

Keep Calm — and Look at Your Contract(s)

Whether you cannot meet your supply obligations because your supply chain has come to a screeching halt or you are losing income because conferences, sports, or cultural events are cancelled and your contract partners do not want to pay for the hotel rooms they booked — there are numerous ways the coronavirus pandemic may affect your business.

Your decision on how to react to any such difficulties should be based on a close look at any contracts that are relevant and the clauses they include.

Force Majeure

A force majeure clause in your contract may provide you with the relief you are looking for, depending on the way it is written and the applicable law. If your force majeure clause consists of an enumeration of events that neither includes “national emergency” nor “epidemic” and is followed by a catch-all phrase such as “other similar causes beyond the control of such party,” you may have to face the argument that “[t]he principle of interpretation applicable to such clauses is that the general words are not to be given expansive meaning; they are confined to things of the same kind or nature as the particular matters mentioned.” (Kel Kim Corp. v. Central Mkts., 70 N.Y.2d 900, 902 (1987)). Your position would be significantly improved if your force majeure clause is written in broad and generic terms beginning with a phrase that defines force majeure events in broad strokes as “conditions beyond its reasonable control,” followed by a list of events that are meant to be used only as examples (as signified by a phrase like “including, but not limited to”).

Even if your force majeure clause seems to cover the current situation, it may not offer relief for all obligations — some explicitly provide that payment obligations are not excused by force majeure. Other clauses may require you to provide notice to your contract partner(s) as soon as you became aware of the force majeure event, in which case you have to pay attention to the notice provisions in your contract as well.

Uniform Commercial Code

Even if your contract does not include a force majeure clause: If the contract at issue is a contract for the sale of goods, a supplier may be able to rely on UCC 2-615(a) that provides “[d]elay in delivery or non-delivery in whole or in part by a seller ... is not a breach of his duty under a contract for sale if 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” According to UCC 2-615 comment 1, this provision applies to “unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting.” The more prevalent the coronavirus pandemic becomes and the greater its effects, such as the declaration of the national emergency in the United States and significant restrictions on international travel, the more likely it seems that a defense based on the Uniform Commercial Code could be successful.

Frustration of Purpose

If your contract does not include a force majeure provision and is not covered by the Uniform Commercial Code, the common law doctrine of “frustration of purpose” may be your last resort. This doctrine refers to a situation “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, thus operating to discharge a party’s duties of performance.” (*Matter of Fontana D’Oro Foods (Agosta)*, 11 Misc. 2d 10961, 1096 (1983)). This doctrine may be of special interest in connection with the cancellation of events such as SXSW or the NCAA basketball championships: The doctrine was used in *Krell v. Henry*, 2 KB 740 (1903) where the defendant had rented an apartment along the route of the king’s coronation procession. The procession was



Barbara Müller

Member

bmuller@cozen.com
Phone: (612) 260-9052
Fax: (612) 260-9080

Related Practice Areas

- Business

cancelled because the king became sick, and the court relieved the defendant from its obligation to pay for the apartment based on the “frustration of purpose” doctrine. Research of court cases relevant for the law governing your specific contract will be required to determine whether you (or your contract partner) can rely on this doctrine.

Finally, the review of your contract should also include a review of the dispute resolution provisions. For example, a Chinese court will likely accept one of the thousands of force majeure certificates issued to a Chinese supplier by the China Council for the Promotion of International Trade, whereas a court in another forum may be willing to give the underlying facts a more detailed analysis.

Cozen O'Connor's attorneys are well placed to assist you with the review of your contracts and the development of a strategy that will enable your business to overcome the unique challenges the current situation poses.