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INTERNATIONAL BUSINESS ATTORNEYS

5 Things to Know About Contracts in the Age of COVID-19

Anyone who's been conscious this year is well aware of the toll COVID-19 has taken on the entire world. In addition to the millions of deaths worldwide, one of the more insidious effects of the outbreak is the havoc it's wreaking on just about every industry, private or public notwithstanding. COVID-19 has damaged every part of the production process, including global manufacturing, cross-border supply chains, and transportation.

Unsurprisingly, hundreds of companies have had to invoke the otherwise-forgotten *force majeure* clause in their business contracts, or a clause that invalidates a contract in light of unforeseen and unstoppable circumstances. But what are some other ways COVID-19 has significantly changed the nature of business contracting?

Read on to find out.

1. Handling the Aftermath of a Force Majeure Invocation

Like we mentioned above, 2020 could be the year that's seen the most force majeure invocations ever. But just because you have this clause in your business contract doesn't necessarily mean you'll get out of jail free. Depending on how the clause is written, it may not protect your force majeure rights in certain events. What's more, a force majeure invocation may be a bit premature if you or your company is not necessarily prevented from performing at semi-normal capacity.

What happens if you're on the receiving end of such a notice? First, ask yourself some pertinent questions. Does the force majeure clause of your contract cover pandemics? Does

the event specifically prevent you from performing the business duties that were promised in your contract? Does the force majeure clause specifically exclude the performance of these events? Was the force majeure notice sent within the specified time frame? Does this clause even have a time frame in your specific contract?

It's important to seriously examine these questions and their answers, as you may be able to seek legal recourse in light of a deficient force majeure clause.

2. Dealing With Termination Clauses

Unfortunately, the pandemic is not reason enough alone to terminate a contract without the proper legal language in your contract. Your contract will still need to contain specific language that allows you to opt out early in light of a serious, unforeseen event, similar to force majeure clauses.

Because of how uncertain this year has been, many companies are beginning to draft variation clauses in their contracts, the terms of which can change significantly according to the global business climate. However, many people are naturally a bit reluctant to sign these types of contracts, as they don't know if they'll be able to comply with the scope of the terms.

But a variation clause will prevent the immediate need to terminate a contract if one of the parties cannot perform their duties as a result of COVID-19. Keep in mind, though, that there's no one way to write a variation clause; it will take extensive negotiation between both parties so that the clause specifically addresses the needs of each.

3. Modifying Preambles to Protect Yourself

Think of preambles as the introduction to a contract; it outlines the parties involved, the dates of validity for the contract, and what they parties hope to achieve by entering into a contract together.

But did you know you can modify the preamble to protect yourself in events like COVID-19?

It's true. In this modified preamble, you can include a 30-day closing date extension, possible virus-related service interruptions, and a paragraph giving the other party the freedom to cancel the contract if banks refuse to give them a loan as a result of the pandemic. However, be wary of one-size-fits-all language; given the pitfall-ridden nature of contracting, you'll want to make sure both parties extensively negotiate the language with each other, so that the contract itself can be watertight.

4. Watch Out for the Material Adverse Effect (MAE) Clause

It's probably no surprise to anyone that companies across the world are now including pandemic-specific language in their MAE clauses. However, including this language isn't enough to prevent interpretation disputes, or prevent the disputes from ever happening in the first place.

Mostly, these entanglements happen when parties can't agree on what the provisions of the MAE clause actually cover. For example, some companies have amended their MAE clauses to include pandemics, while others include COVID-19 specifically.

At the end of the day, it's better to make sure all parties are on board with what your newly-amended MAE clause means, so that you can all avoid drawn-out legal headaches in the future. Otherwise, don't be surprised if one of the parties in the contract tries to argue their way out of a contract simply because there was a difference in understanding what the MAE clause meant.

5. The Need for Speed in a COVID-Ruled Legal System

Like just about every other aspect of society, COVID-19 has significantly slowed down courts of all kinds. Between postponed jury trials and virtual sentence hearings, things just aren't nearly as streamlined as they used to be. Of course, this slower pace may be a problem when trying to draft or amend a legally-binding business contract.

You'll have to think quickly when it comes to drafting or amending a business contract right now; usually, it means taking whatever the courts can offer you in terms of a hearing, be they in person or over video call. You might make your case stronger by stressing that the matter at hand is an emergency, even despite the insanity of the pandemic.

Our newly-restricted legal system has given business owners and entrepreneurs an incentive to obtain preliminary relief, or a special court order that gives parties permission or prohibits them from committing certain acts. Normally, courts are reluctant to expedite cases, but with the number of backed up cases growing exponentially, judges may have no choice but to speed a number of them along.

For example, if a party wants to prevent another party from terminating a contract early, they'll need to seek a temporary restraining order from the court once it becomes obvious that a resolution can't be reached out of court. Failing to do so quickly may undermine any irreparable harm claims you make later. On the contrary, parties who've had a temporary restraining order filed against them will need to be fast when petitioning the court to dissolve this order.

Contracts in a Post-COVID World

It's hard to say when the pandemic will officially end, much less when the world will stop feeling its myriad repercussions. As for contracting, it's likely that this pandemic will fundamentally shape the way we perceive and design legally-binding contracts. Working with an experienced contracting attorney is one of the best ways you can ensure that you avoid any pitfalls moving forward.

Navigating the ins and outs of rapidly-changing contract laws is a headache, so why do it alone? Our team of seasoned, empathetic contracting lawyers here at the Cueto Law Group can help guide you every step of the way, while also answering your most pressing questions and concerns. We've helped hundreds of clients draft, amend, and dissolve contracts in light of the COVID-19 pandemic, and we'd love for you to be our next success story. To learn more about how we can help you, give us a call at 305-777-0377 today.