

insights

TYPES NOT MAPPED YET April 15, 2020 | TTR not mapped yet | Kimberly (Kim) Bousquet

Force Majeure clause protection during COVID-19

Many food and beverage industry companies are assessing whether they can be excused from or enforce contract performance under force majeure clauses in light of COVID-19 and related government action.

Force majeure is a legal term of art, meaning “superior force.” A force majeure clause is not intended to buffer a party against the normal risks of a contract such as market fluctuations. Instead, force majeure clauses create a defense against liability (in whole or part) if a party is unable to fulfill its contractual obligations and/or liabilities due to events that are out of their control and that the parties could not reasonably foresee at the time they entered into the contractual agreement.

Ultimately, whether or not a force majeure clause covers a pandemic such as COVID-19 depends on the wording of the particular clause between the parties. The rights of the parties are best understood by evaluating the scope (e.g. pandemic, epidemic, infectious disease) and effect (e.g. delay, disruption or complete prevention of performance) of the at issue force majeure clause.

Where a contract does not have a force majeure clause, parties look to other legal doctrines including:

- **Common Law Doctrine of Frustration of Purpose.** A party is discharged from performing a contractual obligation which is now impossible to perform and the party neither assumed the risk of impossibility nor could have acted to prevent the event rendering the performance impossible.
- **Doctrine of Supervening Impracticability in the Restatement (Second) of Contracts § 261.** When a party to a contract who claims that a supervening event has prevented, and thus excused, a promised performance must demonstrate: (1) the event made the performance impracticable; (2) the nonoccurrence of the event was a basic assumption on which the contract was made; (3) the impracticability resulted without the fault of the party seeking to be excused; and (4) the party has not agreed, either expressly or impliedly, to perform in spite of impracticability that would otherwise justify his nonperformance.
- **Excuse by Failure of Presupposed Conditions under UCC § 2-615.**

As the COVID-19 circumstances are ever-changing, clients should undertake a review of their contracts so that they may be able to react accordingly should such a provision be asserted. Furthermore, consideration should be had as to whether it may be more prudent to renegotiate or postpone obligations to the benefit of all parties during these challenging times.

Please contact us if you have additional questions.

authorsTest

kimberly

Kimberly (Kim) Bousquet