

Insights



Martin De Luca Talks Force Majeure and New York Law with Law360

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Kobre & Kim's Martin De Luca sat down with Law360 to discuss the coming coronavirus-related litigation centered on force majeure clauses, which can excuse businesses from their contractual obligations due to "acts of God" or events outside their control.

The ongoing pandemic has increased the likelihood of disputes between businesses over failure to perform contractual obligations, but force majeure clauses may help defendants prevent a negative outcome. As the pandemic is "unlike any situation we've seen in our lifetimes," there may be new uncertainty regarding the scope of force majeure, but New York law governs many international business contracts and courts there will define those force majeure clauses narrowly.

As a result, businesses declaring force majeure face an uphill battle, having to prove that there was no way they could perform their contractual obligations, not that it was merely difficult or financially burdensome to do so. "Was there a pandemic? Yes. But that's not the end of the analysis," De Luca said. "It may drive you into bankruptcy, but under a force majeure analysis a court may find that you still have to perform." Businesses declaring force majeure therefore have to prepackage their defense "by documenting the facts very carefully."

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