

Terminating Contracts or Excusing Performance Due to the Pandemic

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What we will cover

- 1. Legal Theories that May Excuse Performance or Permit Termination of Contract Altogether**
- 2. Pitfalls - Being Careful to use the Right Language**
- 3. Strategies and Considerations**
 - a. Should you seek termination or excusal of obligation?**
 - b. Plan B if termination/excusal of obligation is not an option under the circumstances**

1. Legal Theories that Might Permit Penalty-Free Termination of Contract or Excusal of a Contract Obligation

- **“Force Majeure” Clauses in Contract**
- **Common law doctrines that May Apply:**
 - **Commercial Frustration (aka Frustration of Purpose)**
 - **Impossibility of Performance**
 - **Impracticability of Performance**

NOTE:

1. **Simple inability to pay is usually not enough,**
2. **These doctrines are not designed to get you out of a bad deal.**

Force Majeure (Superior Force)

- ▶ Clause contained in some contracts - so its an actual term of your contract.
 - ▶ If you don't have this clause, you cannot invoke "force majeure" to terminate contract
 - ▶ Interpreted strictly.

Force Majeure. If the performance by either party of any obligation under this Agreement (other than any payment obligation) is directly delayed or prevented in whole or in part by any cause not reasonably within its control (including, without limitation, acts of terrorism or unavailability of transportation that prevents the occurrence of your meeting or at least 50% of your attendees from attending your meeting; acts of God; war; civil disturbances; accidents; or labor disputes; but excluding, if you are booking your meeting hereunder for a third party, any cause within that third party's control), it will be relieved of performance of such obligation (and the other party will be relieved of its obligation to pay for such performance) to the extent such performance is so directly delayed or prevented, without liability of any kind (and if your meeting cannot be held due to any such cause you will not be liable to us for any cancellation fees and we will promptly refund you any amounts you paid us for services or products not provided). Nothing in this Agreement will be construed as requiring either party to accede to any demands of labor or labor unions, suppliers or other entities that it considers unreasonable.

Example - Detailed

I. Force Majeure. If MAI or the Charterer is rendered unable, wholly or in part, by Force Majeure (the party which is so rendered unable is referred to herein as the "Affected Party") to carry out its obligations under this Agreement, other than the obligations to make money payments, such party as is prevented from performing shall be entitled to cancel, with such notice to the other party as is reasonable under the circumstances, any and all flights affected by such Force Majeure without being subject to or responsible for any penalties or damages for such cancellation. Furthermore, the obligations of Affected Party, so far as they are affected by the Force Majeure, shall be suspended during the continuance of the Force Majeure. The Affected Party shall give the other party such notice as is reasonable under the circumstances of the nonperformance and shall use commercially reasonable efforts to remove the Force Majeure with all reasonable dispatch but shall not be required to settle strikes, lockout, or other labor difficulty contrary to its wishes and in its sole discretion. The term "Force Majeure" shall mean any event which is not reasonably within the control of the parties hereto which would prevent such party from fulfilling its obligation under this Agreement, including but not limited to acts of God, strike, lockout, or other industrial disturbance, act of the public enemy, war, blockade, public riot, lightning, fire, storm, flood, explosion, governmental restraint, and any otherwise. Without limiting the generality of the foregoing, MAI shall not be liable

Frustration of Purpose

- Common law “gap filler” if contract does not have force majeure clause (or as an additional reason to support termination or suspension of obligation)
- Frustration of Purpose exists if intervening circumstances destroy the reason for a contract due to no fault of either party.
 - E.g., planning on travelling to Florida in mid-April for a group business meeting at Walt Disney
 - Executive orders require Walt Disney theme parks to close for the month of April.
 - Purpose of the hotel contract - group meeting at Walt Disney to also enjoy theme parks - has been frustrated even if group can still technically pay and hotel could still technically provide rooms.

Impossibility of Performance

- Everyone's **counting** on a **certain thing** for the contract
- Something **unforeseen** happens to that thing
- Makes it **impossible** to perform the contract

Examples of Performance

Painting contract

House burns down

Painter excused from painting house

Other example

Impracticability of Performance

- Everyone's **counting** on a **certain thing** for the contract
- Something **unforeseen** happens to that thing
- Makes it **impractical** to perform the contract (not totally impossible)

Examples of Impracticability

Construction contract

DPW cancels jersey barriers mid-contract

General contractor is excused from buying more jersey barriers from concrete subcontractor

Other example

2. Pitfalls in invoking one of these theories

- ▶ What law applies to your contract? (Most states recognize these theories, but there can be nuances in how they are applied.)
- ▶ “Cancellation” v. “Termination” or “Excusal of Performance”
 - ▶ Beware of terms that may be defined in your contract. Saying that you are “cancelling” may invoke a cancellation clause that allows the other party to claim contractual damages.
 - ▶ Make clear that you are invoking one (or more) of the 4 doctrines to terminate the contract completely or excuse performance.
 - ▶ Give prompt notice
- ▶ If you breached the contract prior to the event giving rise to the hardship, you cannot use these theories to get out of your prior breach.

3. Practical Strategies

First, do any of the legal theories apply to your circumstances?

- Is “pandemic” listed as a force majeure event in your contract?
- Does pandemic affect the purpose of the contract, temporarily or permanently?
 - If temporary, may excuse performance temporarily
- Does pandemic affect the ability to perform the contract?

Just because you can doesn't mean you should...

- Do you want to keep a relationship with other party?
- How much is at stake?
 - Litigation can be expensive
 - Does breach of this agreement affect other contracts?
- Will pressing a breach of contract claim cause the affected party to file for bankruptcy protection?
- Are there others who can provide the same goods/services/etc. or is it better to deal with party claiming hardship due to the pandemic?
 - E.g., desire for specific wedding venue originally planned for April, but could be rescheduled for July - is it better to wait until later?
- Will there be negative publicity generated by taking a hard line that could affect your business?

- **If legal theories are not going to apply, doesn't hurt to negotiate:**
 - **Negotiate forbearance agreements**
 - **Extend time to perform contract**
 - **Negotiate new terms that provide a benefit to the party seeking to enforce the contract**