

*Force Majeure*  
Provisions in  
Contracts and  
COVID-19

The uncertainty created by the COVID-19 pandemic is having significant impact on businesses, particularly their contractual rights and obligations. Contracts frequently contain *force majeure* clauses that may excuse or delay a party to the contract's obligations to perform. Because *force majeure* clauses frequently have notice and timing requirements, it is important to have legal counsel review your contracts immediately so you understand those provisions. This article is designed to address the frequently asked questions our clients have been sending to us about their contracts that contain these clauses.

### **1. What is a *force majeure* clause?**

A *Force majeure* clause is a provision in a contract that allows a party to suspend, delay or discontinue performance of its contractual obligations in certain circumstances. The contract will frequently define what constitutes a *force majeure* event. Further, the law of the applicable jurisdiction may further address the scope and applicability of *force majeure* clauses. Accordingly, each case must be considered given the specific *force majeure* language, the facts giving rise to the possible triggering event and the applicable law.

Generally, *force majeure* clauses may permit a party to suspend, delay or discontinue performance of its contractual obligations in events that are outside the reasonable control of a party, are not reasonably foreseeable by the parties, materially affect a party's ability to perform under the contract, and the party has taken reasonable steps to avoid or mitigate consequences of the event. However, each contract's specific *force majeure* provisions should be reviewed.

### **2. Does the COVID-19 pandemic constitute a *force majeure* event?**

The answer depends on your contract and the effects of COVID-19 in your business. Some contracts contain very specific references to events that might apply such as pandemic, quarantine or government order. Even without those specific references, your contract's *force majeure* provision may nevertheless apply. Arguments can be made that "acts of God" or "government action" are broad enough to encompass COVID-19.

### **3. What drawbacks are there to triggering a *force majeure* provision in a contract?**

First, by triggering a *force majeure* provision, you may be permitting the other party to the contract to suspend, delay or discontinue its performance under the contract. It is important to understand the rights the other party to the contract may have if you trigger the *force majeure* provision and how the other party's exercise of those rights could impact your business.

Second, because *force majeure* provisions are highly fact and law specific, the

other party to the contract may see things differently than you do. As a result, the other party could pursue legal action for breach of contract against you for damages arising from the suspension, delay or discontinuation of your contractual obligations. When considering the possibility of legal action, you should also consider whether your contract has dispute resolution provisions.

Third, even without fully triggering the *force majeure* provision, you need to carefully consider your actions with advice of counsel to avoid a legal claim for anticipatory repudiation. Certain actions could be considered by the other party to the contract as your attempts to repudiate the contract, and result in a legal action.

#### **4. What should I do if a party to a contract with me sends a *force majeure* notice?**

Carefully examine your contract, its *force majeure* provisions, and the contents of the notice you receive. Determine whether the other party has complied with the notice and other requirements of the provision and the law of your applicable jurisdiction. Consider what rights the contract affords you if the other party triggers the *force majeure* clause. It may be that your obligations are excused, which could be beneficial to your business. If not beneficial to you, analyze your likelihood of success in challenging the trigger of the provision. Litigation expenses, likelihood of success, and likelihood of collecting a judgment should all be considered.

You should also be cognizant that you have a duty to mitigate damages you will sustain if the other party suspends, delays or discontinues its performance. What constitutes reasonable efforts to mitigate damages is often very fact specific to your business, the terms of your contract and applicable law.

Middleton Reutlinger is available to assist you in understanding these provisions in your contracts. Whether you are considering triggering a *force majeure* clause or have received notice of a triggering event, we are here to help.