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COVID-19, *Force Majeure* Clauses and Contractual Nonperformance

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March 23, 2020

As governments around the world work to contain the COVID-19 pandemic and the public is reintroduced to the phrase "shelter-in-place," another age-old term has quickly emerged as the clause *du jour* in commercial contracts: *force majeure*. French for "superior force," *force majeure* essentially nullifies the parties' contractual obligations and frees them from liability, but only upon the occurrence of an extraordinary event or circumstance beyond the parties' control.

In the face of challenging health and safety concerns, companies are taking a closer look at the *force majeure* clauses in their contracts to assess their obligations when nonperformance becomes an issue. This bulletin summarizes: (i) the factors courts often consider when deciding whether to enforce a *force majeure* clause; (ii) the steps to take when attempting to rely upon a *force majeure* clause; and (iii) key takeaways and other considerations when seeking to excuse nonperformance.

What Is a *Force Majeure* Event and When Will a *Force Majeure* Clause Apply?

Courts have defined *force majeure* as "an event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (*e.g.*, floods and hurricanes) and acts of people (*e.g.*, riots, strikes and wars)."[1] Notably, while "acts of nature" and "acts of God" are often used interchangeably in contracts and case law, there is scant authority as to whether an epidemic falls within either category, particularly when the *force majeure* clause does not specifically refer to it.[2] Rather, when deciding whether an event is such that a *force majeure* clause may apply to excuse a party's nonperformance, courts will frequently consider the following:

1. whether the language in the *force majeure* clause specifically references the event as beyond the parties' control;
2. whether the *force majeure* event was foreseeable; and
3. whether the *force majeure* event caused the party's nonperformance.[3]

While each of these factors is significant in its own right, equally as important are those factors that courts generally refuse to take into account when performing a *force majeure* analysis. For instance, courts refuse to consider adverse market conditions (even if sudden and unpredictable), a party's financial situation or other circumstances that may have made it difficult but not unforeseeably impossible for a party to perform under the contract. Even in cases of severe economic downturn, such as the economic crisis in 2009, or natural disasters, such as Hurricane Sandy, New York courts have refused to apply a *force majeure* clause because of financial difficulty or economic hardship, stating that the contracting parties bear this risk in commerce.[4]

Similarly, a breakdown in commercial negotiations does not constitute a *force majeure* event. In *Wuhan Airlines v. Air Alaska, Inc.*, Air Alaska attempted to excuse its failure to deliver an aircraft to Wuhan under a lease by relying on the lease's *force majeure* clause. However, the court pointed out that the clause excused performance for disasters such as explosion, sabotage, flood and other events resulting in destruction of the aircraft. The court held that a dispute between

the parties did not constitute an event specifically listed in, or even one similar to those listed in, the *force majeure* clause. Accordingly, the court ruled that the *force majeure* clause did not excuse Air Alaska's failure to perform.[5]

Additionally, a nonperforming party will have to demonstrate that it took reasonable steps to avoid or mitigate the *force majeure* event and its consequences. In that regard, courts will often consider whether there were any alternative means for the nonperforming party to satisfy its contractual obligations. This mitigation analysis largely depends on the facts and circumstances surrounding the contract, as well as each party's specific obligations under the agreement.

Relying upon a *Force Majeure* Clause

When a party seeks to rely upon a *force majeure* clause, the contract usually requires the nonperforming party to immediately notify the other party and provide a basis to show that the *force majeure* event caused an inability to perform the contractual obligation. Certain contracts may also include a term where a nonperforming party will be "time-barred" from relying upon a *force majeure* clause if that party fails to provide written notice within a specific period after it first became aware of the *force majeure* event.

Finally, while certain *force majeure* events—such as fires, earthquakes and hurricanes—are usually limited to a particular time and geographic area, COVID-19 has moved with such speed and scale that the extent of the pandemic's effects changes every day. As a result, and generally out of an abundance of caution, a party may send a "protective" or "continuing" *force majeure* notice that accounts for the evolving nature of the COVID-19 pandemic and its impact on that party's inability to perform its obligations under the contract.

Takeaway Considerations

In light of the developments surrounding COVID-19 and its impact on the global economy, businesses should consider the following points in relation to their commercial contracts:

- The specific language of any *force majeure* clause is critically important, as courts will often excuse nonperformance when the *force majeure* event is specifically referenced in the clause. Accordingly, businesses should carefully draft the scope and wording of their *force majeure* clauses to ensure consistency with their objectives;
- In the context of the recent COVID-19 pandemic, clauses should specifically reference "pandemics," "epidemics," "diseases" and "quarantines." Alternatively, a party may seek excusal from performance if the contract lists "government action" as a *force majeure* event, as a government-mandated quarantine or shelter-in-place could arguably render that party unable to perform;
- The nonperforming party should take all reasonable steps to avoid or mitigate the *force majeure* event;
- When relying upon a *force majeure* clause, the nonperforming party should follow the specific procedural requirements set forth in the contract (*e.g.*, provide notice as soon as it became aware of the *force majeure* event, and explain how the *force majeure* event caused the nonperformance);
- A nonperforming party should consider the consequences of relying upon a *force majeure* clause. For example, the other party will likely have the right to terminate the agreement and excuse its remaining obligations under the contract; and
- If a contract does not include a *force majeure* clause, the parties should consider whether other legal doctrines—such as frustration of purpose, impossibility of performance or commercial impracticability—may apply to excuse a party's nonperformance.[6]

For businesses of all types and sizes, Vedder Price P.C. advises companies in drafting, enforcing and defending against *force majeure* clauses. For further information, please contact **Brian W. Ledebuhr** (at bledebuhr@vedderprice.com or 312-609-7845) and **Mark J. Ditto** (at mditto@vedderprice.com or 312-609-7643).

1 *See Stepnicka v. Grant Park 2 LLC,* 2013 IL App (1st) 113229-U, *4 n. 2 (June 21, 2013) (citing Black's Law Dictionary 718 (9th ed. 2009)). *See also Kel Kim Corp v. Central Mkts.,* 70 N.Y. 2d 900, 902-03 (1987); *Watson Labs Inc. v. Rhone-Poulene Rorer Inc.,* 178 F. Supp. 2d 1099, 1111 (C.D. Cal. 2001).

2 *See, e.g., Phelps v. School Dist. No. 109, Wayne County,* 302 Ill. 193 (1922).

3 *See, e.g., Watson Labs Inc.,* 178 F. Supp. 2d at 1109-12; *Raw Material Inc. v. Manfred Forbreich GMBH & Co.,* 2004 WL 1535839 at *6 (N. D. Ill. July 7, 2004); *Reade v. Stoneybrook Realty LLC,* 63 A.D.3d 433, 434 (N.Y. App. Div. 2009); *Toyomenka Pac. Petroleum, Inc. v. Hess Oil Virgin Islands Corp.*, 771 F. Supp. 63, 67 (S.D.N.Y. 1991); *Kodiak 1981 Drilling P'ship v. Delhi Gas Pipeline Corp.*, 736 S.W.2d 715, 720-21 (Tex. App. 1987); *Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236, 241 (Tex. App. 1994, writ denied).

4 *See UBS Real Estate Sec. v Gramercy Park Land LLC*, 2009 N.Y. Misc. LEXIS 6976, *16 (Sup. Ct. N.Y. Cty. Dec. 11, 2009); *Constellation Energy Servs. of N.Y., Inc. v New Water St. Corp.*, 2016 N.Y. Misc. LEXIS 913, *5 (Sup. Ct. N.Y. Cty. Mar. 1, 2016).

5 *Wuhan Airlines v. Air Alaska, Inc.*, 1998 U.S. Dist. LEXIS 15529 *7-8 (S.D.N.Y. Oct. 2, 1998).

6 *See, e.g.,* Restatement (Second) of Contracts § 261; Uniform Commercial Code §2–615.