

## **FORCE MAJEURE PROVISIONS IN A CORONAVIRUS AGE**

One issue missing (thankfully) from all apocalyptic movies is the important, but dry question of what happens to all those business transactions thrown into turmoil when society faces unprecedented disruption. Mad Max had more serious issues about which to be concerned than contractual performance. And, so do we. The health and safety of our fellow humans is first. But we also have to protect the economic health of our businesses – the engines of our economy.

One important business issue is whether contractual performance will be excused, in whole or part, as a result of the outbreak. As businesses consider scaling back spending, leaders must assess the legal risks from contractual nonperformance.

A key part of addressing this issue is a review of so-called “force majeure” provisions, which are sometimes captioned as “impossibility,” “impossibility of performance,” or “impracticability.”. These provisions are intended to protect parties from being held liable for non-performance when performance is impossible and, to some extent, when it is commercially impracticable.

A simple force majeure provision might look like this:

The performance of this agreement is subject to termination without liability upon the occurrence of any circumstance beyond the control of either party, including, but not limited to, acts of God, decree of any government, fire, flood, explosion, riot, and war.

There are at least three (3) important steps to assessing the applicability of a force majeure provision to your particular contractual circumstances.

First, the provision should be carefully read to identify risks that are and are not covered. Many force majeure provisions contain general language covering “circumstances beyond the control” of the affected party. The scope and language of the express provision, or the limiting language if the clause is specific, is a key consideration in determining whether your contractual performance may be excused by fallout from pandemic or otherwise.

Second, depending on the scope of the language, it is necessary to decide whether the relevant language of the clause is related to the event under which force majeure termination is desired to be made. Stated differently, the event must give rise to the impracticability or impossibility. If performance is still operationally feasible, but less economical than before the outbreak, relief may not be available. For example, the above language refers to government decrees. Such decrees

may make performance less profitable, but do not necessarily prohibit performance. Federal government guidance (if widely followed) may only dry up profitability, whereas a travel ban might make performance impossible.

Third, experienced legal counsel is important to determining the scope and applicability of the language in the specific jurisdiction governing your contract. Judges and even arbitrators determine the application of contractual language by reference to the specific facts and applicable case law.

After addressing these issues, timeliness is also important, as many force majeure provisions require written notice invoking the contractual provision and explaining any required remedial steps. Even if relief of some sort is in order, this does not mean that the contract simply disappears. It depends on the specific wording of your contract. Relief may consist of a deferral of the performance obligation, an equitable economic adjustment, or an outright cancellation without liability.

Commercial reality will play a key role in the invocation and application of force majeure provisions. Whatever may be permitted under a contract, many on-the-ground factors will influence the resolution of a contract disruption. We have already seen firsthand how government decrees and global seriousness about the risks related to COVID-19 have led contractual parties to move quickly and reasonably to resolution, through negotiation or otherwise. Judges and arbitrators are also keen to the circumstances disrupting daily life. One can expect more understanding in these times that are trying for all.

After all legal considerations, one of the more important truths is that we are all in this together. Force majeure clauses should be viewed as a shield against liability resulting from circumstances beyond our control, not as a sword wielded to extract concessions or to take advantage of other businesses. After securing our and our families' physical health, a reasonable and measured legal approach to doing business will ultimately help us all get to the other side of a crisis in good financial health.

**For additional information, please contact any of the following with questions or more specific situations:**

**Kevin Broyles at [kevin.broyles@fisherbroyles.com](mailto:kevin.broyles@fisherbroyles.com)**

**Joel M. Ferdinand at [joel.ferdinand@fisherbroyles.com](mailto:joel.ferdinand@fisherbroyles.com)**

**Michael Pierson at [michael.pierson@fisherbroyles.com](mailto:michael.pierson@fisherbroyles.com)**

**Marty Robins at [martin.robins@fisherbroyles.com](mailto:martin.robins@fisherbroyles.com)**

### **About FisherBroyles, LLP**

Founded in 2002, FisherBroyles, LLP is the first and world's largest distributed law firm partnership. The Next Generation Law Firm® has grown to hundreds of partners in 23 offices globally. The FisherBroyles' efficient and cost-effective Law Firm 2.0® model leverages talent and technology instead of unnecessary overhead that does not add value to our clients, all without sacrificing BigLaw quality. Visit our website at [www.fisherbroyles.com](http://www.fisherbroyles.com) to learn more about our firm's unique approach and how we can best meet your legal needs.

These materials have been prepared for informational purposes only, are not legal advice, and under rules applicable to the professional conduct of attorneys in various jurisdictions may be considered advertising materials. This information is not intended to create an attorney-client or similar relationship. Whether you need legal services and which lawyer you select are important decisions that should not be based on these materials alone.

© 2020 FisherBroyles LLP