

## **Contractual Considerations in the Wake of Coronavirus**

In the wake of coronavirus (COVID-19), parties may (1) be in a contractual relationship with a counterparty that asserts it cannot perform or (2) find themselves unable to fulfill their own contractual obligations. Thus, force majeure clauses, doctrines of impossibility and frustration, and material adverse change clauses are of utmost importance. Set forth below are some things to consider regarding your contractual relationships during these unprecedented times.

### **Force Majeure**

The application and interpretation of a force majeure clause is governed by contract and state law. Such clauses are typically construed narrowly.

- Performance is excused only when the event is expressly included within a force majeure clause.
- "Catch-all" provisions may only encompass events that share the same characteristics of the enumerated occurrences.

Absent the express inclusion of a specific event, relief is typically not granted unless the disabling event was unforeseeable at the time of contracting.

There must be a causal connection between the alleged force majeure event and a party's inability to perform.

The party invoking the clause must show what action it took to perform regardless of the disabling event.

### **Doctrines of Impossibility and Frustration**

Doctrine of impossibility hinges upon a showing that performance of a condition is rendered impossible by an unanticipated event that could not have been foreseen or guarded against in the contract.

- Doctrine applies when a government's action renders a party's performance impossible.
- Doctrine not applicable when impossibility is personal to the nonperforming party.

Doctrine of frustration discharges a party's duty to perform where an unforeseen event has occurred, which, in the context of the entire transaction, destroys the underlying reasons for performing the contract, even though performance is possible.

- The purpose that is frustrated must be the primary purpose of the contract.
- Non-occurrence of the frustrating event must have been a basic assumption at the time of contracting.
- This may be limited to cases of extreme hardship.

### **Material Adverse Changes**

Material adverse change clauses may excuse the delay, postponement, or even the termination of contractual obligations.

- The party invoking the clause is subject to a heavy burden.
- Requires unanticipated event that could not have been foreseen or guarded against in the contract.
- Adverse change must be material, e.g., pose a substantial threat to a party's financial condition in a durationally significant manner.

Individuals with questions or concerns about contractual clauses should seek advice from trusted counsel.

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