

Is the COVID-19 Crisis a Force Majeure Event?

Potential Recourse for Businesses under their Contracts and the Law

March 26, 2020

A “force majeure,” translated literally from French as a “superior force,” refers to an “act of God” or other significant and extraordinary event beyond a person’s control. In many contracts, force majeure provisions excuse a party’s failure to perform its obligations if the failure is caused by a force majeure. Many business owners are asking whether the COVID-19 pandemic is a force majeure event that may excuse them or their contractual counterparties from performing certain contractual obligations. As Charles Landry recently told the [Baton Rouge Business Report](#), there is no one-size-fits-all answer, business owners “have to look at their contracts and the specific force majeure language to see if this event is covered.”

How is force majeure defined in the contract?

Typically, force majeure is defined in a contract as an event “beyond the reasonable control” of the contracting parties. The definition may consist of a list of specific events that constitute “force majeure,” or the contract may have a more general definition with a non-exhaustive, illustrative list of events that are examples of force majeure. Of course, if the list (whether exhaustive or illustrative) includes pandemics, epidemics, or a quarantine (which some do), then COVID-19 should, without doubt, be a force majeure event. And, if the definition is broad and includes any event outside of or beyond the parties’ control or “acts of God,” then the circumstances surrounding COVID-19 very likely fit. Some definitions may also include orders or injunctions by civil or governmental authorities, which contemplate governmental directives like Louisiana’s March 22, 2020 “stay-at-home” order. In many contracts, however, the definition of “force majeure” may not clearly cover the COVID-19 crisis.

Does the COVID-19 crisis provide an excuse from performance?

Again, there is no one-size-fits-all answer to whether the COVID-19 crisis excuses a party from performing the party’s contractual obligations; the specific wording of each force majeure provision must be considered. But, typically, force majeure provisions temporarily excuse the party from performing where performance is prevented by the force majeure event. Parties may be required, however, to perform or make reasonable efforts to perform obligations that are not affected by the force majeure event. Parties also may be contractually required to mitigate the effects of the force majeure event, if possible. Finally, the provision may trigger the right of either party to terminate the contract if the force majeure event prevents a party from performing for a certain length of time. Because force majeure provisions vary widely, Charles Landry advises, “to say ‘I’ll just claim force

majeure' is a mistake. If you don't have the right language in your document, you may not be able to claim it."

Proper notice under the contract is essential.

Unsurprisingly, notice provisions also vary widely from contract to contract. It is important to check the notice requirements of any force majeure provision to determine whether and when notice is required, what information the notice must contain, and how it must be delivered. If notice is a condition to obtaining relief under the provision, then the party seeking relief must give proper notice in order to rely on the force majeure clause.

Risks of wrongfully asserting force majeure.

Asserting force majeure as an excuse from performance without a contractual basis could amount to a breach of contract or be evidence of anticipatory breach of contract and the other party may be entitled to claim damages as a result. It is therefore advisable to proceed with caution when relying on a force majeure clause as grounds for nonperformance.

What if there is no force majeure provision in the contract?

If the contract does not have a force majeure provision, the Louisiana Civil Code may provide relief to a party seeking to avoid performance of contractual obligations as a result of the COVID-19 Crisis. The Louisiana Civil Code refers to force majeure as a "fortuitous event", defined as an event that "could not have been reasonably foreseen." When a party cannot perform an obligation because a fortuitous event, such as the COVID-19 Crisis, has made such performance objectively "impossible" (not merely rendering performance more difficult), the party's failure to perform will not be considered a breach of contract. Where a fortuitous event has made the entire performance impossible, the contract may be dissolved. Where a fortuitous event has made only part of the performance impossible, a court has discretion either to modify or dissolve the contract. Whether the COVID-19 Crisis has made a party's performance of its contractual obligations objectively "impossible" depends on the nature of the party's obligations under the relevant contract.

Seek legal advice.

In sum, whether a party to a contract may rely on a force majeure provision or the Louisiana Civil Code as an excuse from performance is dependent on the language in the contract at issue and the facts at hand. If in doubt, seek legal advice.

If you need advice about the effect of the COVID crisis on your business' obligations under a particular contract, please reach out to your Fishman Haygood contact or any of the attorneys listed below.

FishmanHaygood

New Orleans | 201 St. Charles Avenue, Suite 4600
New Orleans, Louisiana 70170

John Werner | jwerner@fishmanhaygood.com
Scott Willis | swillis@fishmanhaygood.com
Maureen Gershanik | mgershanik@fishmanhaygood.com
Sharonda Williams | swilliams@fishmanhaygood.com

Baton Rouge | 100 North Street, Suite 800
Baton Rouge, Louisiana 70802

Charles Landry | clandry@fishmanhaygood.com
Louis Quinn, Jr. | lquinn@fishmanhaygood.com
Scott Chenevert | schenevert@fishmanhaygood.com

www.fishmanhaygood.com