

Force majeure and coronavirus in the US

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Chaya F. Weinberg-Brodt

SPECIAL COUNSEL | US

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The COVID-19 pandemic, compounded by mandatory shutdowns and “stay at home” orders, will cause substantial business disruption and interfere with parties’ abilities to perform contracts. Indeed, even where performance is technically possible, parties may be understandably reluctant to perform, if doing so involves health risks to themselves, employees, counter-parties, or the general public. Conversely, contracting parties may find themselves facing counterparties who apparently could perform, but will not.

Contractual force majeure clauses excuse performance when unforeseen major events beyond the parties’ control render performance impossible, impracticable, or commercially prohibitive. Force majeure clauses usually specify which types of events qualify, including potentially epidemics, pandemics, outbreaks of illnesses, acts of government, etc.

New York Courts have generally narrowly interpreted force majeure clauses according to their terms. Where a party can perform with reasonable additional effort despite a force majeure event, a party might be required to do so. Where specific events are listed, only those events trigger the clause. Likewise, most “catch-all” provisions (i.e., “other events beyond a party’s control,”) are read narrowly to cover only events similar to those specifically listed, unless they expressly cover dissimilar events (i.e., “any similar or dissimilar event beyond a party’s control”). Force majeure clauses generally have additional legal or written conditions for invocation (including providing notice). Parties should carefully read their clauses, and consult with counsel where necessary.

In the absence of applicable force majeure clauses, common laws doctrines such as impossibility or frustration of purpose might also excuse contractual performance. For example, performance may be excused under the impossibility doctrine where it has been rendered illegal by a subsequent change in law. Traditionally, these doctrines are also narrowly construed in New York.

Nevertheless, these interpretations may broaden as a result of the current pandemic. Given the repeated exhortations that New Yorkers stay home, prevent workers from coming to the office, and shutter all non-essential businesses, when courts finally get to hear these cases, they may tend to favor parties who were unable to perform despite reasonable efforts, or even parties who did not perform because doing so posed unreasonable health and safety risks.

At this point, parties cannot control the pandemic or the potential future direction of the law, and they cannot retroactively “correct” their contracts, or the force majeure clauses they contain. Parties should therefore focus on what they can control, which is to take reasonable steps to honor those contractual obligations which can be honored, while minimizing the dislocation to counterparties when unable to do so.

Best practices therefore involve:

- (1) Act as reasonably as possible, and document this conduct;
- (2) Perform contracts which can legally and safely be performed, giving priority to essential services;
- (3) Take no unilateral steps to prevent your own or your counterparty’s performance, or to render it more difficult;
- (4) Provide timely notices, updates, and information to counter-parties (either as required by the contract or law, or where not required, as a common courtesy);
- (5) Propose, or remain open to, reasonable resolutions (including agreed-upon delays, rescheduling, reassigning rights and obligations, changing the forms of performance, changing the methods of delivery, etc.); and

(6) Consult with counsel to make sure you comply with all requirements for invoking a force majeure clause or any common-law doctrines excusing performance, as well as the continuously changing laws, rules, edicts, and decrees issued by governmental authorities trying to control the pandemic.


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Authors

Chaya F. Weinberg-Brodt

SPECIAL COUNSEL | NEW YORK

Litigation and arbitration

 +1 212 848 9846

 chaya.weinberg-brodt@withersworldwide.com