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Covid-19 --- Contracts and Force Majeure

Check your contracts now to determine the effect of the Covid-19 coronavirus pandemic on your obligations and those of your counterparties.

Companies should review their major contracts, specifically the clauses on 'force majeure', to argue or prepare for arguments that the Covid-19 coronavirus pandemic could excuse the performance of certain contractual obligations. Business contracts often carry 'force majeure' clauses that provide that major unforeseeable events outside of either party's control can relieve the performance of such obligations.

The World Health Organization has recently declared the coronavirus outbreak to be a pandemic. In addition to the fatalities and severe illnesses sadly caused by the virus worldwide, businesses, both locally and across the globe, are accumulating huge economic losses. Moreover, the nature of the pandemic and the related precautions taken by governmental authorities to contain the outbreak have rendered many businesses unable to execute on many of its contracts. For example, the recent ban in the State of New York on gatherings in excess of 500 people and the reduction in seated capacity by 50% for venues with a seating capacity of 500 or less has greatly affected business contracts related to large catered events. Similarly, the suspension of sporting events and Broadway shows has caused major havoc with the contractual relationships with contractors, vendors and suppliers who make such events and shows possible.

The ability to utilize force majeure based on the coronavirus outbreak will likely depend significantly on the applicable force majeure provision. New York courts have historically applied a narrow interpretation to force majeure clauses. Accordingly, if "epidemic" or a similar enumerated force majeure event such as "communicable disease outbreak," "public health emergency," or "reportable, communicable and virulent disease" is not included in your contract, it is possible that a court will not permit the invocation of force majeure as a defense to a failure to perform due to the coronavirus.

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Some contracts may not contain a contractual force majeure clause at all. In those cases, parties seeking to excuse performance due to coronavirus may attempt to rely on the common law doctrine of impossibility. However, similar to their narrow interpretation of force majeure clauses, New York courts are hesitant to re-write contracts and have also limited the scope of the common law doctrine of impossibility. Thus, it may be unlikely a court will excuse a party's performance for impossibility because of coronavirus.

One mitigant to the courts' historic strict interpretation will be the declaration of State of Emergency by Federal, State and local governments as well as the requirement for certain businesses to close. A party may be more likely to be successful in invoking the doctrine of impossibility due to coronavirus if the failure to perform is due to a governmental proclamation. For example, the restriction on travel and receipt of goods from other countries and quarantining citizens.

In sale contracts, UCC §2-615, which excuses performance due to "unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting", might not provide adequate protection to a seller. Similar to the doctrine of impossibility of performance, UCC §2-615 is narrowly interpreted and a court could determine that non-performance due to an epidemic such as coronavirus was "within the contemplation of the parties at the time of contracting" if the applicable force majeure provision did not specifically enumerate "epidemic" or a similar event.

The attorneys in Meltzer Lippe's Corporate and Business Practice Group are here to help your company scrutinize its existing contracts to see if those contracts include a force majeure clause and to see whether coronavirus is a force majeure event. Going forward, parties should insist that their contracts include "epidemic" as a force majeure event in case performance becomes impossible due to coronavirus or a future epidemic. Parties should also ensure that their contracts contain a provision specifically enumerating what happens when the force majeure event is in effect (i.e., only temporarily suspending performance or providing for the supply of fewer goods).

Anyone facing questions about COVID-19 should contact their Meltzer Lippe attorney for personalized guidance.