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ALERT

Force Majeure Provisions and COVID-19

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In connection with the global coronavirus (COVID-19) pandemic and the unprecedented restrictions on businesses that it has caused, many companies may be looking to terminate, modify, or postpone events, supply, distribution, or other commercial contracts without incurring liability. The first step for companies in this position is to review their contracts to see if COVID-19 triggers a *force majeure* provision, or whether controlling state law contains a *force majeure* or act of God defense.

Does COVID-19 trigger the *force majeure* provision in your existing contracts?

Generally, *force majeure* refers to the occurrence of an extraordinary event beyond the reasonable control of a party and prevents that party from performing its obligations under a contract. There is no standard *force majeure* clause and little case law addressing the effect of an epidemic or pandemic on contractual performance.

If you seek to cancel or modify your performance under a contract on the basis of *force majeure*, your potential legal exposure may turn on the interpretation of the specific wording of the *force majeure* provision in your contracts and a fact-specific analysis of your company's and the counterparty's actions and contractual relationships.

Force majeure provisions typically set forth a list of specific circumstances that constitute a *force majeure* event. You will want to examine the list of specific events that your contract defines as a *force majeure* event and see how COVID-19 fits into the items or categories listed. Typical *force majeure* clauses specify acts of God (like earthquakes, hurricanes, and fires), acts of war or terrorism, civil disturbances, strikes, and labor disputes. While it is not common for a

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global pandemic to be specifically listed, certain governmental actions or orders like health or travel advisories are often enumerated and may be helpful clauses given the widespread business closures and governmental restrictions that have been implemented across the country in response to COVID-19. Still other contracts may include broad references to unforeseen, unpreventable economic hardship as a condition of *force majeure. See In re Old Carco LLC,* 452 B.R. 100, 119 (S.D.N.Y. 2011 (enforcing express contractual provision to excuse non-performance based on *force majeure* provision that referenced "change to economic conditions").

Many contracts also include catch-all language that broadly excuses performance upon the occurrence of other, non-articulated events outside a party's reasonable control. If your contract contains the catch-all language in the *force majeure* provision, the COVID-19 global pandemic and the resulting forced closure of many nonessential businesses would almost certainly be considered to be an event beyond a party's ability to prevent, control, or mitigate, as COVID-19 was unforeseeable and unprecedented at the time of execution of the agreement. Without such catch-all language, courts typically have rejected arguments that unforeseen financial crises excuse performance. *See Elavon, Inc. v. Wachovia Bank, Nat. Ass'n*, 841 F. Supp. 2d 1298, 1306 (N.D. Ga. 2011) (2008 financial crisis not an act of God under Georgia law); *407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y. 2d 275, 281 (1968) ("[W]here impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused.").

It is important to note that the mere occurrence of a *force majeure* event is often not sufficient to invoke a *force majeure* provision. You must also be able to show the occurrence of the event prevents, hinders, or delays performance. Typical *force majeure* clauses require that a triggering event make performance "impossible," "illegal," "inadvisable," or most commonly, "impracticable." The analysis of what makes performance "impracticable" depends in part on the degree of difficulty, expense, injury, or loss to your company should you perform under the agreement despite the COVID-19 outbreak.

For an unforeseen cost increase to excuse performance on the basis of impracticability, generally the increase must be more than simply expensive – it must be unjust to hold the parties bound. The relevant question is whether the unforeseen circumstance has made performance completely different than what the parties contemplated at the time of execution.

Performance may also be excused on the basis of impracticability based on a risk of injury that is disproportionate to the goals to be attained by performance. Some courts have held that risk of injury includes health, holding performance of a contract to be impracticable where the public would be exposed to potential health risks.

In summary, the applicability of a *force majeure* provision calls for a close analysis of the plain language of the contract and the specific facts and circumstances of the situation.

Does controlling state law provide an "act of God" defense?

Even in the absence of a useful *force majeure* clause, some jurisdictions recognize act of God or impossibility defenses, either by statute or at common law.

Under Georgia law, for example, a party is excused from performance under a contract where "performance of the terms of a contract becomes impossible as a result of an act of God, ... except where, by proper prudence, such impossibility might have been avoided by the promisor." O.C.G.A. § 13-4-21. Although that code section does not define "act of God," the Georgia Code elsewhere defines "act of God" as "an accident produced by physical causes which are irresistible or inevitable, such as lightning, storms, perils of the sea, ... sudden death, or illness." O.C.G.A. § 1-3-3.

Other jurisdictions, again either by statute or common law, have incorporated into their jurisprudence the similar concept of "impossibility" as a defense. Accordingly, the Restatement (Second) of Contracts § 261 provides that "[w]here, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate to the contrary."

As is apparent, under either construct, just as with *force majeure*, the defense is available only where 1) performance must be impossible; and 2) the reason performance was rendered impossible must have been both unforeseen and unpreventable.

If *force majeure* or act of God/impossibility might apply, what actions should you take?

If you want to try to take advantage of a *force majeure* provision in a contract, below are some of the questions that should be reviewed:

- Does the contract permit a party to fully terminate the agreement as a result of a *force majeure* event or merely excuse performance for the duration of the *force majeure* event?
- Does the contract require you to provide the counterparty with a timely written notice suspending performance? Failure to do may mean that your performance is not excused.
- Does the contract provide that the party affected by the *force majeure* is under a duty to minimize the disruption caused by the *force majeure* event? This calls for a fact-based analysis of what your company can actually do to minimize disruption. You may want to keep a list of concrete actions you have taken in this regard and any incremental costs that you may incur if you choose to perform despite the *force majeure* event.
- Does the *force majeure* provision only excuse the performance of nonmonetary obligations and not all contract obligations? If so, payment obligations under a contract may still be required.
- Does the contract require payment of liquidated damages or a penalty if completion or some other event does not occur by a specified date? If so, does the contract provide that the date in question is

extended by the period during which you are prevented from performing the work?

- If performance is excused for a period of time, is contract term extended for the length of the delay?
- Does the affected contract link into any other contracts which should also be reviewed?
- Does the contract afford either of the parties a termination right in the event of a lengthy *force majeure* event?
- Does the controlling jurisdiction offer an act of God or impossibility defense? If so, has performance been rendered impossible due to unforeseeable and unpreventable events? How and when should notice be provided to the promisee?

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