

## Interpreting and Drafting Force Majeure Clauses During the Coronavirus (COVID-19) Pandemic

Force majeure is a French term that means “a superior force.” Force majeure clauses are contract provisions that can excuse nonperformance under a contract when an unforeseeable extraordinary event prevents the fulfillment of contractual obligations. These can be acts of either nature or acts of people. Examples of force majeure events include the terrorist attacks of September 11, 2001, the 2010 Deepwater Horizon Oil Spill, and Hurricanes Katrina and Sandy. The COVID-19 pandemic has affected the ability of business entities and individuals to maintain regular operations and perform contract obligations and illustrated the value of carefully planning for unexpected “Acts of God” when negotiating contracts.

A court considering the applicability of a force majeure clause considers: (1) whether a particular event triggers the force majeure provision of the contract; (2) whether the risk of nonperformance was foreseeable or if the parties can mitigate nonperformance; and (3) whether the performance was actually impossible.

Generally, a force majeure provision becomes applicable only when performance becomes impossible, not when it simply becomes more difficult.

### **Has the performance of a contract been frustrated by the COVID-19 pandemic?**

Courts will likely reject a force majeure claim if the parties' agreement does not contain a force majeure clause, apart from an assertion of the common law doctrines of the frustration of purpose, impracticability, or impossibility. This reasoning makes sense, as Courts are bound to interpret contracts as written and should acknowledge the absence of a force majeure clause (or, in some instances, a poorly written one) rather than write a better contract than the parties initially contemplated. Of course, the strength or weakness of a force majeure clause is subjective, depending on what side claimed impossibility. Thus, as explained in detail below, it is important to draft contracts containing strong force majeure clauses from the perspective of your contractual risk and to evaluate contracts carefully to determine what remedies may be available if an extraordinary event (arguably, the COVID-19 pandemic) frustrates a contract's purpose or performance.

The three aforementioned common law doctrines, however, may provide relief to a party unable to perform under a contract. The frustration of purpose doctrine permits either or both parties to discharge their performance if an unforeseeable event frustrates the principal purpose of a contract through no fault of a particular party (or both parties).<sup>1</sup> For example, not all jurisdictions have prohibited public gatherings of less than 250 people due to the COVID-19 pandemic, but dramatically restricted airline, bus or rail transportation to a particular event venue might frustrate the purpose of a contract providing that venue for a wedding. In other words, unforeseeable travel limitations compromised the wedding guests' ability to travel to the wedding, thus, frustrating the purpose of the wedding venue contract.

Similarly, some contracts cannot be performed when a party's obligations become impracticable or impossible due to the occurrence of an unforeseeable event (i.e., the COVID-19 pandemic) not originally contemplated by the parties when they assented to contract.<sup>2</sup> Impracticability means more than just “impracticality,” but that does not mean parties cannot excuse performance due to extreme and reasonable difficulty, expense, injury, or loss to one of the parties involved.<sup>3</sup> As illustrated by the above example, the excusal of performance for the frustration of purpose might be available even when contractual performance is technically possible. Impracticability or impossibility, on the other hand, could be available if a particular contract condition, which both parties to the contract assumed when the parties formed the agreement,

ceases to exist.

In the previous hypothetical, the wedding venue contract was technically performable, even if dramatic travel limitations would have compromised guests' ability to attend the wedding. If, however, the jurisdiction in which the venue sat did prohibit all public gatherings, even those of less than 250 people, the contract might be excused because holding the wedding at the venue would clearly be impermissible.

Obviously, an assumed condition of the wedding venue contract was that the government would not prohibit public gatherings. When that condition failed, the wedding venue contract became impossible to perform.

With regard to the COVID-19 pandemic, a contract's force majeure clause will likely only provide a remedy if the pandemic constitutes a "qualifying event." Important considerations are: (1) Does the contract define an Act of God or force majeure? and (2) does the contract contain a specific clause regarding a public health emergency?

Many contracts reference specific designations such as the World Health Organization's (WHO) designation of "Public Health Emergency of International Concern (PHEIC)" or other specific terms such as pandemic or epidemic. Courts have found, however, that generalized economic hardship (e.g., supply chain disruptions, workforce shortages, cash flow interruptions), without more, does not necessarily constitute a force majeure event. Accordingly, it may be challenging to avoid contractual obligations simply because the COVID-19 pandemic continues to cause irregular market conditions that strain business operations (e.g., increased or depressed demand of a product or service). The confluence of multiple forms of economic hardship of significant magnitude, which are beginning to take shape, may warrant a revisiting of this body of law in light of the unprecedented economical impact of the COVID-19 pandemic.

If the COVID-19 pandemic or related event compromises either your or the other contracting party's ability to perform under a contract, you should take the following steps in evaluating the impact of the pandemic on your existing contractual relationship:

1. Identify whether the contract contains a force majeure clause;
2. Determine what state's laws govern the contract;
3. Evaluate whether the pandemic or related event was foreseeable and affects performance (i.e., is performance impossible or impracticable);
4. Analyze whether the COVID-19 pandemic might constitute a force majeure under the terms of any specific provisions;
5. Determine what remedies the force majeure clause provides regarding the performance or otherwise under the contract; and
6. Determine what steps a party must take to invoke a force majeure clause – is a notice required under the force majeure to assert the right to any available remedies?

In short, a party seeking to invoke a force majeure clause must consider that contractual language, its specific circumstances, and any jurisdictional variations as these will all factor into whether performance is excusable under a contract. Therefore, there is no specific answer as to whether the COVID-19 pandemic constitutes a force majeure excusing performance as it turns on specific contract language and is a fact-sensitive determination. Moreover, the invocation of a force majeure clause, even if in the best interest of one party, is not necessarily an apt or prudent business decision. Excusal of performance under a contract is often zero-sum, and a party that seeks to invoke such a contract clause must consider whether it is

healthy for both parties' long-term relationship. To this end, other dispute resolution processes can be beneficial to resolve a current dispute while also preserving an ongoing business relationship.

**Should new contracts contain force majeure provisions that protect against the Coronavirus pandemic?**

On April 12, 2020, WHO special envoy David Nabarro explained that there would likely continue to be small outbreaks of the novel coronavirus until the development and widespread distribution of a vaccine. Undoubtedly, such outbreaks will continue to present new challenges to business entities and individuals that must continue to form new contracts and update existing ones. In light of these circumstances, parties may find it prudent to consider including contract provisions that protect their interests from the unpredictable consequences of the pandemic.

Well-crafted force majeure clauses delineate three critical elements:

1. What constitutes a force majeure (e.g., flood, war, pandemic, etc.);
2. What occurs under the contract when a force majeure occurs; and
3. What is required by the parties to trigger applicable remedies (e.g., provide notice to relevant parties)?

The first element demands that contracting parties utilize precise language in the force majeure clause. Sometimes, force majeure clauses consist of lists that include events parties might consider unforeseeable (Acts of God). To render force majeure clauses more useful, the parties should precisely define triggering events to encapsulate industry or relationship-specific risks. For example, a business that depends heavily on importing products from China may want to specifically reference supply chain disruptions caused by regional COVID-19 outbreaks as triggering force majeure events.

The second element demands the parties specify what occurs in the event a party invokes a force majeure clause. In most commercial contracts, one or more provisions may specifically address the parties' rights in the event of a force majeure event. For example, contracting parties could draft a force majeure clause with provisions giving an affected party additional time to perform its obligations upon the occurrence of a triggering event, merely suspending a party's performance, or wholly excusing a party's performance.

Lastly, triggering applicable remedies generally requires an affected party to provide notice of his or her intent to invoke a force majeure clause. Requirements for providing notice may specify a minimum amount or method of notice or demand that a party notices its intention to invoke a force majeure clause within a certain number of days of a triggering event. Failure to comply with notice requirements outlined in a force majeure clause or as otherwise stated in an underlying contract may compromise a party's ability to do so at all. Accordingly, notice requirements for invoking a force majeure clause should be specific and clear.

Well-drafted force majeure clauses can serve as a safe harbor for parties facing unforeseeable circumstances. They serve as a useful tool for managing risk and providing predictability. When parties interpret force majeure clauses incorrectly or draft them poorly, however, this reduces the usefulness of force majeure provisions and can even be detrimental by catalyzing costly litigation.

Weber Gallagher continues to monitor the impact of COVID-19 on both its clients and various business sectors. We are prepared to provide guidance in assessing whether the Coronavirus pandemic has triggered an agreement's force majeure provision and to advise whether seeking excusal of performance due to the Coronavirus pandemic is in a party's interest.

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- 1 Restatement (Second) of Contracts 265.
- 2 Restatement (Second) of Contracts 261.
- 3 Restatement (Second) of Contracts 261, comment "d".