily mean your own obligations will be excused. Some contracts do permit a termination of the contract should a force majeure event exists or persist for a set period of time outlined in the contract. Parties should understand their rights under the applicable clause as this may impact your rights and obligations.

For example, certain supply contracts reflect a discounted sales price by the seller on the expectation that fixed, high volumes will be purchased by the buyer. If the buyer invokes force majeure to purchase a lesser volume, the seller will need determine whether it is still obligated to provide the goods at the discounted price negotiated on the assumption of that sales volume for the period that the force majeure event is impacting performance. Similarly, while a force majeure clause may excuse performance in one geographical area, it does not automatically mean that performance will be excused in other applicable geographies. While there may be commercial reasons to continue to perform regardless of your rights, it is important to examine the contract and consider governing law to see what is required.

Practice Pointers:

- Where a force majeure exists, the non-performing party generally must look for reasonable ways to limit the scope or duration of its impairment. Most force majeure provisions will expressly require such efforts, but even where they do not, courts generally expect such efforts under the implied duty of good faith and fair dealing read in to all contracts.
- If a party invokes a related common law defense like commercial impracticability or frustration of purpose (i.e. if there is no contractual force majeure clause), the other party will generally be excused from performing, too.
- If a contractual clause is invoked to excuse a counterparty's non-performance, the contract language will control whether your performance is also excused. Some force majeure clauses specify that only one party's performance is excused, for example: "If **either** party to this Lease shall be delayed or prevented from the performance of any obligation . . . the performance of such obligation shall be excused." Other clauses state that both parties' performance

obligations are excused, for example: “**Each** party is excused from this contract for the reasons of force majeure.” Some contracts may have different clauses to address different contingencies, so it is important to review the contract in its entirety prior to acting.

- If the contract is ambiguous, courts will likely look to common law principles to interpret the clause to excuse both parties’ performance while the force majeure condition remains.

2. Was force majeure properly invoked?

When a party asserts force majeure, that party is excused from performing only if the event or circumstance at issue actually prevented or delayed performance of a contractual obligation. Be sure to review the entire contract for a precise understanding of what it obligates the non-performing party to do, and whether *that* performance is truly disrupted by the claimed force majeure. Where a contract does not specify a sole source of supply, for example, an unforeseen disruption to that source may not justify non-performance if supply may be obtained elsewhere, even at a much higher cost.

Practice Pointers:

- If a counterparty invokes a force majeure clause to excuse its future performance obligations in a way that does not match the changed circumstances or their duration, it may be that the counterparty, by its conduct, is repudiating the contract.
- If the other party repudiates your contract, you likely do not have to continue performing. In such circumstances, there may be additional steps you should take, such as demanding assurances of continued performance.

3. What happens next if the parties disagree over whether a force majeure exists or performance is not excused?

If you want to obtain a declaration that your performance is excused because of a force majeure clause or you think a party has improperly used force majeure to excuse its non-performance, you will have to review your contract to determine how to proceed. Some contracts will specify a notice and negotiation procedure in which the parties must participate prior to initiating arbitration or litigation. These provisions are generally included by parties that hope to amicably resolve any disputes that arise within the context of an ongoing, otherwise beneficial long-term relationship. In these trying times, looking for ways to reach a commercial accommodation and communication are good places to start.

Practice Pointers:

- Some contracts may specify that all disputes be decided by arbitration, while other may specify that only certain disputes must be arbitrated.
- Even if your contract does not contain a dispute resolution clause, it may include clauses specifying the governing law or requiring litigation to be brought only in a certain forum.
- Even if a contract requires an alternative form of dispute resolution, there may be an exception for seeking emergency equitable relief, such as a temporary restraining order or preliminary injunction. Those remedies remain extraordinary, however, and there is a high standard for obtaining specific performance, so this route would only be appropriate in extreme cases.

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