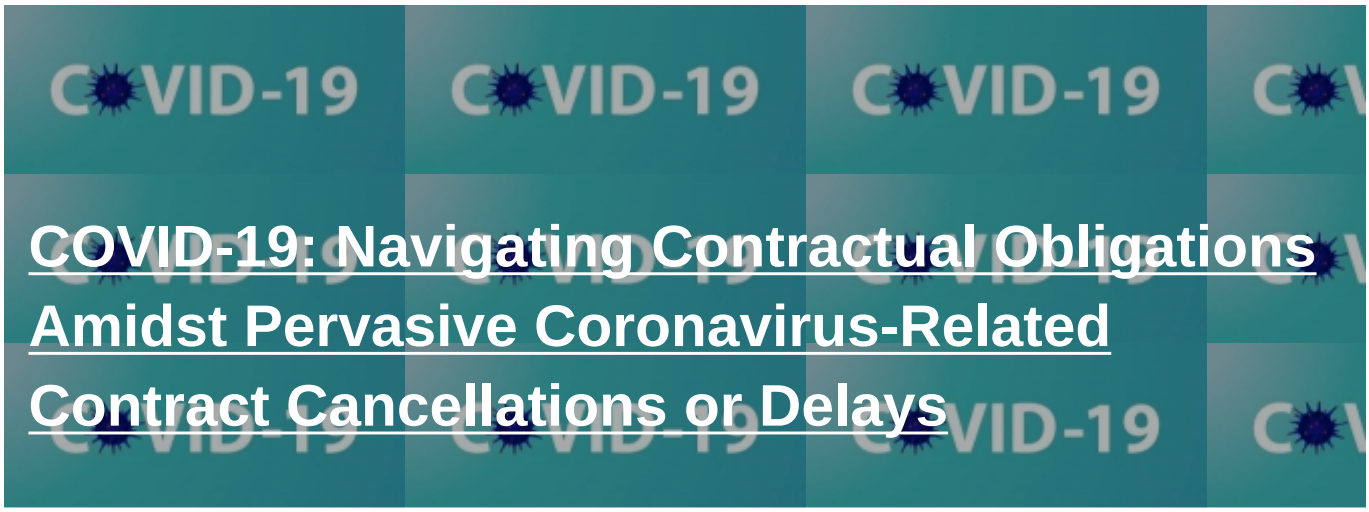

COVID-19: Navigating Contractual Obligations Amidst Pervasive Coronavirus-Related Contract Cancellations or Delays

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The COVID-19 (“Coronavirus”) fallout has already presented a number of challenging legal issues. With the impact of the virus becoming more widespread, and federal, state, and local authorities taking various measures to attempt to limit the spread, many events, conferences, meetings, and other public gatherings have been cancelled or are in jeopardy of cancellation in the near future, and some businesses are being forced to temporarily shut down operations. Meanwhile, many businesses find themselves in the position of assessing their potential liability if they are not able to perform their contractual obligations due to such Coronavirus-related consequences, which turns, in part, on the language in the contract at issue.

How do parties to a contract address contractual obligations in the wake of an unexpected occurrence? Many businesses allocate the risk for unanticipated business interruptions or supervening events, like the Coronavirus, in their contracts. If you are considering avenues for recovery against a breaching party, are seeking to excuse contractual performance, or are defending against a breach of contract claim related to a Coronavirus-related cancellation or delay, there are several issues that likely must be considered.

Force Majeure Clauses

One important consideration is whether the contract at issue contains a Force Majeure clause. A Force Majeure clause is a common contractual provision that works to mitigate the negative effects and allocate risk if contractual performance becomes impossible, commercially impracticable, illegal, or inadvisable as the result of an event or other occurrence that the parties could not have anticipated and that was not within the parties’ control. Depending upon the language in a given Force Majeure clause, the clause may be a valuable resource in addressing whether contractual performance is likely to be excused due to the effects of the Coronavirus and resulting cancellations. In some instances, a Force Majeure clause will excuse the performance of a party to the contract.

The applicability of a Force Majeure clause could hinge on how the contract defines Force Majeure

events, i.e., does the contract carefully define Force Majeure events, or is a Force Majeure event defined broadly? Some courts construe these clauses narrowly, only excusing performance in limited situations or as strictly defined by the Force Majeure clause. Other courts will consider the factors related to the event causing the cancellation or non-performance of the contract in deciding whether the contract performance is excused.

Ideally, for a party who seeks to excuse its performance under a contract due to a Coronavirus-related cancellation, the Force Majeure clause will include a specific reference to epidemics or pandemics in its definition of the events that trigger the Force Majeure clause. Otherwise, companies may be forced to rely on commonly-used language that generally and broadly defines a Force Majeure event as an Act of God, exceptional event, event beyond a party's control, or an unavoidable event not attributable to the other party. If such general language is used in a contract, a dispute over the applicability of the Force Majeure clause is more likely to ensue between the parties.

Remedies in the Absence of a Force Majeure Clause

If the contract at issue does not contain a Force Majeure clause or a separate clause that excuses contractual performance due to a Coronavirus-related cancellation, the party seeking to avoid performance may be forced to consider and rely on various common law defenses to avoid its contractual obligations, including but are not limited to:

• impossibility of performance (Kansas and Missouri recognize this defense);
• commercial frustration (Kansas and Missouri recognize this defense); and
• impracticability of performance (Kansas recognizes this defense).

Liquidated Damages

The presence of a Force Majeure clause in a contract may help to defeat a party's claim for liquidated damages for non-performance of contractual obligations. But fights over contractually-specified liquidated damages are certain to abound as cancellations continue to occur as a result of the current pandemic. This is especially true as it relates to contracts without Force Majeure clauses. Many states (including Kansas and Missouri) enforce liquidated damages clauses, assuming the designated liquidated damages amount is reasonable. Generally, a liquidated damages clause will be enforced if: 1) damages are difficult to estimate at the time of contracting; and 2) the liquidated damages amount is reasonable and is not, in essence, a penalty imposed upon the breaching party. Thus, being able to successfully invoke a Force Majeure clause to excuse a party's contract performance can have significant, positive financial ramifications for the non-performing party.

Conclusion

The global effects of the Coronavirus pandemic has spawned, and will continue to spawn, many legal battles, some of which are sure to relate to the issues discussed in this article. Properly and timely dealing with these issues will require consideration of the specific circumstances, the specific location(s) in which a company operates, and the specific language used in the contract at issue, among many others. If you have cancelled or delayed performance under a contract due to the Coronavirus pandemic, are considering doing so, or are involved in a dispute arising from such a cancellation or delay, consult an attorney at Seigfreid Bingham to evaluate your options and potential liability.

This article is general in nature and does not constitute legal advice. Readers with legal questions should consult the authors, Curry Sexton (csexton@sb-kc.com) or Brenda Hamilton (bhamilton@sb-kc.com), or your regular contact at Seigfreid Bingham at 816-421-4460. For the latest updates from Seigfreid Bingham, please visit our COVID-19 Resources page.