



ROSE LAW FIRM

TO: Clients
FROM: Rose Law Firm, a Professional Association
DATE: March 24, 2020
RE: Force Majeure

Force Majeure

In business arrangements, uncontrollable events, often referred to as force majeure events, may arise and prevent or delay fulfillment of a party's obligations. If the arrangement has been reduced to a contract, a force majeure clause in the contract may excuse a party's failure to perform if such an event arises. Depending on the language of the contract, COVID-19 may excuse performance under a force majeure clause.

Applicability of Contract Clause

The applicability of a force majeure clause will vary based on the language of the contract, the laws of the state governing the contract, and the impact of COVID-19 on the relevant industry and business. A review of the specific contract language is required to determine if a party's performance may be delayed or excused entirely pursuant to a force majeure clause.

The force majeure clause of a contract could cover a broad range of unforeseeable, insurmountable events. Often, however, the clause will specifically provide a narrow list of events that trigger excusal of performance. Force majeure events commonly enumerated in contracts include:

- epidemics and pandemics;
- natural disasters or acts of God;
- war and acts of terrorism;
- acts of governmental authorities; and
- strikes and labor disputes.

If a contract's force majeure clause includes an exhaustive list of triggering events, courts will be reluctant to find that events outside such list are force majeure events for purposes of the contract. If the force majeure clause at issue specifically lists epidemics or pandemics, or includes broad, catch-all language, COVID-19 may excuse a party's performance.

Actual Cause; Mitigation

Assuming COVID-19 falls within the triggering events of a contract's force majeure clause, for performance to then be excused under the contract 1) COVID-19 must be the actual cause of the failure to perform, and 2) the party seeking excusal of performance must be unable to mitigate the problem or fulfill the contract through other reasonable means. A few examples of these requirements are provided below:

- Ex. 1: If in the midst of the COVID-19 pandemic, a contracting party has an equipment malfunction that causes a delay in performance, such party cannot claim force majeure based on COVID-19, since COVID-19 was not the actual cause of the failure to perform.
- Ex. 2: If a state's shelter-in-place order based on COVID-19 requires the temporary shut-down of a contracting party's facility, and such party cannot reasonably use another facility to fulfill the given contract, then the force majeure clause could apply, assuming the other applicable conditions of the clause are met.
- Ex. 3: If the party in Ex. 2 above could foresee that a production facility would shut down and could reasonably move production to another facility, it is less likely the force majeure clause applies.

Length of Excused Performance:

The force majeure clause may only excuse performance for a specified period of time (e.g. three days), or it may leave the time period open. If no time period is specified, Arkansas courts have found that the length of time performance is forgiven is based on the particular facts and circumstances of each case.¹

Impossibility/Impracticability:

A seller of goods may also be able to invoke the defenses of impossibility or impracticability if such seller is unable to perform under its contract due to COVID-19. The Uniform Commercial Code (UCC) provides that a seller is

¹ *Wilson v. Talbert*, 259 Ark. 535, 540, 535 S.W.2d 807, 809 (1976).

excused from performing under a contract when “performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.”²

COVID-19 has resulted in the issuance of shelter-in-place and lockdown orders by many country, state, and local governments. As a result, a contracting party impacted by such an order may be able to successfully argue that performance under a given contract is impracticable or impossible. As with the force majeure analysis, this will depend on the facts and circumstances surrounding each contract and industry at issue.

² Ark. Code Ann. § 4-2-615.