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Force Majeure and the COVID-19 Pandemic

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Questions We Will Be Answering Today

- How do I interpret a force majeure provision?
- What are my options if force majeure is not included in my contract or not available?
- After having experienced a pandemic, how do I negotiate force majeure provisions for new contracts?

Force Majeure Analysis

- Read your contract
- Is there a force majeure provision in the contract?
 - What does it include as a force majeure event?
 - Who receives the benefit?
 - What contractual obligations are covered?
- Is there a causal connection between your inability to perform and your obligations under the contract?
- What remedies are available?
- How can you mitigate your damages?

Possible Force Majeure Events

- Pandemic or Epidemic
- Act of God
- Government Acts
- “Catch-all” Provision – e.g. “Other events beyond the reasonable control of the impacted party”

Procedural Requirements

- How do you provide notice to the other party?
- What is the deadline to provide notice of the force majeure event?
 - When did the force majeure event start?
- What must you include in your notice?

Mitigation of Damages

- The impacted party must take steps to mitigate damages, both at the start of the force majeure event and as it continues.
- What is the standard for mitigation?
 - Does the contract state a standard?
 - What standard do courts apply?
- Remember – Mitigation is not a one size fits all approach.

Practice Tips

- Review insurance
 - Keep detailed records
 - Keep any supporting evidence
 - Make a copy of all notices sent
 - Monitor changes in the force majeure event
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- Document, document, document

Alternatives to Force Majeure

- Common Law Defenses
 - Impossibility
 - Impracticability
 - Frustration of Purpose
- Other Contractual Provisions
 - Suspension
 - Termination
 - Compliance with Laws or Change in Laws

Force Majeure Clause including Epidemics and Pandemics

- No party shall be liable or responsible to the other party, nor be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement when and to the extent such failure or delay is caused by or results from acts beyond the impacted party's ("Impacted Party") reasonable control, including, without limitation, the following force majeure events ("Force Majeure Events"): (a) acts of God; (b) flood, fire, earthquake, explosion, pandemics or epidemics; (c) war, invasion, hostilities (whether war is declared or not), terrorist threats or acts, riot or other civil unrest; (d) government order, law, or actions; (e) embargoes or blockades in effect on or after the date of this Agreement; (f) national or regional emergency; and (g) other similar events beyond the reasonable control of the Impacted Party.

Force Majeure Clause Excluding Future COVID-19 Related Causes

- The parties acknowledge and agree that the current outbreak of the novel coronavirus pandemic and the disease caused by it (COVID-19), which has caused the shutdown and shelter-in-place Orders issued by the Commonwealth of Pennsylvania through the Effective Date (and any subsequent date resulting from any continuation, extension or restatement of such shut down and shelter-in-place Orders), shall not be a Force Majeure event, and the parties have considered the effects on the parties, including, but not limited to, possible supply chain disruptions and possible labor shortages that may result from the current outbreak of the pandemic and the parties each acknowledge that it has adequate resources to perform their obligations under the Agreement irrespective of the occurrence of such pandemic.

Takeaways from Today

- Force majeure may be available, but the threshold is high.
 - Read your contracts.
 - Conduct a fact specific analysis
 - Mitigation matters
 - Document everything
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- Remember – Your end goal is to be able to continue operating after the pandemic is over

Please feel free to reach out to us if you have any further questions:

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