COVID-19 Impacts and a Potential Avenue for Contract Relief

As the impacts of the COVID-19 virus spread and more businesses begin slowing or ceasing operations, some by government order, others voluntarily, many businesses are left wondering whether their contracts contain any avenue to excuse their non-performance during the emergency. Most turn immediately to the "force majeure" provisions, hoping to find relief. We have received numerous inquiries from our clients over the past days regarding force majeure clauses. The force majeure term generally lives among the boilerplate terms of a contract, and may not have been heavily reviewed or discussed (if at all) by the parties during contract negotiation. Accordingly, most force majeure provisions take a generalized catch-all approach, which could potentially benefit such an unusual situation as the COVID-19 pandemic.

From a general standpoint, the concept of force majeure is intended to excuse the performance of one or both parties to a contract when that performance is prevented or delayed by some event outside of the control of the performing party. The basic idea is that if a party cannot avoid, prevent, or overcome the occurrence of an event or circumstance that was not foreseen or foreseeable at the time of contracting, the affected party should be excused from any delay that is caused or, in some cases, the party may be excused from performing altogether. In practice, however, the exercise becomes more complicated. Force majeure provisions, like all other provisions in a contract, are subject to negotiation, and

while the basic idea remains as described above, the application of this idea in each contract can vary widely. For instance, the term may only protect one party, it may have strict notice requirements, or it may be limited to a specific set of enumerated circumstances. The devil is truly in the details.

Unfortunately, the inquiry does not stop there. Assuming that the force majeure provision in your contract applies to your performance and encapsulates the effects of the COVID-19 virus, the critical question remaining is whether your performance is actually prevented by this emergency. Some cases may be clearer, such as when your business is ordered by a local, state or federal agency to cease operations. However, many businesses have not yet received such an order, meaning their cases for force majeure relief are murky.

In either case, the two key factors to consider are (1) what type of performance is required and (2) is the direct cause of non-performance outside of the party's control? The answers to these questions are, unsurprisingly, dependent on the particular circumstances of each case. Some businesses may be directly prevented from performing under one or more contracts. Many businesses, however, may be left in a tough position where performance is possible, but is neither advisable nor profitable. While there may be other avenues for relief in certain circumstances, the best course of action in this situation may be to open a dialogue with your counterparty with the goal of clarifying (and properly documenting) that that anticipated impacts of the COVID-19 emergency will be treated as force majeure impacts.

As mentioned above, the impact, and potential avenues for contractual relief, arising from the COVID-19 emergency will depend greatly on the particular facts of each situation and, as is generally the case, there is no one-size-fits-all solution. In order to discuss the impacts of the COVID-19 emergency or the particular circumstances of your company's

situation, please contact one of the corporate and transactional attorneys at GreeneHurlocker.