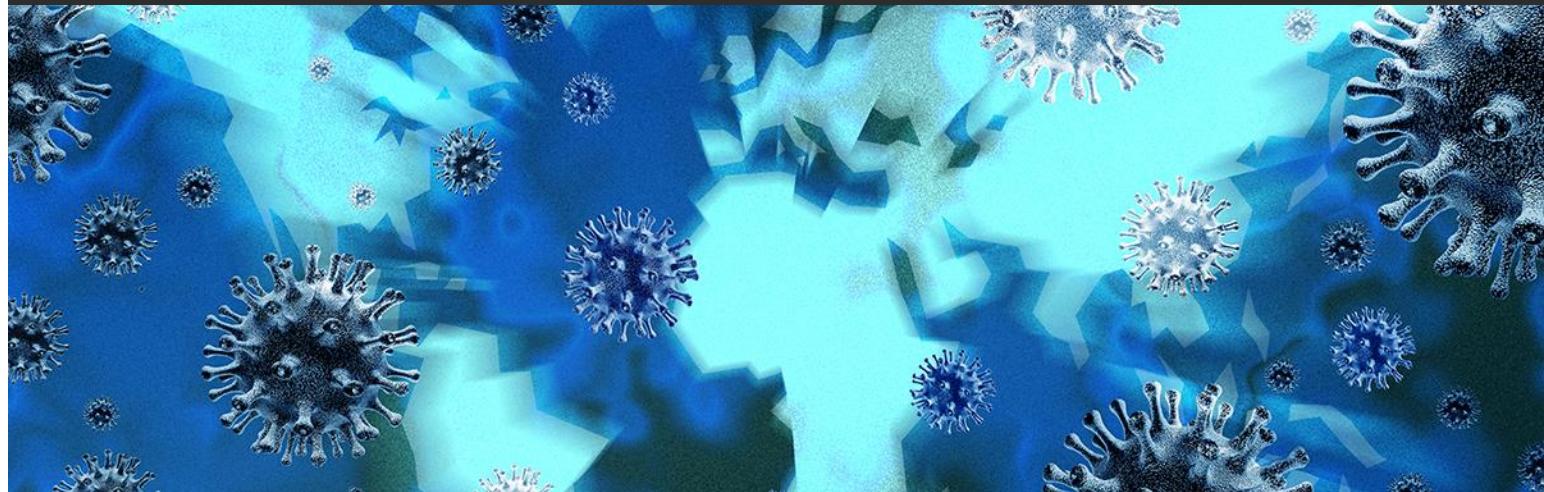


Alert | Health Emergency Preparedness Task Force: COVID-19 (Coronavirus)



March 2020

Coronavirus and Force Majeure Contract Clauses

It's been a month since the Department of Health and Human Services (HHS) – [declared a public health emergency](#) due to the continued spread of COVID-19 (Coronavirus). News over this past weekend that several people in the United States are infected despite having no known connection to previous cases, so called "community spread," is beginning to have a ripple effect on markets and leading to what seem to be ever-increasing travel restrictions. Supply chain disruptions are touching consumers all over the globe, and widespread media coverage is stoking general public fear, causing consumers to rethink travel, and businesses to consider canceling long-planned meetings and conventions. On Friday, Feb. 28, the 90th Annual Geneva Motor Show was cancelled after the Swiss government banned gatherings of 1,000 or more people, in the hopes of containing the spread of the virus. Speculation of moving or canceling the 2020 Olympics in Japan is beginning to swirl.

While it is too early to predict how long the coronavirus will disrupt everyday life, or whether its spread will continue to pandemic levels, it isn't too soon to proactively consider your potential risk and understand both potential consequences and benefits of the legal landscape when planning for or dealing with the coronavirus outbreak. It is important to note that the HHS emergency declaration can last for the duration of the emergency, or 90 days, but the secretary has discretion to extend as necessary, and the World Health Organization (WHO) has the power to declare the outbreak a pandemic, which it has been reluctant to do to date.

Of course, economic considerations are secondary to the protection of human health; they should not be ignored. Companies often allocate the risk for unanticipated business interruptions through their contracts and insurance policies. Whether you are considering recovery options or are defending against breach of contract claims, there are some important concepts to consider.

Greenberg Traurig is advising clients on numerous legal issues relating to the coronavirus and its effects, such as the invocation and enforceability of force majeure clauses in contracts, employment matters on the effects to your workforce, negotiating commercial agreements in light of world events, and risk mitigation, among other issues.

Simply put, a force majeure clause is a contract provision that excuses a party's performance of its obligations under a contract when certain circumstances beyond their control arise, making performance inadvisable, commercially impracticable, illegal, or impossible. These clauses are fairly common in contracts, yet in times like this, can prove to be a valuable resource in determining how to navigate performance when there are issues affecting performance that are outside the parties' control. However not all clauses are alike, and in the aftermath of the terrorist attacks of Sept. 11, 2001, as well as recent storm and flood damage caused by Superstorm Sandy, the details of force majeure clauses have taken on increasing importance when negotiating contracts. Force majeure clauses afford parties the opportunity to draw a roadmap of the implications to the parties if the otherwise remote or unplanned catastrophe occurs. That roadmap may allow for decision making in times of uncertainty, informed underwriting as well as proactive crisis planning.

Some courts have in the past interpreted force majeure clauses narrowly; that is, excusing performance in limited situations and/or events within the scope of the clause, but courts may also consider the factors around the listed events. For example, while "disease" might be a specified force majeure event in your contract, adverse parties may contend that a party's performance is not excused due to the coronavirus' potential impact, especially if your business is solely in the United States. However, if your business is solely in China, or areas most impacted by the global health concerns posed, excused performance at this stage could be more plausible.

Insurance

There are myriad issues relating to insurance for COVID-19. While there is form language in many policies, there may be situations where manuscript language is in place that will affect the general coverage grants that are summarized below.

Business interruption coverage is the most logical place to start. Business interruption coverage is typically provided if there is a direct physical loss such as a fire, flood or earthquake. In certain cases, the policy may require that a loss is designated, while in other policies there is no such requirement. In the case of COVID-19, a direct physical loss may not be readily apparent, although there are certain situations that could trigger a physical loss if a factory or other workplace becomes contaminated and therefore unusable due to a COVID-19 outbreak. There is also a possibility that business interruption coverage could apply in the event that a supplier suffers a shutdown due to COVID-19 that affects the operations of a primary insured (often defined as "Dependent Property," which is "property operated by others whom you depend on to . . . deliver materials or services to you . . . accept your products or services . . . manufacture products for delivery to your customers . . . attract customers to your business").

Another possible source of coverage relates to coverages triggered by the actions of a civil or military authority. If access to a property is impaired by order of a civil or military authority in connection with an insured peril – or a non-specified causes of loss coverage grant – there is a potential for recovery. Often these coverages last for four weeks.

As brokers or the insurers themselves may be reluctant to acknowledge coverage, it may be necessary to have a specialist closely examine policies to see if they may be applicable.

Consider the following when evaluating plans to assert your rights under a force majeure clause:

1. Understand and evaluate the individual facts and circumstances the outbreak may have on your business and your ability to perform your obligations under a contract. Consider the other party's obligations, and whether they too may be adversely affected. Is an event or service impossible to perform? Understand, that mere poor performance (such as decreased anticipated attendance at a conference) or increased cost to perform alone may not be a sufficient basis to excuse performance and invoke a force majeure clause.
2. Monitor the situation. The current situation is fluid, meaning facts and circumstances can change quickly, and often do. While conditions today, for example, may not allow for the invocation of a force majeure clause depending on where you are located, if the crisis worsens, and additional U.S. government or WHO declarations may add significant restrictions on travel or force event cancellations, it's more likely a force majeure invocation would prevail. Within the United States, consideration should also be given as to whether various states have declared states of emergency tied to health conditions or imposed their own separate restrictions on travel in and out of the state and popular areas within the state itself such as public buildings and facilities in order to prevent the potential spread of any communicable virus.
3. Each contractual clause governing performance is different and can be interpreted differently depending on the law that governs, so it is important to discuss with your counsel your situation and whether you are seeking to enforce and/or excuse performance. Also, be mindful of any notice provisions under the contract as well as specific additional obligations you have to either compel performance or mitigate damages should the virus interfere with your business expectancy.
4. Keep detailed records that include the scope of the interruption to your business, and detail the factors leading to impossibility. Track any costs that you may have or anticipate, and be aware of the other party's costs if force majeure were to be invoked.
5. Review your insurance coverages. Understand whether you carry business interruption insurance or other relevant insurance.
6. Consider whether there are alternative means to perform contractual obligations. Realize that the other party to the contract may be amenable to potential ways to mitigate, or adjust each party's performance obligations, including but not limited to partial performance.
7. Consider business solutions to legal issues, such as a mutual agreement, to move your event to a time after the crisis is over. Both parties likely want to encourage full performance (and maximum attendance), and sitting back down at the bargaining table to negotiate a compromise often leads to the best results.

Greenberg Traurig attorneys stand ready to assist with questions regarding force majeure clauses and potential related commercial litigation.

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