FAQs – Force Majeure

The ongoing coronavirus (COVID-19) pandemic, and government actions taken to combat it, have placed businesses of all types under great strain. For many businesses, commercial contracts that were profitable or advisable before the COVID-19 pandemic may now seem inadvisable, if not impossible, to continue.

These circumstances have placed a spotlight on “force majeure” provisions in many commercial contracts. A force majeure provision is like an “all bets are off” clause that can relieve the parties of their contractual obligations when unforeseen events outside the parties’ control make it impossible (or nearly so) to continue performing under the contract.

Prior to the COVID-19 pandemic, force majeure provisions were often treated as boilerplate and rarely used. In the wake of the COVID-19 crisis, however, many businesses are evaluating whether they can use force majeure provisions to terminate or suspend contracts that either cannot be performed or no longer make business sense. Similarly, many businesses are on the receiving end of force majeure notices and must evaluate what steps they can take to stop contract counterparties from using the COVID-19 pandemic to excuse performance under binding contracts.

While there are no bright-line answers to whether force majeure justifies the termination or suspension of a particular contract, there is a set of general considerations that will apply to most situations. This set of “Frequently Asked Questions” is intended to address those broadly applicable considerations. The answers to these questions are general and not based on the law of any particular jurisdiction.

Is the COVID-19 pandemic a force majeure event?

The COVID-19 pandemic could very well qualify as a force majeure event, depending on what your contract says and how the pandemic has impacted you.

The starting point is the language of your particular contract. If the parties agreed to a force majeure clause and it has language that is specific enough to cover an event encompassing the COVID-19 crisis, it is more likely that COVID-19 will qualify as a force majeure. For example, COVID-19 is more likely to be a covered event if the force majeure provision includes words or phrases like “epidemic,” “pandemic,” “worldwide illness,” “outbreak,” “quarantine,” “public health crisis,” or similar events. If the force majeure provision contains such words or phrases, a court is more likely to conclude that the parties agreed to excuse their respective obligations in response to the COVID-19 pandemic.

Many force majeure provisions, however, make no mention of epidemics, pandemics, or similar events. In those cases, a party seeking to terminate or suspend a contract may be forced to rely on broadly worded “catch-all” provisions in the force majeure clause. Most force majeure provisions, for example, broadly apply to “acts of God.” There are very few court decisions analyzing whether outbreaks of disease qualify as “acts of God” under force majeure provisions. Thus, whether COVID-19 will qualify as an “act of God” will have to be analyzed pursuant to the relevant jurisdiction’s case law. Although the result is unpredictable, some courts have recognized that “sudden deaths and illnesses” or “events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them” are acts of God.

Another common “catch-all” in force majeure provisions is a reference to “acts of government.” Given the many government actions taken to combat the COVID-19 epidemic, a government regulation or restriction could constitute a force majeure, depending on what the contract says and how the government regulation has affected your business. This question is analyzed in more detail below, in response to the question, “Could a government response to COVID-19 be a force majeure event?”

In all cases, it is important to keep in mind that courts construe force majeure provisions quite narrowly. Thus, broad catch-all provisions such as an “anything beyond the control of the parties,” may not excuse performance unless the force majeure clause makes at least some reference to the event at issue. Another important consideration is whether the force majeure events was reasonably foreseeable. Courts generally refuse to apply force majeure clauses to events that the parties reasonably could have seen coming. The party seeking to use the force majeure clause to excuse performance will bear the burden to prove that the event in question is covered by the force majeure provision and was unforeseeable in nature.

Illustration: A Texas court refused to give expansive meaning to a “catch-all” force majeure provision that included “any other cause not enumerated herein but which is beyond the reasonable control of the Party whose performance is affected.” In that case, the force majeure event—a downturn in the oil and gas market—was considered by the Court to be a reasonably foreseeable event, and thus was not excused by the “catch-all” provision, which the Court held only applied to those events which could not have been foreseen and guarded against in the contract. *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176 (Tex. App. 2018).

Another important consideration that applies across the board is whether the force majeure event made it impossible (or nearly so) to perform the contractual duty you seek to have excused. Courts have generally refused to classify events as force majeure unless performance was rendered nearly impossible by the event in question. It will not be enough to show that COVID-19 or related government action made the contract less profitable, less convenient, or that the macro-economic conditions have imposed financial hardship. The issue of impossibility is addressed in more detail below in response to the question, “When does a force majeure event make it impossible to perform my contractual duties?”

Could a government response to COVID-19 be a force majeure event?

Very possibly. Again, it depends on what your contract says and how the government response to COVID-19 has impacted your ability to perform your contractual duties.

A specific government action taken in response to COVID-19 may be a force majeure if the contract defines things like “government regulation,” “government intervention or act” or changes to “Federal and State Laws, Executive Orders, Rules or Regulations” as force majeure events. Thus, depending on the language used in the force majeure clause, it is possible that COVID-19 itself, or the government response thereto, could each constitute separate force majeure events.

Illustration: In one case out of New York, a lease agreement between a commercial landlord and tenant contained a catch-all force majeure provision providing that performance could be delayed in the event of “governmental prohibitions.” When a different court issued a Temporary Restraining Order prohibiting the landlord from turning the property over to the tenant as initially agreed, the landlord’s breach was excused under the force majeure clause because “the force majeure clause specifically include[d] the event that actually prevent[ed] a party’s performance.” *Reade v. Stoneybrook Realty, LLC*, 882 N.Y.S.2d 8 (2009).

Not all government actions will qualify as force majeure events. To constitute a force majeure, the government action in question must generally be unforeseeable – that is, outside the scope of routine or ordinary changes to laws, as those sorts of legal changes are generally regarded as risks the parties assumed under the contract. Changes in tax or tariff rates, for example, probably represent reasonably foreseeable risks that contracting parties willingly assume. Additionally, government policies that affect the profitability of a contract but do not preclude performance may not be considered “government acts” for force majeure purposes. For example, in fixed-price contracts, a party assumes a risk that the price might change to its detriment due to government regulations. In such cases, a force majeure provision may not be applicable even if it includes “government regulation.”

If my contract does not have a force majeure clause, is it still possible to terminate or at least suspend the contract based on the impacts of COVID-19?

It most likely is possible, but difficult. Courts have developed “common law” doctrines called impossibility of performance, impracticability and frustration of purpose that, in certain cases, permit termination or suspension of a contract in response to unforeseeable events, even if the contract has no force majeure clause. The particular requirements of these doctrines vary from state to state. Generally speaking, they are very difficult to invoke, and whether they apply to your situation will likely depend on the following considerations.

As its name suggests, impossibility applies when a contracting party’s performance has been rendered objectively impossible due to an event unforeseen at the time the contract was entered. Whether COVID-19 or a related government action make it impossible to perform your contract duties will depend on your unique circumstances and how you have been affected. These highly fact-dependent determinations are discussed further below in response to the question, “When does a force majeure event make it impossible to perform my contractual duties?”

The doctrine of impossibility has been successfully raised to avoid, for example, paying rent or to terminate agreements under limited circumstances. It is far from a given that government action or economic distress related to the COVID-19 crisis would constitute impossibility. Indeed, some courts have found that discretionary government action pursuant to existing laws is not a valid basis for impossibility because the action was foreseeable and therefore, cannot be excused. Additionally, financial difficulty or economic hardship (even to the extent of insolvency or bankruptcy) may not establish impossibility. Accordingly, while it is anticipated that parties will raise impossibility defenses based on COVID-19, this defense is likely to succeed only when it actually rendered performance impossible.

Impracticability is a related defense where a party’s performance under a contract is not impossible but due to unforeseen circumstances, is made commercially impracticable and excessively burdensome, without significant cost and expense. Where government invention is involved, some courts have found impracticability by having to comply with an unforeseeable domestic or foreign governmental regulation or order which impairs a party’s ability to perform. Courts have held that a small shift in the degree of difficulty or expense does not amount to impracticability unless it goes way beyond and can be performed only at an excessive and unreasonable cost.

Frustration of purpose differs from impossibility and impracticability in that frustration focuses on impairment to the *purpose* of the contract whereas impossibility and impracticability focus on a party’s inability to perform. Frustration applies when performance remains possible, but the fundamental purpose of the contract has been so impaired by an unforeseeable event that the contract has essentially become worthless to at least one of the parties. Whether an event is unforeseeable, and whether it frustrates the purpose of a contract, are highly fact-dependent inquires.

Illustration: A tour operator operated sightseeing tours and had an agreement with an advertiser in which the advertiser would distribute advertisements for the tour operator’s business around the city. Shortly after entering the agreement, the government issued an order prohibiting commercial sightseeing tours in the city. The court ruled that because the government action destroyed the expected value of the performance for the tour operator, both parties were excused from further performance and the tour operator was not liable for discontinuing payments to Plaintiff. *Ask Mr. Foster Travel Serv. v. Tauck Tours*, 43 N.Y.S.2d 674 (Sup. Ct. 1943).

Illustration: In a fairly recent decision, a federal court in Iowa held that a jury trial was necessary to determine whether a contract to build an egg processing plant was frustrated by an outbreak of the Avian Flu. The buyer, a large-scale producer of eggs, argued that the flu outbreak caused such an increase in the price of eggs that it could no longer fill orders at stipulated contract prices, and the new egg processing facility was therefore unnecessary. The builder of the facility, on the other hand, argued that the buyer’s problems were self-inflicted through poor management and that the buyer’s own subjective purpose for entering into the contract (i.e., to fill specific orders at pre-arranged prices) was irrelevant. The court held that a jury would have to determine the parties’ shared purposes for entering into the contract and whether the Avian Flu outbreak had frustrated those purposes. The court’s decision illustrates the highly fact-bound nature of frustration of purpose and the difficulty in predicting how it will be applied to any particular contract. *Rembrandt Enterprises, Inc. v. Dahmes Stainless, Inc.*, 2017 WL 3929308 (N.D. Iowa Sept. 7, 2017).

When does a force majeure event make it “impossible” to perform my contractual duties?

Most courts have held that a force majeure event excuses a party from his/her contractual duties only when it has become physically impossible (or nearly so, such as commercially impracticable) to perform those duties. Financial hardship or inconvenience, on the other hand, is generally insufficient to constitute a force majeure. These rules are extremely dependent upon the contractual language and the fact, such that their application is difficult to generalize. Past decisions do, however, offer some guidance, and illustrate the difficulty of establishing physical impossibility.

Illustrations:

A New York court refused to excuse Ruby Tuesday’s failure to construct a restaurant due to the Great Recession, finding that Ruby Tuesday failed to demonstrate that it was actually prevented from complying with its obligations under the Lease due to events entirely outside of its control. Instead, the court held that Ruby Tuesday’s “decision to undertake a capital-intensive expansion during a time of apparent economic growth and its subsequent responses to the severe economic downturn represent business decisions on the part of Ruby Tuesday, not events outside of its control.” *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc*., 910 N.Y.S.2d 408 (Sup. Ct. 2010), aff’d, 931 N.Y.S.2d 436 (2011).

In another case, a party was contractually obligated to deliver gas through its pipelines to a specific location on a specific date. After two hurricanes damaged the pipeline to the extent that delivery to the specified location was no longer possible, the seller claimed force majeure. The court agreed, finding that hurricanes were legitimate force majeure events as contemplated by the contract and that the force majeure events had rendered performance objectively impossible. *Virginia Power Energy Mktg., Inc. v. Apache Corp*., 297 S.W.3d 397 (Tex. App. 2009).

What if I have received, or am eligible to receive, federal stimulus funds? Will that impact my ability to declare a force majeure?

Through the recently enacted CARES Act (aka, the federal stimulus package), many businesses are eligible for federal grants and/or loans intended to at least partially offset the economic impacts of the COVID-19 pandemic and related government restrictions. A natural question arises: if your company is eligible for assistance under the CARES Act, can you still use force majeure or a related doctrine to justify termination or suspension of a commercial contract?

The answer, in most cases, is yes, assuming that your situation qualifies as a force majeure under the standards discussed above and you are not seeking to be excused from a financial obligation. As noted above, force majeure and the related doctrine of impossibility applies where performance has become physically impossible. Whether performance is physically impossible should be distinct from whether a party has the financial capability to perform. Thus, strictly speaking, your eligibility for or receipt of federal funds should be irrelevant to whether COVID-19 or a related government action has made it impossible for you to perform under a contract. Thus, if you believe that you have grounds for declaring a force majeure, passage of the CARES Act should not, without more, be a reason that you refrain from doing so. Of course, if the duty at issue is a financial obligation, then the receipt of funds may make performance possible and thus preclude a force majeure or related defense.

Must I attempt to perform and/or mitigate damages if a force majeure event occurs?

Generally, yes. In many jurisdictions, a party seeking to invoke force majeure must demonstrate that it at least tried to perform contractual duties despite the event. Additionally, some force majeure clauses explicitly state that a force majeure exists only if the parties could not have avoided the adverse consequences of the event through the exercise of reasonable diligence.

In either of these circumstances, a party seeking to use force majeure to excuse its contractual duties must show that it made “reasonable” or “sufficient” efforts to perform its contractual duties. It is not usually enough to simply claim that performance was hindered because of a force majeure event. In some cases, it may be sufficient to show an attempt to provide cover or to source means of performance from other providers or suppliers, even if doing so causes additional expense.

Illustration: A seller declared force majeure on August 7, claiming that it would be unable to meet its obligations to ship coal to the purchaser at the end of the months of September and October, as provided in their contract, due to a labor strike. Finding that such a declaration was premature in light of the fact that circumstances surrounding the labor dispute could change before the obligation became due, the court refused to give effect to the seller’s attempted use of force majeure to preemptively escape its obligations. *PT Kaltim Prima Coal v. AES Barbers Point, Inc*., 180 F. Supp. 2d 475 (S.D.N.Y. 2001).

Does the occurrence of a force majeure event terminate the entire contract or suspend performance of specific obligations?

Once again, the answer to this question ultimately depends on the contract language and the nature of the force majeure event.

Upon the occurrence of a force majeure event, some contracts may entitle one or both parties to terminate or cancel the entire agreement immediately, or after the event continues for a specified period of time. Others may permit one or both parties to suspend performance until the event ceases or allow parties to seek an extension of time for performance. You should therefore pay careful attention to the specific wording of your force majeure provision to determine what, if any, termination or suspension rights are granted. You will also need to assess the impact of COVID-19, or a related government action, on your particular contract. Depending upon the facts, a temporary disruption caused by COVID-19 may not justify termination, as opposed to a temporary suspension, of the contract.

Illustration: Parties to a lease agreement included language in the force majeure clause providing that “the time for the party’s performance shall be extended one (1) day for each day’s prevention, delay, or stoppage by reason of such event of force majeure.” This language ensured that performance would be excused only for so long as necessary as a result of the force majeure and would then resume at the earliest possible time. *Burnside 711, LLC v. Nassau Reg’l Off-Track Betting Corp.*, 888 N.Y.S.2d 212 (2009).

Some force majeure provisions may only apply to certain specific obligations (i.e., shipping obligations), or may require the obligated party to perform in the face of the force majeure event rather than extending relief. The specifics of each parties’ agreement must be considered and even then, there could be extenuating circumstances that may be relevant given the parties’ intent and surrounding circumstances. In connection with any decision to suspend or terminate performance, the parties to a contract should critically analyze the risks and benefits of invoking the right to avoid performance and the duty to mitigate damages even in the presence of an entitlement to avoid performance.

Can the occurrence of a force majeure event excuse payment obligations or does it only excuse other performance obligations?

any force majeure provisions expressly carve out “the obligation to make payments” (in addition to disaster recovery and business continuity obligations) from the performance obligations otherwise excused during the pendency of a force majeure event. The purpose of this carve out is to hold each contracting party to its payment obligations despite unforeseen circumstances beyond a party’s control.

Impairment to payment obligations comes in two forms: (1) inability to process payment, such as if the government restricts payments to a payee in a prohibited country, or (2) lack of sufficient funds, such as declining revenue based on a financial crisis. The first type would typically be excused in a force majeure context so long as outside the party’s control. In the absence of a specific contractual provision, courts are loath to characterize the second type of financial hardship as a force majeure event. While government shut-downs, workforce reductions and lack of sales revenue directly impact a party’s financial stability, they do not necessarily prevent a party from paying amounts due under a contract to the same degree that a plant closure would likely excuse a party’s obligation to manufacture products. To prevail in avoiding payment obligations, the party claiming such excuse should be prepared to prove that the force majeure event directly impacted its ability to make the payment, not simply that the profitability or financial wherewithal of the party had been impaired due to an economic downturn caused by the event.

Many customers are circulating notices to their vendors claiming the global crisis excuses their obligations to pay or requesting extensions in credit and payment terms. Such concessions are more often negotiated between the parties to maintain commercial relationships and not a product of excused performance under a force majeure clause or other recognized defense.

Vendors should be aware that granting concessions to some but not all customers may lead to unintended consequences such as potential antitrust claims by other similarly situated customers who would claim to have been treated discriminately.

Illustration: Kyocera contracted to purchase silicon from a Chinese supplier to use in the production of solar panels. Thereafter, the U.S. government-imposed tariffs which resulted in significant increases in the costs of the silicon to Kyocera. Kyocera sought to avoid its payment obligations under a general force majeure clause in the contract which excused all obligations for events beyond a party’s control, including acts of the government. The court rejected Kyocera’s position finding that Kyocera was able to perform, albeit under financial conditions not to its liking. *Kyocera Corp. v. Hemlock Semiconductor, LLC*, 886 N.W.2d 445 (Mich. Ct. App. 2015).

Must I give notice to my counterparty if I decide to declare force majeure, impossibility, or frustration?

Many contracts affirmatively require notice of a force majeure event. In those cases, you must comply with the contract’s notice provisions, and failure to follow them risks waiving the right to declare a force majeure.

Illustration: One particular force majeure clause required prompt written notice to the other party of the occurrence of force majeure events. However, the party claiming force majeure provided the required notice by telephone and the court held that, although the notice was provided in a timely manner, the failure to do so in writing was fatal to the defense. *W. Texas Utilities Co. v. Exxon Coal USA, Inc*., 807 P.2d 932 (Wyo. 1991).

Even in cases where the contract does not contain any particular notice requirement, it usually is best practice to give the other party some notice before attempting to terminate or suspend. Just what your notice should say, however, is a nuanced decision that depends on your particular contract language and circumstances. Because the notice might later be used as evidence in litigation, any such notice should be carefully crafted with the assistance of legal counsel.

I have received a notice from my counterparty claiming force majeure, impossibility, or frustration of purpose. What should I do?

If you have received such a notice from a counterparty and may want to dispute it, there are several important considerations.

First evaluate the notice you have received and determine whether it complies with any notice requirements in your contract. As noted above, insufficient notice can, in some circumstances, result in a waiver of the right to claim force majeure.

Second, evaluate the force majeure clause in your contract and compare it to the reasons given for declaring force majeure. Does the notice relate to a specific type of event mentioned in the force majeure clause?

Third, you should consider demanding that the counterparty fully state the basis for any claim of force majeure, impossibility, or frustration. Such a demand should be within your rights, because the party attempting to excuse performance bears the burden of proving that performance is truly excused. The more you know about the basis for the other party’s declaration, the better you can evaluate your options for challenging it. For example, does it appear that the other party’s performance is truly impossible, or is the other party relying on financial hardship that usually is insufficient to excuse performance? Is the event relied upon by the other party truly unforeseeable and, if so, why or why not? Foreseeable events usually are not sufficient to excuse performance.

Also consider other provisions of the contract that may be relevant. Examples include a “time is of the essence” clause or a “hell or high water” clause.

“Time is of the essence” is a term of art with specific meaning under contract law; it means that the performance by one party within a specified period of time is essential to require the other party to the agreement to perform. Some courts have found that “time is of the essence” performance cannot be excused by a claim of impossibility. However, the outcome may vary based on the facts, the specifics of the agreement, and the jurisdiction. If the parties’ agreement has both a “time is of the essence” and force majeure clause, then the language will need to be closely examined to determine how each provision should be read within context as to not render any clause meaningless.

A “hell or high water” clause is typically found in an equipment lease agreement and shifts the risk of any performance preventing event to one of the contracting parties. Such clauses often describe a contractual obligation as being “absolute and unconditional,” or other words to that effect. Such clauses also are often enforceable and may defeat any declaration of force majeure, impossibility, or frustration of purpose.

Illustration: A federal court in Iowa, for example, rejected the defense of frustration of purpose in the face of a “hell or high water” provision. *Gen. Elec. Capital Corp. v. FPL Serv. Corp*., 986 F. Supp. 2d 1029 (N.D. Iowa 2013). That case involved a lease for industrial copiers that were destroyed by Hurricane Sandy. Because the lease contained a “hell or high water” provision, the lessor was obligated to continue paying rent on the destroyed copiers.

If you decide to challenge a declaration of force majeure, impossibility or frustration, you probably will need to file a lawsuit or arbitration to enforce your rights. You should carefully review any dispute resolution provisions in the contract to ensure that you follow all required procedural steps.

Are force majeure, impossibility, and related doctrines available in jurisdictions outside of the U.S.?

Yes, these principles exist in other countries but there are nuances and potential significant differences.

Many countries recognize force majeure principles that are steeped in contract law. Courts will look to the parties’ written contract to determine whether force majeure applies to the facts of the case. Most jurisdictions interpret these provisions narrowly; that is, only the specific events listed in the express terms of a written contract will be covered. These general principles, however, are not recognized by all countries and jurisdictions. For example, some foreign jurisdictions may imply a right to declare a force majeure event even if the contract does not contain an explicit force majeure clause. In contrast, U.S. courts only apply a force majeure clause if the parties included it in the contract. Many countries also recognize as defenses to non-performance such as frustration of contract and impossibility, but the availability and scope of these defenses is hardly uniform across national jurisdictions. For instance, an act that may excuse performance in one country may be found in another country to be merely a hardship that has no effect on the parties’ obligations under the contract.

In light of the variances in the availability and applicability of these various defenses to non-performance, parties should carefully consider these issues when agreeing to a contractual choice of law provision.

Does the government have to compensate businesses that it orders to shut down under a “takings” theory?

In some limited circumstances, business owners may be entitled to compensation under what is known as a “takings” claim. Generally, takings claims fall into two categories. One category is a permanent physical taking which typically requires just compensation; the second is a regulatory taking where the value of private property is merely diminished by a regulation but there is no physical occupation. If the regulation merely regulates the use of property, then compensation is only required in narrow circumstances. The courts will consider the extent to which the government action deprives the owner of the economic use of the property and whether the regulation unfairly singles out particular property owners when the burden should be shouldered by the population as a whole. While many temporary regulations are considered exercises of the police power that do not require compensation (i.e., restricting access to a building due to health code violations or fire damage), one court has found that temporarily closing an apartment complex to “wage a war on drugs” by curbing use by tenants was compensable as a taking because it deprived the owner of all viable economic use of the property during the closure.

The takings doctrine is highly complex and fact specific. The impact of the government regulation on the economic viability of the specific business is an important factor. Takings claims were prevalent and often successful during World War II when the government physically occupied or interfered with different businesses. The government reaction to COVID-19 has already resulted in a takings claim lawsuit filed in federal court, and is likely to lead to further litigation concerning whether the government’s actions require compensation.