

Contract Performance Checklist: Excusable Performance

The following Checklist may be used by companies to determine whether contract performance may be excusable due to an unforeseen supervening event such as the COVID-19 outbreak. This Checklist addresses initial considerations, gathering information, and common issues to analyze as part of this assessment. Please note that any assessment requires consultation with counsel and should never be solely relied upon for the purposes of taking a position that may have legal consequences.

Determine Impact and Assessment of Supervening Event

- What is the nature of the supervening event? How can it be described?
 - With respect to the COVID-19 outbreak, the supervening events could include the occurrence of an epidemic or pandemic but also federal and state governmental action. For example, forced governmental “stay at home” orders may impact contract performance by governmental action.
- Determine the impact on a company’s contractual performance: How can it be described?
 - How has the supervening event made contract performance more costly or difficult? or
 - Has it made contract performance impracticable because operations have been materially impacted due to reduced workforce numbers (e.g. social distancing) or due to mandatory governmental actions such as business closings or stay-at-home orders)? or
 - Has it made contract performance impracticable because current suppliers and vendors and other potential suppliers or vendors are also shut down or have reduced supplies or raw materials available? or
 - Has it made the whole purpose of the contract impracticable?
- Gather available information that supports the supervening event’s impact on a company’s contract performance.
- Pull all contracts in which contract performance has been impacted due to the supervening event and carefully review them.
 - Separate contracts into two categories:
 - Contracts with specific Force Majeure clauses or provisions; and
 - Contracts that are silent or do not address force majeure or supervening events that are impacting contract performance.

Contracts with Force Majeure Provisions

- Is there a specific “Force Majeure” clause in your outstanding contracts in which performance has been affected?
- What Force Majeure Events are specifically listed, and does it include references to “epidemics,” pandemics,” or “governmental actions”? If no specific exclusion applies, is there a catch-all provision contained in the clause or provision and does it refer to events outside of each party’s control?
- What are the notice requirements set forth under any specific Force Majeure provision? For example, does the party claiming a Force Majeure have to estimate how long the delay will last or what mitigation steps have been taken? Has notice been delivered? Has notice been delivered as required by the contract?

Establishing Statutory or Common Law Defenses

- Is the contract at issue one involving services, goods or real property?
- With respect to the contracts involving the sale of goods or Article 2 of the Uniform Commercial Code:
 - Is there language intended to exclude the UCC’s gap-fillers?
 - Was the non-assumption of the supervening event a basic assumption of the parties’ agreement? Generally, parties don’t anticipate pandemics.
 - Has this obligation or risk of the occurrence of the supervening event been assumed?
 - Has the affected party provided seasonable notice and has the party made a fair and reasonable allocation of available goods to its customers?
 - Is the affected party a buyer or seller? Some states permit buyers to claim commercial impracticability but are very state and fact specific.
- With respect to contracts involving services:
 - Was the supervening event unexpected or was it simply not reasonably foreseeable at the time the contract was signed or executed?
 - Due to the supervening event, contract performance has become extremely difficult or burdensome.
 - The risk of the supervening event was not assumed by the party seeking to be excused of its contract performance.

Consult with Counsel as Early as Possible

- Due to the risks involved in seeking to establish a defense under a Force Majeure clause or provision or seeking to utilize any statutory or common law defense of commercial impossibility, commercial impracticability or frustration of purpose, contacting and consulting with counsel as early as possible is key. Too many factors the legal importance of which may be missed by the officers or managers of your business can greatly affect a company’s ability to utilize or react to the defenses discussed above.
- Note that due to email, conference calling, and scanning, the contacting and consulting with counsel does not necessarily require face-to-face meetings. Don’t wait to reach out to counsel to discuss any impacted contractual performance issues.