



Force Majeure Clauses: What Are They and Do They Apply in Issues Caused by COVID19?

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The article is not a substitute for legal advice.

2020 has been a challenging year with the global economic shutdown from COVID-19 leading to disruptions in many industries. Agriculture has had its fair share of disruptions from this global pandemic. Such disruptions have raised questions for many of you about your contracts to supply farm products to businesses, such as restaurants or schools, that no longer need those products due to shutdowns. You may also have issues finding labor to help move products to customers. Contracts between suppliers and customers often include provisions called force majeure clauses. These clauses allow one or both parties in a contract to excuse the performance, in this case, the fulfillment, of the contract in certain situations.

Force Majeure Clause

Force majeure is a French term meaning a superior force. These clauses may kick in when unforeseeable actions or events occur which prevent fulfilling the contract. These unforeseen actions do not have to be caused by people, leading to the alternative name for these clauses: "Act of God" clauses. Force majeure clauses often lay out the extreme, yet possible, unforeseeable actions that will allow a party to excuse the fulfillment of the contract. Such extreme events may include epidemics, pandemics, flooding, famine, acts of war or terrorism, changes in government regulations or laws that make the agreement illegal, and other similar events. The clause may also contain a catchall provision to include other activities that may become extreme over time and prevent performance.

For example, a farmer supplies a restaurant with leafy greens. The contract between the farmer

and the restaurant may include the following language as the force majeure clause:

This contract is subject to force majeure, and is contingent on strikes, accidents, Acts of God, weather conditions, epidemics, inability to secure labor, fire regulations or restrictions imposed by any government or governmental agency, or other delays beyond the control of the parties (Williston and Lord, 2020).

Force Majeure and COVID-19

What happens if either of the parties (the farmer or the buyer) stops fulfilling their end of this contract because of COVID-19 using this clause? If one party invokes the force majeure clause and the other party agrees that the clause is applicable, the contract will be canceled or suspended until both parties can fulfill the contract or come together to write a new agreement. This may be immediate or may happen after the virus outbreak comes to an end.

But if one party does not agree that the force majeure clause applies to the situation, that party can pursue legal action for breach of contract. How will the court decide if the force majeure clause can be invoked if the parties disagree?

The answer depends on how the court interprets the provisions of the contract. Courts typically apply these clauses based on the specific language of the force majeure clause in the contract. Since that specific language is what the parties agreed to, the courts will rarely add words not included in the written contract. In the example

above, the parties included the term “epidemic” in the list of unforeseeable actions and therefore, COVID-19 should be a covered event excusing the performance of the contract.

What if the word “epidemic” was missing from the list? In the above example, the phrases “regulations or restrictions imposed by any government or governmental agency” or “other delays beyond the control of the parties” might be enough to excuse one of the parties from performing their portion of the contract. But this will depend on how a court interprets that language in the clause. It’s important to note that the force majeure clause applies only in cases of legal and/or physical constraints, not for economic reasons. If a party takes the other party to court over a canceled or unfulfilled contract, the court would look at the specific wording of your contract to determine if the failure to perform is allowable under the force majeure clause. Courts will look at the ordinary (dictionary) definitions of the words used in the clause. If you are considering using the force majeure clause, check with an attorney who has an understanding of the specific contract to determine if the current situation applies to the clause as written in the contract. That attorney will be in the best position to determine if you can invoke the force majeure clause, which may prevent legal battles in the future if the other party is unhappy with the decision.

What Should You Be Doing?

Take a look at your contract to see if it includes a force majeure clause. If it does, try to determine whether the clause covers the COVID-19 pandemic and/or the governmental restrictions due to COVID-19. Even if you are able to fulfill your portion of the contract, it may help with risk management in the future to see if the other party or parties have the option of invoking a force majeure clause. This can help you be prepared in case a buyer invokes the clause.

If you cannot fulfill your end of the contract due to the extreme event imposing a legal or physical restraint, you should let the other party know promptly that you are invoking the force majeure clause of your contract. You cannot invoke force majeure for an economic restraint.

Closures or changes in service based on State rules would be examples of a potential legal restraint preventing performance. For example, an order by the Governor to close restaurants for dine-in service could cause a restaurant to cancel supply contracts if the restaurant is unable to convert its business into a carryout service. Milk processors may look at canceling supply contracts because schools and other institutions that are closed due to State guidance are no longer purchasing milk. Economic constraints cannot lead to applying the force majeure clause. For example, due to the drop in milk prices, a processor may try to get out of paying contractually obliged prices by canceling existing contracts. Since this would be an economic restraint and not a legal or physical restraint, the processor could not use a force majeure clause to cancel the contract.

Conclusion

Take a moment to review your existing contracts and determine any of them include a force majeure clause. If there is a force majeure clause in one or more of your contracts, talk to an attorney to determine a) what the specific language used means for your current situation, and b) what could happen if one of the parties does not perform under the contract. This pandemic is a stressful time for many of us and poses new challenges. Understanding your contracts and working with an attorney can help you manage potential legal and financial risks in this uncertain time.

References

Williston and Lord, *5A Williston on Contracts 4th Forms* § 77F:3 (2020).

Additional Resources Covering Force Majeure and COVID-19

Fryer, Stephanie Bradley, *Ask Stephanie: Should I update my Contracts in Response to COVID-19?*, Rincker Ag Law Blog (Mar. 20, 2020) available at <https://rinckerlaw.com/ask-stephanie-update-contracts-response-covid-19/>

Bradley, a food, farm, and family lawyer, looks to COVID-19 as a time to review contracts and potentially update force majeure to include epidemics and pandemics. Bradley states: "There is not a standard clause used in all contracts so the specific terms will vary from document to document."

Schroeder, Brianna J., *COVID19 & Force Majeure in Agricultural Contracts*, Schroeder Ag Law Blog (Mar. 26, 2020), available at: <https://www.aglaw.us/schroeder-ag-law-blog/2020/3/26/covid19-amp-force-majeure-in-agricultural-contracts>

Brianna Schroeder digs into agriculture contracts and discusses the potential for COVID-19 to qualify as force majeure in the scope of food production: "Livestock growers have contracts with integrators. Egg processors have supply agreements with farms. Trucking companies have contracts with grain businesses. Produce farms have agreements with farmers' markets ... A force majeure provision might provide either party with a way to avoid

penalties for failing to perform—but it depends on the specific language used in the contract."

Schroeder, Lee R., *Legal-Ease: Force majeure: legally unforeseen and uncontrollable acts of God*, The Lima News (Mar. 21, 2020), available at: <https://www.limaohio.com/top-stories/403408/legal-ease-force-majeure-legally-unforeseen-and-uncontrollable-acts-of-god>

Guest columnist and northwest Ohio lawyer, Lee R. Schroeder, delves into the "Act of God" that is COVID-19. Explaining, "Most contracts of any sophistication will include provisions that essentially say, 'If the world falls apart for some unforeseen reason that we cannot control before the goods or services are provided, this is how we will handle that situation.'"

Van Voris, Bob, *When God Appears in Contracts, That's 'Force Majeure': Quick Take*, Bloomberg (Feb. 6, 2020) available at: <https://www.bloomberg.com/news/articles/2020-02-06/when-god-appears-in-contracts-that-s-force-majeure-quicktake>

From Bloomberg News, a quick read that defines force majeure and explores its application in contracts during coronavirus. "The closures and other unexpected disruptions that have accompanied the spread of the virus bear 'all the hallmarks of force majeure,' said Dallas-based lawyer Beth Petronio."

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