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Practice Update

The Coronavirus and Force Majeure Clauses in Contracts

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Across the globe, businesses are experiencing issues with productivity due to employees being self-quarantined to prevent risk of exposure to the coronavirus (COVID-19), and due to facilities being shut down in an attempt to slow the virus' spread. In light of this, many businesses are now seeking to determine whether they are obligated to perform under their contracts, or whether they can invoke a force majeure clause to excuse performance temporarily or even permanently. Below, we review force majeure, how it can apply in various jurisdictions, the analysis companies must undertake before invoking it, and the options available in lieu of force majeure.

Force Majeure Clauses Generally

A force majeure clause is a contractual provision which excuses one or both parties' performance obligations when circumstances arise which are beyond the parties' control and make performance of the contract impractical or impossible.[1]

Force majeure events typically enumerated in contracts include:

1. acts of God, such as severe acts of nature or weather events including floods, fires, earthquakes, hurricanes, or explosions;

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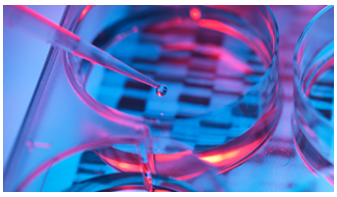

2. war, acts of terrorism, and epidemics;
3. acts of governmental authorities such as expropriation, condemnation, and changes in laws and regulations;
4. strikes and labor disputes; and
5. certain accidents.[2] Economic hardship typically is not enough to qualify as a force majeure event on its own.[3]

Determining whether a force majeure clause can be invoked is a fact intensive inquiry, as it depends on the specific language of a contract. Generally, force majeure clauses are interpreted narrowly.[4] "[T]he general words are not to be given expansive meaning; they are confined to things of the same kind or nature as the particular matters mentioned."[5] Force majeure clauses are interpreted in light of their purpose, which is "to limit damages in a case where the reasonable expectation of the parties and the performance of the contract have been frustrated by circumstances beyond the control of the parties."[6] "[W]hen the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure."[7]

State Specific Requirements for Force Majeure Clauses: New York, Florida, California, Texas, Illinois

Under New York law, a key issue in determining whether a party can successfully invoke a force majeure clause is whether the clause lists the specific event claimed to be preventing performance.[8] As noted previously, some force majeure clauses list "epidemics" or "pandemics" as force majeure events. The CDC defines an epidemic as an outbreak of disease that infects communities in one or more areas, and a pandemic is an epidemic which spreads across the globe. If a contract at issue lists epidemics or pandemics as a force majeure event, the claiming party could argue that the coronavirus qualifies in

light of the fact that is has been officially declared a pandemic by World Health Organization.

If a force majeure clause does not list epidemic or pandemic as a triggering event, it is possible that the coronavirus could be covered as an act of governmental authority in some areas, given that many governments, including the United States government, have instituted lockdowns to prevent the spread of the coronavirus.

If a listed force majeure event occurs, however, there is still further analysis required to determine whether invocation will be successful. In New York, the force majeure event must be unforeseen, and the party seeking to invoke the force majeure clause must attempt to perform its contractual duties despite the event.[9] However, some jurisdictions, including Texas, do not require that the force majeure event be unforeseeable.[10]

Under Florida law, a party seeking to invoke a force majeure clause must show that the force majeure event was unforeseeable, and that the force majeure event occurred outside the party's control. This means that the claiming party must show that the event could not have been prevented or overcome, and there additionally cannot be any fault or negligence on the part of the claiming party.[11]

In California, force majeure is not necessarily limited to the equivalent of an act of God, but the test is whether under the particular circumstances there was such an insuperable interference occurring without the party's intervention as could not have been prevented by the exercise of prudence, diligence and care. *Mathes v. City of Long Beach,* 121 Cal. App. 2d 473, 477, 263 P.2d 472, 474 (1953). Even in the case of a force majeure provision in a contract, mere increase in expense does not excuse the performance unless there exists extreme and unreasonable difficulty, expense, injury, or loss involved. *Butler v. Nepple*, 54 Cal. 2d 589, 598, 354 P.2d 239 (1960)

Under Texas law, unless expressly included in a contract, parties seeking to invoke a force majeure clause to excuse non-performance are not required to exercise reasonable diligence to perform or overcome the force majeure event.[12] If the parties contracted for this, however, determining whether a party exercised reasonable diligence is fact intensive, and must be assessed on a case-by-case basis.[13] "Reasonable diligence" is defined under Texas law as "such diligence that an ordinarily prudent and diligent person would exercise under similar circumstances.[14]"

On the other hand, under Illinois law, there is an implied duty on the claiming party to make an effort to attempt to resolve the event causing delay or inability to perform under the contract before invoking a force majeure clause. This duty is "related to the duty of good faith [and] is read into all express contracts unless waived."[15]

Some contracts additionally require that the claiming party give the other contractual parties notice before invoking a force majeure clause. If the claiming party does not give proper notice as set forth in the contract, it could preclude successful invocation of a force majeure clause.

Businesses seeking to invoke the force majeure clause of their contracts likely have a strong argument that the coronavirus outbreak is an unforeseen event, unless the parties entered into the contract after the outbreak of coronavirus. Whether businesses have also attempted to perform their contractual duties despite the coronavirus outbreak, and whether that is even required under a particular contract are questions that must be assessed on a case-by-case basis.

Force Majeure Certificates

Of importance to note is that due to the extent of the coronavirus outbreak and the government-imposed lockdowns in China, a quasi-governmental agency

called the China Council for The Promotion of International Trade (CCPIT), backed by Beijing's Commerce Ministry, has been providing businesses in China with force majeure "certificates." CCPIT is issuing the force majeure certificates if businesses can provide documents proving that they cannot meet their contractual obligations due to the effects of the coronavirus.[16] Given this fact, if a business in China located in an area on government-imposed lockdown has a force majeure clause in a contract governed by Chinese law, the invocation of a force majeure clause may be successful.

Other Options: Impossibility/Impracticability and Frustration of Purpose

If a party is unable to successfully utilize a force majeure clause to excuse performance during the coronavirus outbreak, or if a contract does not contain a force majeure clause, other options may still potentially be available to excuse performance, such as the defenses of impossibility and impracticability.[17] The Uniform Commercial Code (UCC) provides that a seller is excused from performing under a contract when "performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid."[18] The Restatement (Second) of Contracts defines impossibility as "not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved."[19]

Given the fact that the governments of many countries, including the United States, have implemented lockdowns, businesses can argue that performance under their contracts is impracticable or impossible. In the United States in particular, a national state of emergency has been declared. The governors of California, Ohio, Illinois, Washington,

and Massachusetts have ordered that all bars and restaurants must close. The mayors of New York City and Los Angeles have ordered that all bars, restaurants, cafes, and theatres must close to slow the spread of coronavirus. Other cities and counties in the United States, including New Rochelle, New York, and the San Francisco Bay area are currently under similar government-imposed lockdowns as well. These factors support the possibility that businesses will be able to successfully utilize an impossibility/impracticability defense.

If a contract does not contain a force majeure clause, and an impossibility or impracticability defense fails, another possible defense for a party unable to fulfill its obligations under a contract due to the coronavirus is frustration of purpose. For the doctrine to apply, "the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense. "[20] Put differently, frustration of purpose occurs where "a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract."[21] Business should be mindful, though, that economic hardship such as an increase in the cost of performing under a contract is not enough to assert a frustration of purpose defense.[22]

Conclusion

The coronavirus is having a significant and harmful impact on businesses and their ability to perform under their contracts. However, whether a claiming party can successfully invoke a force majeure clause, an impossibility/impracticability defense, or a frustration of purpose defense in order to excuse performance due to the coronavirus is a fact intensive inquiry and must be assessed on a case-by-case basis. Contractual parties must look to the specific language of the contract, including the applicable law, to determine their likelihood of success.

[1] See Ner Tamid Congregation of N. Town v. Krivoruchko, 638 F. Supp. 2d 913, 931 (N.D. Ill. 2009), as amended (July 9, 2009).
[2] General Contract Clauses: Force Majeure, Practical Law Standard Clauses 3-518-4224; see also Kel Kim Corp. v. Cent. Markets, Inc., 70 N.Y.2d 902 (1987); Rochester Gas & Elec. Corp. v. Delta Star, Inc., 2009 WL 368508, at *2 (W.D.N.Y. Feb. 13, 2009).
[3] Sherwin Alumina L.P. v. AluChem, Inc., 512 F. Supp. 2d 957, 967 (S.D. Tex. 2007).
[4] Kel Kim Corp. v. Cent. Markets, Inc. 70 N.Y.2d at 902; see also Allegiance Hillview, L.P. v. Range Texas Prod., LLC, 347 S.W.3d 855, 865 (Tex. App.—Fort Worth 2011, no pet.).
[5] Kel Kim Corp. v. Cent. Markets, Inc. 70 N.Y.2d at 903 (citing 18 Williston, Contracts § 1968 (3d ed. 1978)); see also Wisconsin Elec. Power Co. v. Union Pac. R. Co., 557 F.3d 504, 507 (7th Cir. 2009).
[6] Constellation Energy Servs. of New York, Inc. v. New Water St. Corp., 146 A.D.3d 557, 558 (1st Dep't 2017) (quoting United Equities Co. v First Natl. City Bank, 52 A.D.2d 154, 157 (1st Dep't 1976), affd on op below 41 N.Y.2d 1032 (1977)).
[7] Constellation Energy Servs. of New York, Inc, 146 A.D.3d at 558 (quoting Route 6 Outparcels, LLC v Ruby Tuesday, Inc., 88 A.D.3d 1224, 1225 (3d Dep't 2011)); see also Allegiance Hillview, L.P. v. Range Texas Prod., LLC, 347 S.W.3d at 865; Sun Operating Ltd. P'ship v. Holt, 984 S.W.2d 277, 283 (Tex. App. 1998).
[8] Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl, 720 F. Supp. 312, 318 (S.D.N.Y. 1989) (citing Kel Kim Corp. v. Central Markets, Inc., 70 N.Y.2d at 902-03).
[9] See Rochester Gas & Elec. Corp. v. Delta Star, Inc., 2009 WL at *7; Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl, 720 F. Supp. at 318; see also Goldstein v. Orensanz Events LLC, 146 A.D.3d 492, 493 (1st Dep't 2017).
[10] See Perlman v. Pioneer Ltd. P'ship, 918 F.2d 1244, 1248 (5th Cir. 1990)("Because the clause labeled "force majeure" in the lease does not mandate that the force majeure event be unforeseeable or beyond

the control of [the non-performing party] before performance is excused, the district court erred when it supplied those terms as a rule of law."); See Sun Operating Ltd. P'ship v. Holt, 984 S.W.2d at 288 ("Indeed, to imply an unforeseeability requirement into a force majeure clause would be unreasonable.")
[11] Bloom v. Home Devco/Tivoli Isles, LLC, 2009 WL 36594, at *4 (S.D. Fla. Jan. 6, 2009) (quoting Florida Power Corp. v. City of Tallahassee, 18 So.2d 671, 675 (Fla. 1944)); see also Fru-Con Const. Corp. v. U.S., 44 Fed. Cl. 298, 314 (1999).
[12] See Sun Operating Ltd. P'ship v. Holt, 984 S.W.2d at 283-84.
[13] El Paso Field Servs., L.P. v. Mastec N. Am., Inc., 389 S.W.3d 802, 808 (Tex. 2012).
[14] Id. at 808-09.
[15] Commonwealth Edison Co. v. Allied-Gen. Nuclear Servs., 731 F. Supp. 850, 859 (N.D. Ill. 1990).
[16]https://www.reuters.com/article/us-china-health-trade/china-trade-agency-to-offer-firms-force-majeure-certificates-amid-coronavirus-outbreak-idUSKBN1ZU075
[17] Id. at 855.
[18] NY UCC § 2-615(a).
[19] Second Restatement of Contacts § 254.
[20] Crown IT Servs. v. Olsen, 11 A.D.3d 263, 265 (1st Dep't. 2004).
[21] PPF Safeguard, LLC v. BCR Safeguard Holding, LLC, 924 N.Y.S.2d 391, 394 (2011) (quoting Restatement (Second) of Contracts § 265, Comment a).
[22] A + E Television Networks, LLC v. Wish Factory Inc., 2016 WL 8136110, at *13 (S.D.N.Y. Mar. 11, 2016).
