



Force majeure provisions: Dusting off a law school exam topic for the COVID-19 pandemic

March 17, 2020

As the COVID-19 pandemic increasingly causes business disruption across the United States and the world, the issue of force majeure will become increasingly relevant. On a near-daily basis, national, state and local governments are implementing stringent containment policies. States of emergency have been declared, schools and institutions of higher education closed, travel restrictions imposed, businesses shuttered, sporting events canceled, large gatherings banned and worship services canceled. While the long term effects of the pandemic are yet unknown, it is certain that these containment strategies will present unique challenges as businesses struggle to adapt to the new realities presented by COVID-19, including the ability to comply with various contractual obligations. In evaluating the range of options available to deal with performance under a contract amidst the uncertainty, parties should consider how the concept of force majeure will impact their rights, obligations and remedies.

What is force majeure?

Whether found in a health care agreement, loan document, real estate contract, oil and gas lease or collective bargaining agreement, a force majeure provision defines the scope of unforeseeable events that might excuse non-performance by one or more parties to a contract. (See, e.g., *United States v. Brooks-Callaway Co.* (1943), 318 U.S. 120.) Under Ohio law, the party invoking force majeure bears the burden of proof. (See, e.g., *Stand Energy Corp. v. Cinergy Servs., Inc.*, 144 Ohio App. 3d 410, 416 (2001).) As the court in *Stand Energy* noted, force majeure clauses are included in commercial contracts to provide flexibility in a volatile economy. But, a party cannot be excused from performance merely because performance may prove difficult,

burdensome or economically disadvantageous. *Id.* (citing *State ex rel. Jewett v. Sayre* (1914), 91 Ohio St. 85).

Seven practical considerations for analyzing force majeure:

1. **Read the contract.** Find and then read the relevant contract. This may sound like simple advice, but too often people guess or summarize what a contract says without actually reading it. If you anticipate performance will be an issue under a contract, find a signed copy of the contract, read it and determine whether there is a force majeure provision in it.
2. **Confirm if the contract has a force majeure provision.** Although many contracts include helpful headings, not all force majeure provisions actually include the words “force majeure.” Heed the advice above and read the contract as force majeure provisions are sometimes buried in other contractual provisions or under headings such as “regulations and delays.”
3. **Examine the contractual definition of force majeure.** The specific scope of a force majeure event will be defined by the language in the relevant contract and will vary contract to contract. Often, definitions will include a laundry list of items that are not anticipated, would be beyond the party’s control, and that would prevent a party from performing certain obligations under the agreement. These are referred to as “acts of God” and include weather-related events (e.g., fires, earthquakes and floods), war, labor disputes and yes, sometimes even epidemic or pandemic. To the extent the contract specifically identifies epidemics or pandemics as a force majeure event, the COVID-19 outbreak would likely fall within the scope of the definition. Even if epidemics or pandemics are not specifically identified, the COVID-19 outbreak might still qualify. For example, the definition of force majeure might also include governmental orders or any other cause not reasonably within a contracting party’s control.
4. **Research the relevant state’s case law.** Just because a contract is signed in Ohio by contracting parties based in Ohio does not necessarily mean that Ohio law governs the contract. Many contracts have a choice of law provision which expressly identifies which state’s law governs the contract. In the context of force majeure, this could have a significant impact on your analysis as some states may have very little relevant force majeure case law and case law surrounding this legal principle (and the larger context of the impossibility of performance) varies from state to state. For example, does the relevant state require complete prevention of performance in order to trigger force majeure?
5. **Evaluate causation.** A party claiming force majeure generally must show that the force majeure event proximately caused a contracting party to be unable to perform. In addition, courts generally require the party invoking the clause to use reasonable efforts to avoid the effects of force majeure. A factual analysis will be necessary to determine whether the COVID-19 pandemic was the proximate cause of the failure to perform, and whether the invoking party used reasonable efforts to avoid the effects.
6. **Comply with any notice provisions.** Parties impacted by force majeure events frequently have contractual obligations to notify other contracting parties of the occurrence of the force majeure event and/or the inability of such party to perform. Parties who believe they may be impacted by the COVID-19 outbreak should strictly comply with such notice provisions and understand the impact of sending proper and timely notice of a force majeure event. For example, such notices frequently give rise to termination rights for the other contracting party, especially if the force majeure event continues (or is expected to continue) for an extended period of time. Further, in the context of the COVID-19 pandemic, the trigger for providing notice may not be entirely clear. For example, even where epidemics or pandemics are specifically included in the definition of a force majeure event, there often is little guidance as to when the pandemic or epidemic actually started. Is it when the World Health Organization or Center for Disease Control declares the situation a pandemic or epidemic? Is it when state and local governmental authorities issue quarantine orders?
7. **Identify the available remedies for a force majeure event.** The remedies for a force majeure event under a contract may

include an extension of time to perform certain obligations or permit the invoking party to terminate without liability. The specific remedy should be identified in the contract and should be considered as part of any parties' strategic decision-making.

Conclusion

As the business implications from the COVID-19 containment strategies at the national, state and local level are fully realized, contract parties must be proactive in evaluating the impact on their business. As always, early and effective documentation and communication with your legal counsel prior to taking any action is recommended. If your current contract forms do not contain force majeure provisions, care should be taken to now include them, with specific references to events currently impacting commercial transactions, such as the COVID-19 pandemic and related governmental actions and orders.

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