

Force Majeure and Business Interruption in the Time of COVID-19

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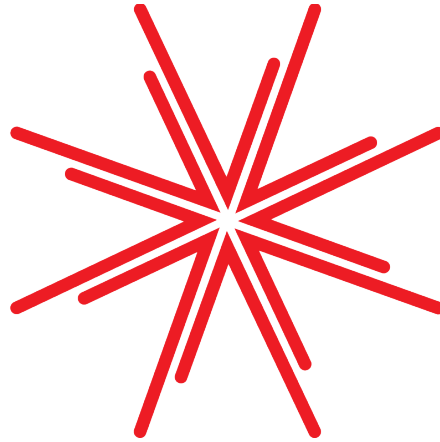
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Understanding Force Majeure

- *Force Majeure* is French for “superior force”
- Parties may sometimes be excused from performance under a contract when an event outside their control makes performance impossible
- Contract provisions are important, but common law and statutory issues as well
- Typical force majeure events
 - “Act of God”
 - Natural disasters, earthquakes, fires, floods, etc.
 - Wars, terrorism, riots, labor disputes (typically strikes)
 - Governmental regulations or actions

Understanding Force Majeure

- *Black's Law Dictionary* defines an “act of God” as “[a]n overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado.”
- Does a pandemic count as an “act of God”?
 - Does it fit another “typical” category?

Understanding Force Majeure

Analysis

- Does the contract include a force majeure clause?
 - Typically included in event contracts, supply agreements, construction contracts, and other contracts requiring specific performance timelines
- If so, how does the contract define force majeure events?
 - Very specific, very general, or in between?
- Is performance actually impossible or can it be delayed?
 - Is there an alternate supply source?
 - Local vs global effects of pandemic
- *What about impracticability?*

Understanding Force Majeure

Analysis - Continued

- What are the risks of contract termination?
- What relief may the contracting party get if a court finds that this was not a force majeure event?
- To what extent does a “most favored nation” clause come into play?
- What must a party excused from performing be required to do to mitigate the impact of non-performance?
- *Fact-specific analysis*

Understanding Force Majeure

What if your contract doesn't include a force majeure clause?

- Leases
 - Rent abatement or suspension
- Doctrine of frustration/frustration of purpose
 1. Unforeseen situation
 2. Absence of relevant contract provision (force majeure clause)
 3. “Radically different performance of contract”
- Material adverse change clause
 - Real estate or other purchase agreement
 - Loan term sheet

Understanding Force Majeure

What if your contract doesn't include a force majeure clause? - Continued

- Defense of impossibility/impracticability of performance
 - UCC includes impracticability defense
 - Under Michigan UCC, performance excused where:
 - Inability to perform is due to compliance with governmental regulations OR
 - performance becomes impracticable due to occurrence of an “unforeseeable” event

What to do about existing contracts?

1. Review existing contracts to understand force majeure clauses and possible solutions
 - a. Pay attention to notification deadlines
 - b. Unintentional waiver or default
 - c. Allocation of risk
2. Communicate with contracting parties
3. Plan for future performance
 - a. Rescheduled event or
 - b. Ramping up resumed supply of goods

Drafting New Force Majeure Clauses

- **Sample clause: Event Contract**
- Impossibility of Performance/Force Majeure: Notwithstanding the cancellation policy set forth herein, the parties' performance under this Agreement is subject to acts of God, war, **national emergencies**, **government regulation**, threats or acts of terrorism or similar acts, acts of government (including governmental travel advisories), **threat of disease**, disaster, strikes and other labor disputes (except those involving Facility's employees or agents), work stoppage, civil disorder, riots, curtailment of transportation facilities, **health issues**, or any other cause beyond the parties' control, making it inadvisable, illegal or impossible to perform their obligations under the Contract. Either party may cancel the Contract for any one or more of such reasons upon written notice to the other.

Drafting New Force Majeure Clauses

- Event Contract
 - May also include a cancellation policy that allows the event to be rescheduled without penalty
 - Carefully review event contracts prepared by event venues (large hotel chains, casinos, etc.)

Drafting New Force Majeure Clauses

- Sample clause: Distributor Agreement
- **Force Majeure.** Neither Party will be deemed in default of this Agreement to the extent that performance of its obligations, or attempts to cure any breach, are delayed or prevented by reason of circumstance beyond its reasonable control, including, without limitation, **act of Government, pandemic or other serious public health issue**, fire, natural disaster, earthquake, accident, or other acts of God ("Force Majeure"), ***provided that the Party seeking to delay its performance gives the other written notice of any such Force Majeure within five (5) days after the discovery of the Force Majeure***, and further provided that such Party uses its good faith efforts to cure the Force Majeure. ***If there is a Force Majeure, the time for performance or cure will be extended for a period equal to the duration of the Force Majeure.***

Business Interruption

- **Business Interruption Insurance**
 - Insurance coverage is contractual, and depends on the terms of the policy
 - Review policy, but many policies specifically prohibit claims due to viral illness
 - Ambiguities are construed against the insurer
 - Consult with insurance agent
 - Consult with attorney with expertise in insurance coverage issues
 - **If you think you may have coverage → you must comply with the policy's notice and proof of loss requirements**

Business Interruption

- **Business Interruption Insurance**
 - Monitor pending litigation to see how this issue develops
 - Some class actions already filed
 - Pending legislation in some jurisdiction to require insurers to pay claims
 - But will this be enforceable if it expands coverage beyond what the insurer bargain for?

Business Interruption

- **First Party Property Insurance Policy**
 - Often provides coverage for direct physical loss (fire, flood, etc.)
 - Does COVID-19 contamination on premises constitute a physical loss if it prevents occupancy for a period of time?
 - Generally no coverage for loss due to market conditions or due to fear of contamination
 - Causation of loss may be difficult to prove

 - Governmental regulations, order – “Interruption by Civil Authority”
 - “Denial of Access”
 - Was it a mandatory closing of the business, or a voluntary closing by the business to prevent contamination/illness?

Business Interruption

- **First Party Property Insurance Policy**
 - Stay at Home Order”- Equivalent to mandatory closing of business if employees are still working remotely?
 - Common Exclusions (post-SARS) for:
 - Communicable diseases
 - Organisms
 - Viruses
 - Pandemics
 - Did insured purchase extension of coverage to cover infectious diseases?

Other Possible Insurance Coverage

- Event Cancellation Insurance
- Contingent Business Interruption Coverage
 - Caused by supplier or customer's interruption

Questions?

Today's Presenters



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