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Is COVID a *Force Majeure*?

The current Coronavirus pandemic (aka "COronaVIrusDisease-2019" or simply COVID-19") has produced a global reaction including "shelter-in-place" orders by various city, county, state and federal governments in the United States and throughout the world. The initial focus and daily news all have been on health and medicine. There now is emerging a secondary focus on law and litigation. Will COVID-19 now operate to provide new defenses to the enforcement of otherwise binding written agreements? The answer, as in most things legally is: it depends! This short summary is designed to flag the relevant issues and open a discussion about what will likely be years (if not decades) of litigation in the state and federal courts as they grapple in the United States (and beyond) to address the consequences of a disease that has threatened all.

What is *Force Majeure*?

Translated from the French as *superior force, Force Majeure,* is a contractual defense that allows a party to suspend, limit, or discontinue the performance of contractual obligations triggered by an extraordinary events or circumstances beyond the control or any and every reasonable expectation of all the parties to the contract. The operate word is "beyond" as many contracts expressly define a very limited class of events "beyond" any expectations. Certainly contracts entered during the pandemic (such as orders for PPEs and the like) are enforceable because the event is known and the contract is still being entered (and indeed in the case of PPEs the pandemic is the reason for the contract itself!) Accordingly, what constitutes a force majeure event is determined on a case-by-case basis and depends upon the terms of the relevant contract.

Examples of Possible Force Majeure "Candidates"

Destructive "Acts of God"	Destructive Epidemics	Government Acts
Destructive Hurricanes	Quarantines	Embargos
Destructive Earthquakes	Terrorism	Labor Strikes & lock-outs

In each of the above cases, of course, the actual "destructive" event must have a nexus to the actual contract and to the underlying contractual obligations. For example, a destructive hurricane in San Juan, Puerto Rico may well produce a *Force Majeure* to certain contractual parties living and working in San Juan but it may well have no material impact whatsoever in any city in Puerto Rico outside of San Juan and it may have no impact whatsoever in New York City or any other place within the continental United States. The same is true for any other destructive "candidate" events identified above; indeed, the Covid-19 pandemic seems to have had a more destructive impact in New York City than it has had in any other part of the State of New York or in any other city throughout the United States. Indeed, some states in the USA have not been harmed at all.

When Does *Force Majeure* Apply?

If the contract is silent on *force majeure*, a court renders its decision whether to excuse an impacted party's performance during the force majeure event based on the foreseeability of the event. In California, force majeure clauses vary depending on the nature of the contract. *See Cal Civ. Code* § 1511 (performance of an obligation is excused "[w]hen it is prevented or delayed by an irresistible, superhuman cause . . . unless the parties have expressly agreed to the contrary.") Thus, here is a good checklist for discussion purposes:

1. Check your contracts for a Force Majeure clause[1]: For example, the NBA players' collective bargaining agreements contain *force majeure* clauses specifically related to pandemics that impact player compensation. Parties are free to draft specific clauses; courts generally prefer that parties do so since freedom of contract is a basic premise of American law. When parties define what is and what is not a "force majeure" event, the contract language controls.

2. Was the Covid-19 crisis unforeseeable at the time the Contract was executed? The long-established test for Force Majeure 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." Pacific Vegetable Oil Corp. v. C.S.T., Ltd., 29 Cal. 2d. 228, 238 (1946). Absent specific deviations, however, a party must establish the general requirements of unforeseen, uncontrollable impracticability's to invoke a typical clause.

3. Is the Contract a form "take it or leave it" document or was it negotiated by the parties? Take, for example, the force-majeure clause in the take-or-pay contract between Kyocera Corp, a solar panel manufacturer, and Hemlock Semiconductor, a polysilicon producer, stated that neither party was liable for delays or failures in the performance that arose from causes beyond such party's control. The Michigan Court of Appeals found the force-majeure clause was inapplicable to allegedly illegal actions taken by Chinese government, which allegedly depressed the solar panel market prices and effected manufacturer's profits because the Chinese government's actions were foreseeable risks under the take-or-pay contract that did not prevent the manufacturer from performing under the contract. The decision in Kyocera Corporation should remind companies that a force majeure clause will not rescue a breaching party from every risk, even if the parties believed they drafted the provision to cover the impacting event. Kyocera Corp. v. Hemlock Semiconductor, LLC, 313 Mich. App. 437, 886 N.W.2d 445 (2015)

4. Does the Contract contain a notification process and other procedural requirements? The *force majeure* clause may specify how and when the party invoking the force majeure clause must give notice to the other party. Typically, it will allow for a notice period (for example, ten days) between the event and notification of the applicability of the clause. The method of delivery may also be specified. For events that are unfolding over some time, determining when to invoke the force majeure clause is an important consideration. The COVID-19 pandemic, with many moving parts from identification to escalation of quarantines to regulation of PPEs and other wearables and other workplace protections will create additional requirements for many organizations. The determination of reasonableness by the Courts will be a very fact-based one.

[1] If you are a party to a contract that does not have a force majeure provision, frustration of purpose could provide some relief. Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 P. 458 (1916). We will cover related doctrines in our next (coming) newsletters.

5. What is the appropriate remedy to the claimed "*Force Majeure*" defense? Courts tend to interpret *force majeure* clauses (and events) narrowly and remedies address only was is justified. For example, actual terrorism, for example, might be a "*force majeure*" event allowing for delay in performance as remedy, but "threats" of terrorism may not be covered at all and may not act to cause any delay in performance. Thus, fears of the virus also may not qualify at all and even actual infection may only justify a 2 to 4 week "recovery" period if no comorbidities exist. Many local regulations are suggesting that delays in performance be allowed and that the parties cooperate to make contract performance occur on a delayed basis and without litigation.

6. How should one create a record of good faith and reasonableness to all counter-parties? If the specified event (in this case, a pandemic/quarantine) is listed, it means that the parties allocated the risk of the specified event to the obligated party and the remedies provided for that event should be decisive if the specified event occurs. For example, the devastation of the World Trade Center from the 9/11 actual terrorist attacks was total and the impacted parties were excused entirely from performance. One World Trade Ctr., LLC v. Cantor Fitzgerald Securities, 789 N.Y.S.2d 652, 655 (N.Y. Sup. Ct. 2004). **All contracts impose on all parties the obligation of good faith and reasonable behavior; this is another fundamental principle of contract law; if the benefits of the contract can no longer be provided, obligations of good faith, fair dealing and reasonableness require recognition of this fact.** How the parties interact with each other after the "event" (however characterized) is identified is often critical for the Courts.

7. Is partial performance required if partial performance can occur in a timely fashion? If the specified event is not listed, it means that the parties allocated the risk of the specified event to the impacted party. The impacted party is not excused from performance; it must perform the contract; and will breach the contract if it does not perform. It will also not be showing good faith, fair dealing or reasonableness if there can be partial performance and no partial performance is rendered. Renegotiations often happen in the face of potential "force majeure" events and parties who ask for contract adjustments must be ready to similar act in good faith, deal fairly, and reasonably with whatever performance they can give even while the discussions continue about timing for the balance of performance. No pretexts are allowed. Performance is not optional. Good faith, fair dealing and reasonableness all require that "all cards turn face up."

Conclusion

In summary, every word matters in a *force majeure* clause can change the impact of the clause's applicability. Force majeure clauses have generally been narrowly interpreted. However, *force majeure* clauses in the context of a global pandemic have not been interpreted, and there is limited guidance on how they may apply in the COVID-19 context. As in all matters "legal," an "inconvenience" does not excuse contract obligations, due care, good faith and reasonableness; there must be "extreme and unreasonable difficulty, expense, injury or loss, involved." 2 Cal. Affirmative Def. § 30:18 (2d ed.). Before invoking, claiming or asserting *force majeure* as a defense, it is best to consult with competent legal counsel. Call us if you need more information.

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