Contracts and Covid-19

(Force Majeure Clauses in the Covid-19 Era)

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The pandemic has reshaped many of our familiarities and has launched the world into a new age of business, technology, and interaction. The legal sphere, in particular, has undergone a remarkable transformation in response to these novel and unprecedented events. Many realms of the legal profession have been (and continue to be) impacted by COVID-19 and surrounding circumstances, including how contract provisions are written and invoked. The use of Force Majeure ("FM") clauses in written contractual agreements, once included merely as standard boilerplate language, are now resurfacing with much more vigor and strength. The pandemic has recharacterized the importance of FM clauses; they are now more artfully customized to reflect pandemic circumstances and are being utilized as both a sword and a shield by contracting parties in the COVID-19 era.

A force majeure clause, also commonly known as the "Act of God" clause in contractual arrangements, is a provision that relieves a party from performing its contractual obligations when certain circumstances arise that are beyond the party's control. The driving force responsible for a party's failure to perform, or "force majeure event," has to be of exceptional circumstances which would render performance inadvisable, commercially impracticable, illegal, or impossible. Common examples of FM events include natural disasters and other weather disturbances (sometimes referred to as "acts of God"),

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"As long as men are liable to die and are desirous to live, a physician will be made fun of, but he will be well paid."

- Jean de la Bruyère

"The practice of medicine is a thinker's art, the practice of surgery a plumber's."

- Martin H. Fisher

"There are some remedies worse than the disease."

- Publilius Syrus

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Force Majeure and Covid

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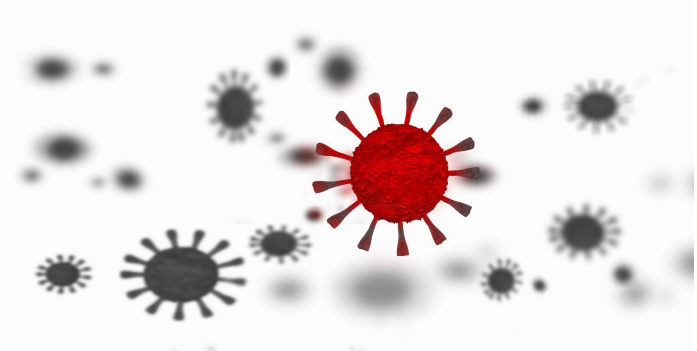
war, terrorism or threats of terrorism, civil disorder, labor strikes or disruptions, and fires. Ironically, pandemics and epidemics have been commonly included as FM events in boilerplate force majeure clauses for decades, but in light of COVID-19, the wording of these clauses is changing drastically.



Force Majeure clauses are important because invoking a FM clause acts as a legal defense mechanism to a breach of contract claim for a party's failure to perform its obligations under the contract. Parties who fail to include a force majeure provision in their contract run the risk that their inability to perform under the agreement due to causes beyond their control will nonetheless constitute a breach of contract, subjecting such party to potential legal liability. COVID-19 backlash caused much unrest in the transactional industry due to government mandated shutdowns and quarantine orders, which affected the supply of materials and accessibility of venues and vendors. As a result, contracting parties suffered due to nonperformance of contract obligations agreed upon prior to the pandemic. Those with contracts lacking a FM clause were left without much legal remedy or relief for these breach of contract claims.

Determining whether a FM clause can be invoked as a defense to nonperformance is a fact intensive inquiry and is therefore evaluated on a case-by-case basis, as it depends on the specific language of the FM contract provision. In light of the pandemic, there has been a surge in FM clauses that now explicitly address whether COVID-19 will be considered a FM event that can trigger invocation of the FM clause. For example, FM clauses that include COVID-19 specifically as a FM event can provide contracting parties with legal relief should nonperformance occur due to pandemic related circumstances. Conversely, legal recourse may be withheld from parties entering into contracts with FM clauses that explicitly exclude COVID-19 as a FM event.

Contract Considerations

Moving forward, contracting parties have much to consider when entering into a written agreement in the current and post-pandemic world. First and foremost, the initial inquiry should be whether the contract includes a force majeure clause. If it does, the next question to ask is whether COVID-19 and related circumstances constitutes a force majeure event under the FM provision. In other words, will nonperformance due to COVID-19 allow a contracting party to invoke the force majeure clause as a legal defense to a breach of contract claim should a party fail to fulfill its contractual obligations, or is COVID-19 explicitly excluded as a force majeure event under the contract, which would not allow for invocation of the FM clause for pandemic-related nonperformance?

Additional considerations to account for when entering into a contract with a FM clause include (1) whether the contract includes a right to terminate clause (either related to or separate from a FM clause), (2) whether the contract provides for additional duties explicitly attached to a force majeure clause (for example, a duty to mitigate or a duty to provide notice to other parties), and (3) whether the contract address delays in performance or price adjustments due to a force majeure event (for example, whether a contracting party is entitled to an "equitable adjustment of the contract time or price" if a force majeure event occurs).

While force majeure clauses are not new to standard contracts, the legal implications of COVID-19 are still surfacing and are assessed on a case-by-case basis through fact-intensive inquiries by the courts. As these cases make their way through the legal system, legal authority will become more available.

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