Contracts in the Age of COVID-19: Does a *Force Majeure* Clause Provide Protection?

Pandemics, plagues, swarms of locusts, and other "Acts of God" are nearly impossible to foresee, but preparing for the unforeseen is very important in drafting contracts, as is probably no more evident than in the age of COVID-19. All businesses should review and understand the language in their contracts, and, if negotiating new contracts, consider language that may be vital to protecting their business interests in unforeseen circumstances, including the standard *force majeure* clause, particularly when their businesses are being impacted by a global pandemic.

What is a *force majeure* clause?

The purpose of a *force majeure* clause is to protect the parties to a contract if an unforeseen, uncontrollable event occurs. A *force majeure* clause contemplates those unanticipated events and, under specific circumstances, provides the parties with a defense for nonperformance of the contract.[1] A *force majeure* clause typically provides that nonperformance of the contract is excused for events such as: "acts of God, war, government regulation, terrorism, disaster, strikes (except those involving [a party's] employees or agents), civil disorder, curtailment of transportation facilities, or any other emergency beyond the parties' control, making it inadvisable, illegal, or impossible to perform their obligations" under the agreement.[2] If any of the explicitly named events occurs, the *force majeure* clause provides either party with an excuse to cancel the contract, thereby relieving the party of the obligation to perform under the contract.[3] However, not all *force majeure* clauses are the same, and the application of such a clause depends upon the specific language used, the applicable law, and the relevant event.[4]

Does the COVID-19 pandemic potentially trigger a *force majeure* clause?

The party seeking to cancel the contract usually has the burden of proving that the event is "qualifying" under the *force majeure* clause. The party seeking to cancel must prove the event was outside of that party's control and not due to that party's negligence or fault.[5] Thus, when reviewing a *force majeure* clause in light of a global pandemic, the key question is: Does the pandemic qualify as a *force majeure* event under the language of the contract?

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[1] 77A C.J.S. Sales § 370. *See also* 30 Williston on Contracts § 77:31 (4th ed.).
[2] 30 Williston on Contracts § 77:31 (4th ed.).
[3] *Id.*
[4] *Id*. *See also Ergon-West Virginia, Inc. v. Dynegy Marketing & Trade*, 706 F.3d 419 (5th Cir. 2013) and *Aquila, Inc. v. C. W. Mining*, 545 F.3d 1258 (10th Cir. 2008).
[5] *Gulf Oil Corp. v. F.E.R.C.*, 706 F.2d 444 (3rd Cir. 1983) and *OWBR, LLC v. Clear Channel Communications, Inc*., 266 F.Supp.2d 1214 (D. Haw. 2003).

Force majeure clauses may include specific language that references circumstances like a health emergency. Provisions for pandemics would certainly apply, but so could references to public health emergencies or possibly even government-ordered shutdowns. Many business relationships may be adversely affected not by the pandemic itself, but also by the "stay at home" orders from state and local governments. Consequently, if these "stay at home" orders adversely impact a party's ability to perform under a contract, the party could argue that the government orders regarding essential and non-essential activities triggered a *force majeure* clause.

Furthermore, although some *force majeure* clauses specifically reference pandemics or similar qualifying events, most such clauses do not. Rather, a party may need to look for "catch-all" language, such as "any other emergency beyond the parties' control, making it inadvisable, illegal, or impossible to perform their obligations." A catch-all provision of this type only applies if the party's expected performance is disrupted due to an unexpected event beyond the party's control.[6] Such a provision would not apply to an event that could have been anticipated or that was within the party's control.[7] However, if a contract was executed prior to 2020, COVID-19 and the resulting "stay at home" restrictions could arguably fall within a catch-all provision of a *force majeure* clause, even if the clause does not specifically reference government orders. Consequently, a party seeking to cancel a contract by invoking the *force majeure* clause should review the contract for all potential avenues to cancel performance, whether via specific references to specific events or via catch-all language.

Does an economic downturn due to a pandemic trigger a *force majeure* clause?

Many businesses may wish to cancel contracts and question whether an economic downturn itself is a valid reason to do so. However, an economic situation alone may not suffice to call upon a *force majeure* clause.

Courts have found that "[f]orce majeure clauses generally do not insulate against declines in market demands and the resulting inability to make a profit because of the disparity between a high contract price and a low market price."[8] A *force majeure* clause may justify nonperformance of a contract when something "reasonably beyond the control of the party failing to perform" occurs, but "a clause does not extend protection against changes in economic or market conditions that make it more expensive to perform."[9]

For example, Sherwin Alumina L.P. entered into a supply contract with AluChem, Inc., but when it became necessary to purchase new equipment to manufacture AluChem's products and stay within its air permit, Sherwin Alumina attempted to cancel the contract by relying on its *force majeure* clause.[10] Sherwin Alumina argued that it was "not within [its] reasonable control to avoid violating its air permit without having to purchase new equipment in order to be able to manufacture the AluChem products and to avoid further violations of the TCEQ regulations."[11]

Finding that the *force majeure* clause did not apply to Sherwin Alumina's situation, the Court found that it was "within Sherwin Alumina's reasonable control to continue performance under

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[6] *See Clean Uniform Co. St. Louis v. Magic Touch Cleaning, Inc*., 300 S.W.3d 602 (Mo. Ct. App. E.D. 2009).
[7] *Id*.
[8] *Sabine Corp. v. ONG Western, Inc*., 725 F.Supp. 1157, 11 U.C.C. Rep. Serv. 83 (W.D. Okla. 1989).
[9] *B.F. Goodrich Co. v. Vinyltech Corp*., 711 F.Supp. 1513 (D. Ariz. 1989).
[10] *Sherwin Alumina L.P. v. AluChem, Inc*., 512 F.Supp.2d 957 (S.D. Tex. March 19, 2007).
[11] *Id*. at p. 966-967.

the Supply Agreement," but "the issue is the cost to Sherwin Alumina to upgrade its equipment."[12] The Court held that for the *force majeure* clause to be applicable, Sherwin Alumina must have been prevented from manufacturing the product "at all or within the time specified by the contract, 'due to events beyond [Sherwin Alumina's] reasonable control.'"[13] The *force majeure* clause did not excuse Sherwin Alumina's nonperformance under the contract simply because the cost to perform was "higher than Sherwin Alumina would have liked or anticipated."[14]

Despite the economic downturn since the outbreak of the pandemic, a *force majeure* clause alone may not excuse nonperformance of a contract. As *Sherwin Alumina* shows, if a business entered into a contract for the sale of goods, an increase in manufacturing costs is not a sufficient basis to invoke a *force majeure* clause, without some additional reason. The pandemic may provide sufficient basis to invoke the clause, depending on the language of the *force majeure* clause, and the specific circumstances at issue.

Also, keep in mind that the timing of the pandemic and any resulting "stay at home" restrictions may be key to any argument that the *force majeure* clause applies. When did the pandemic begin in a business' local area, and when (if at all) were "stay at home" restrictions imposed? Were suppliers or subcontractors in other areas or states under similar restrictions, and when were their restrictions imposed? If it is within a business' reasonable control to perform at the time performance is due, then the pandemic and resulting "stay at home" restrictions may be a sufficient excuse to invoke a *force majeure* clause.

When invoking a *force majeure* clause, notice and mitigation are required

It is important to examine the clause closely, and often the clause requires providing written notice of the intent to invoke the *force majeure* clause. Also, within the contract's *force majeure* clause is often the requirement that the party seeking to invoke the clause mitigate the effect of the event disrupting performance. An example of that language is: "such party shall use its best efforts to mitigate the effect and to perform in spite of the difficulties causing such failure or delay and shall resume performance with the utmost dispatch as soon as the cessation of the *Force Majeure* Event permits."[15] When a party fails to mitigate the effects of the event on performance, courts may not permit a party to invoke the clause.[16]

Defenses to countering the attempted use of a *force majeure* clause

Alternatively, a business may face an attempt to invoke a *force majeure* clause by the other party to a contract. One valid defense would be that the clause is limited in scope (i.e. does not reference any sort of public health emergency or government regulations) and does not include any catch-all provision.

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[12] *Id*. at p. 967.
[13] *Id*.
[14] *Id.*
[15] *Rembrandt Enterprises, Inc. v. Dahmes Stainless, Inc.*, No. C15-4248-LTS, 2017 WL 3929308, at *11 (N.D. Iowa Sept. 7, 2017).
[16] *Bayader Fooder Trading, LLC v. Wright*, No. 1:13-CV-02856, 2014 WL 5369418, at *2 (W.D. Tenn. Aug. 21, 2014), *report and recommendation adopted*, No. 13-2856, 2014 WL 5369420 (W.D. Tenn. Oct. 21, 2014).

Additionally, another defense is that performance is still reasonably within the other party's control, such as in the case of *Sherwin Alumina.* Other applicable contract defenses include: ambiguity in contract language, including in contracts of adhesion ("take it or leave it" contract that was not fully negotiated by all parties);[17] and unconscionability.[18] Ambiguities are generally decided against the drafter of an adhesion contract, so ambiguity in the *force majeure* clause could be a valid defense.[19] Similar to adhesion contracts, an unconscionable contract may exist if there was no "meaningful choice" regarding the contract terms and if the terms "are unreasonably favorable to the other party."[20] Unconscionability may be another useful defense if the *force majeure* clause is entirely one sided (for example it explicitly states that only one party may attempt to exercise it).

Conclusion

Regardless of the type of business, all businesses should review their contracts and determine if a *force majeure* clause exists and whether it may be applicable due to the COVID-19 pandemic, resulting government orders, and economic downturn. A business may not anticipate invoking the clause, but circumstances can change. Furthermore, the other party to the contract may already be evaluating whether to invoke the *force majeure* clause. Perhaps just as important, when negotiating any future contracts, it is important to carefully consider the language in the *force majeure* clause to cover possible, even if unanticipated, events, such as global pandemics and government orders shutting down the economy, and include a clear, expansive catch-all provision. As the COVID-19 pandemic has shown, unexpected and unprecedented events are lurking in the future threatening normal contract performance, and preparing for the unknown with proper *force majeure* contract clauses is critical, even if use of such clauses is rare.

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[17] *Hebert v. Vantage Travel Service, Inc.*, 2020 WL 1190992 (D. Mass. March 12, 2020).
[18] *Brennan v. Bally Total Fitness*, 153 F.Supp.2d 408 (S.D. N.Y. July 16, 2001).
[19] *Hebert*, 2020 WL 1190992.
[20] *Brennan*, 153 F.Supp.2d at p. 416.

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