

Force Majeure and Insurance Considerations for COVID-19 Cancellations

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As the coronavirus (COVID-19) forces the cancellation of countless events, businesses are finding themselves assessing both their losses and their remedies. Suddenly, that boilerplate language in the fine print of contracts discussing an “Act of God” has taken on a whole new level of importance. Understanding what this means for your organization can make the difference between an unmitigated disaster and a business saving reprieve.

Force Majeure

“Force majeure” is defined by Black’s Law Dictionary as an “event or effect that can be neither anticipated nor controlled.” A force majeure clause allocates risk among the contracting parties if performance becomes impossible or impracticable because of such an event. However, despite force majeure clauses being relatively standard in contracts, there is limited legal guidance on the application to this legal principle to epidemics or potential pandemics such as COVID-19. Accordingly, those businesses who are making decisions based on a belief that the coronavirus and the surrounding public safety concerns should provide a contractual excuse for non-performance may be in for a surprise.

Like enforcement of most contractual provisions, how the parties have themselves defined the contours of force majeure in their agreement will dictate the application, effect and scope of force majeure. New York courts, for example, interpret such clauses quite narrowly and require that clauses include the specific event that is claimed to have prevented performance. Therefore, it is imperative that those potentially effected review the specific language of their agreements to determine what type of events are covered.

For example, the contract may explicitly exclude illnesses unless it is accompanied by an official government directive. Some contracts may even designate a specific health authority, or require a travel ban versus a travel guidance or a warning. Accordingly, even where the World Health Organization or Centers for Disease Control and Prevention has issued statements of caution or suggested restrictions on travel, courts will typically only excuse performance where the specific conditions set forth in the contract are met.

With so much information out there from so many different sources, businesses should review their important contracts to identify what sources of statements are relevant to their contractual duties. In some cases, it may even be appropriate for a business to coordinate with the local

authorities to cancel an event, therefore triggering contractual protections that may not be otherwise available if the business or organization simply cancels the event itself.

While health concerns and public safety are an important concern, these types of general concerns will likely have no bearing on whether performance under a contract is actually excused. Businesses should remember that the law places the burden to establish force majeure on the party seeking to invoke the clause, and that party must establish that performance was **impossible** and not merely impracticality or unanticipatedly difficult.

Furthermore, many contracts include a duty to mitigate damages, or other language that may place additional burdens on the affected parties to take action to minimize the damages caused by cancellation. The 2008 case of *Macromex SRL v. Globex International, Inc.* provides an illustration of what can go wrong if a business is unwilling to explore alternatives even when faced with a seemingly impossible task caused by health restrictions.

Globex had entered into a contract to deliver chicken to Macromex, a Romanian company. In June 2006, in response to the “bird flu” the Romanian government declared without notice that no chicken could be imported into Romania. As a result, Globex took the position that it could not complete the order and that its performance was excused. Macromex proposed as a workaround that the chicken be delivered to the neighboring country of Georgia; however, Globex rejected that proposal. Globex then sold that chicken in a robust market for “safe” chicken, looking to capitalize on the situation. As found by an arbitrator and later confirmed by the District Court for the Southern District of New York, Globex was required to ship to the newly designated location and could not use the ban in Romania as a force majeure event. Macromex was awarded not only the associated damages but approximately \$200,000 in attorney fees.

As both force majeure clauses and their interaction with other contractual provisions vary wildly, it is imperative that a party fully understands its rights and obligations prior to taking action.

Insurance Considerations

While the contract between the affected parties is the first place businesses should find themselves looking, not far behind should be their insurance policies. Businesses often carry coverage for business interruptions, and determining the scope of that coverage is important for a business to assess in making determinations. The language and application of such provisions vary greatly, with some requiring the physical loss of the space as the result of fire or natural disaster and others being broader or including other requirements. For example, certain policies may require action by a governmental or health authority before coverage is triggered. If that is the case, the timing of cancellation and whether cancellation was a choice of the company or the result of the decision of a governmental or health authority, may make the difference on if coverage is available.

As courts tend to interpret insurance policies more broadly than contracts between businesses, bases for coverage may be available even when not identified by the insurance broker or denied by the carrier. With the global economic impact of the COVID-19 only beginning to be assessed, insurance carriers will no doubt be significantly impacted and cautious about approving related claims.

Looking Ahead

It is critical that businesses impacted by COVID-19 assess their positions before making important decisions. With countless events still facing potential cancelation, businesses' ability to survive these uncertain times will undoubtedly turn on force majeure and insurance policy provisions. While safety is always the primary concern, understanding the applicable contractual triggers, law, and the available remedies will allow businesses to limit the impact of what appears certain to be a growing trend over the weeks and months ahead.