

COVID-19 and Force Majeure



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Force Majeure

- ▶ An event beyond a party's control prevents their performance
- ▶ Is COVID-19 a force majeure event?
 - ▶ Is it specifically listed? (I.e., pandemic, epidemic, public health emergency)
 - ▶ Is it covered by general wording? (acts of God, acts of government, circumstances beyond the parties' control)
- ▶ Issues to consider:
 - ▶ Foreseeability
 - ▶ Causation - causal link between pandemic and inability to perform
 - ▶ Duty to mitigate - can performance occur with reasonable mitigation?
 - ▶ Notice and response - timeliness, proper address, delivery method
 - ▶ Choice of law, forum selection, dispute resolution clauses

Impossibility/Impracticability

- ▶ Defense to breach of contract/excuse for nonperformance
- ▶ Performance rendered impossible or highly impracticable by an unforeseen supervening event.
 - ▶ “Highly impracticable” means that performance can be done only at an excessive and unreasonable cost.
 - ▶ A “supervening event” is an unforeseen event that creates a major change in the expected circumstances.
 - ▶ Examples of supervening events supporting the defense of impossibility/impracticability include:
 - ▶ Death of a necessary party;
 - ▶ Destruction of essential property;
 - ▶ Unforeseen change of law, act of God

Frustration of Purpose

- ▶ Defense to breach of contract/excuse for nonperformance
- ▶ Are the circumstances a supervening event, unforeseen at the time the contract was entered into?;
- ▶ Did the circumstances arise through no fault of the nonperforming party?;
- ▶ Have the new circumstances rendered the original purpose of the contract useless?