

Q&A – COVID-19 Pandemic Contract Issues and Concerns: Part II (Force Majeure)

By: Jonathan S. Berg, Member, Enterprise Procurement Practice Group

The COVID-19 pandemic and the measures being taken to contain its spread are creating a myriad of issues for companies, including issues relating to their contracts and relationships with suppliers. From a legal perspective the measures being taken, including lockdown and stay home orders, may make it difficult or impossible for suppliers to perform. One avenue of relief for a supplier that is unable to perform its contractual obligations is invoking force majeure. The following Q&A addresses the issue of force majeure and its impact on companies' contracts with suppliers.

Question: What is force majeure?

Answer: Force majeure provisions in contracts address the circumstances under which a party to a contract may be excused from performing its contractual obligations. Force majeure is an event that is beyond a party's control and that makes performance of the contract impossible. Generally, force majeure events are limited to the most significant of events. Examples of force majeure events include acts of God, fire, war, epidemic or pandemic, and government intervention or action. Force majeure generally does not excuse performance merely because a party's performance is difficult or more onerous, but only when it is prevented by the force majeure event. Force majeure provisions in contracts may also set forth what a party's responsibilities are if a force majeure event occurs, e.g., notice, mitigation, etc.

Question: Is the COVID-19 pandemic a force majeure event?

Answer: The answer depends on the language of the contract. The COVID-19 pandemic may or may not be a force majeure event depending on whether the pandemic itself is directly affecting performance under the contract, but in general all of the associated governmental orders and restrictions would undoubtedly qualify as an event of force majeure.

Question: I received a notice from a supplier claiming that they cannot perform under our contract and invoking force majeure as result of the COVID-19 pandemic. What should I do?

Answer: First, examine the contract in question to determine if the contract has a force majeure provision. Sometimes the provision is called "excused performance". And, not all contracts have a force majeure provision. If not, the general law of force majeure would apply, or if it is a contract for the sale of goods, the UCC law of commercial impracticability would apply. But, this conclusion is only the start of your journey with force majeure. It is not automatic. The force majeure clause may not cover a pandemic or the supplier may not have complied with the contract's requirements for declaring force majeure. In the coming months we expect substantial commercial disagreements regarding the

practical implementation of force majeure concepts, including whether the force majeure clause covers the event in question and whether the force majeure event actually prevented performance or just made it more burdensome.

Question: If one of my suppliers is affected by the COVID-19 pandemic and they want to declare a force majeure event, do they need to give notice to me as a customer?

Answer: Yes, if notice is required by the terms of the contract. In any event, they should give you notice if they are declaring force majeure. In many contracts, the force majeure provision requires prompt or immediate notification of the force majeure event. Some may even require ongoing updates. The notice provisions should be carefully followed. Failure to comply might limit the protection available.

Question: If one of my suppliers is affected by a force majeure event can they suspend performance or terminate the contract?

Answer: Yes, a supplier can suspend performance if a force majeure event has occurred and that event makes performance under the contract impossible, assuming the supplier has complied with the other requirements of the contract to declare force majeure. They can also terminate if the relevant contract clause provides for termination.

Question: What can I do now to prepare?

Answer: First, examine all of your contracts with critical suppliers. If they have force majeure provisions, understand what your and your suppliers' contractual obligations are to each other, and the extent to which these obligations may be excused. Second, communicate. Engage with your suppliers in discussions regarding the status of their business continuity procedure implementation and their performance limitations. If you are engaging in continuing dialogue with your suppliers you may be able to agree upon temporary changes that allow the supplier to continue performance and avoid having them declare force majeure.

The COVID-19 pandemic is and will continue to impact commercial parties and their existing contracts, as well as raise concerns about contracts being negotiated now or in the future. Bodman's attorneys are available to assist you as businesses adjust to this difficult time, please contact any member of Bodman's Enterprise Procurement Group if you need assistance. We will be providing frequent updates and additional FAQs as the situation develops.

ENTERPRISE PROCUREMENT PRACTICE GROUP	Jonathan P. Burleigh Chair 248.743.6012 jburleigh@bodmanlaw.com	Courtland W. Anderson 248.743.6063 canderson@bodmanlaw.com	Jonathan S. Berg 248.743.6061 jberg@bodmanlaw.com
	Katherine Razdolsky Rothstein 248.743.6010 krothstein@bodmanlaw.com	Alex E. Haney 248.457.3164 ahaney@bodmanlaw.com	