

## COVID-19's Effect on Your New York Contracts

The novel coronavirus ("COVID-19") pandemic has created economic hardships for businesses and individuals that have and will continue to affect contractual obligations. New York law provides several defenses to fulfilling your contractual obligations that may be available during this time. In some situations, invoking these defenses may temporarily suspend or eliminate performance obligations, while in others they may terminate the contract. CBMS can advise you on strategies to address potential breaches, either through renegotiating contracts or in litigation, if negotiation strategies fail.

### Review Contracts

The place to start is to review your contracts for provisions that may excuse failure to perform or provide other alternatives to timely performance. These provisions may have notice requirements, which are important to be aware of early.

### *Force Majeure*

Your contract may include a "*force majeure*" (or "Act of God") provision that may protect parties if events beyond their control, such as wars, floods, earthquakes, or travel bans, make it impossible to perform contractual obligations. In New York, contracts must explicitly include a *force majeure* provision to be able to use this doctrine.

New York courts typically interpret *force majeure* provisions narrowly. If the provision lists specific events, courts will excuse performance only if one of these events occurred. If your contract includes a *force majeure* clause that lists "pandemics," "epidemics," "viral outbreaks," "quarantines," "travel bans," or other similar terms, it may be possible to use it to excuse or delay performance of contractual obligations as a result of COVID-19.

If your contract includes a *force majeure* clause, you must also be prepared to show that COVID-19 made it impossible for you to perform and that you made reasonable efforts to avoid failure to perform but were unsuccessful. You may also have to show that COVID-19 was unforeseeable at the time you entered the contract. Therefore, if you entered the contract after COVID-19 had become a global pandemic, it may also be difficult for you to use this provision.

There are several other defenses that may excuse potential breaches in New York.

**Termination:** Some contracts include provisions that allow a party to terminate the contract under certain circumstances. These provisions may apply in the COVID-19 pandemic.

**Extension of Time:** Your contract may include provisions that permit extensions of time if unexpected events occur. Even if your contract does not, it may be worthwhile to try to negotiate in good faith an extension with the other party if performance will become possible when the effects of COVID-19 lessen. These negotiations may help you avoid litigation.

## Explore Your Other Options

If your contracts do not include the clauses discussed above, or if the clauses are ambiguous or inapplicable, you may still have options. New York courts have created certain defenses that, while not contained within the four corners of the contract, may be used to try to avoid liability for breach of contract: Frustration of purpose, impossibility, or impracticability.

**Frustration of purpose** excuses failure to fulfill contractual obligations when an unforeseen event makes a contract virtually worthless.

**Impossibility** excuses breach of contract when an unanticipated event destroys the subject matter or the means of performance of the contract such that performance is objectively impossible.

**Impracticability** under the Uniform Commercial Code may be used if the contract is for the sale of goods and a contingency occurs that makes performance impracticable and the nonoccurrence of the contingency was a basic assumption of the contract.

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