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COVID-19 and Commercial Disputes: Some Practical Considerations



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The COVID-19 pandemic is impacting all sectors of the economy. Businesses and organizations are facing multiple challenges involving potential business interruption, financing needs or workforce concerns. Another major problem to come will surely involve disputes over current contractual relationships.

As contracts are disrupted by the pandemic and its related consequences, *force majeure* (or “Act of God”) clauses will become important. These clauses are meant to address unforeseen situations that prevent performance of contractual obligations.

While most contracts include such clauses, they can vary in a number of ways. Some clauses may specify application to “disease,” “epidemic,” “national emergency” or “state of emergency” while others do not. The party attempting to invoke such a clause will typically have the burden of demonstrating its application – namely, that this pandemic was unforeseeable at the time the parties executed the contract and that, but for the pandemic, the party would have been able to perform its obligations.

If the agreement lacks a force majeure clause, in many jurisdictions the doctrine of “contractual frustration” may provide relief for a party that finds itself unable to perform its obligations. Typically, the party will have to show that a truly unexpected event has made it physically or commercially impossible to fulfill the agreement. This defense may be difficult to prove, as its application often depends on the specific circumstances of the contract at issue.

In addition to disrupted contracts, businesses and organizations that remain in operation and open to the public during the pandemic may also face a surge of personal injury claims in the aftermath of the coronavirus. While the defense of such claims may be covered under commercial general liability or other insurance policies, one can anticipate that many insurers will certainly struggle with the impact of the pandemic as well.

Some practical tips either to help avoid disputes or assist in preparing for them:

- You may wish to contact your insurance broker and review your insurance policies for coverage for business disruption, personal injury claims or other harms arising from the pandemic. File any claim(s) with your insurers as promptly as possible.
- Examine your current contracts carefully, making sure to take note of any notice and mitigation requirements in your force majeure clause. Many contracts will have requirements for giving notice to your counterparty.
- If you are entering any commercial agreements during this time, consider how the current disease and future epidemics could affect your agreement. Consider the language of your force majeure clauses carefully and use the opportunity to prepare for a similar situation in the future.

If you have any questions concerning current or potential disputes or how to take steps to avoid them, please contact any of the members of our [Litigation Practice](#).