MSF CLIENT ALERT

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Is My Force Majeure Defense Likely to Succeed?

By now, dozens of posts and articles have been written on whether force majeure, the contract clause that excuses performance of an "act of God," applies to COVID-19. Each post and article reach the same conclusion: it depends….

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It depends both on the particular language in the force majeure clause and the particular circumstances of the party seeking to have its non-performance excused. That is surely the correct answer. But it is not a very useful one. This Client Alert attempts to provide a bit more guidance concerning the circumstances in which a party claiming force majeure is likely to succeed if a contract is governed by New York law.

Force majeure is a Latin phrase meaning "superior force." The idea behind the legal doctrine is that a superior force prevented a contracting party from performing is obligations. Thus, force majeure is fundamentally a defense to a claim of breach of contract. In simplest terms, the party accused of breach alleges that while it did not perform, it has a lawful excuse for not performing. Hence, the question becomes: given the language of the force majeure clause whether COVID-19 is a lawful excuse for the party's failure to perform.

The party raising force majeure is generally a defendant, although a plaintiff could file a declaratory judgment action seeking the court declare that the plaintiff has a valid force majeure defense. Such plaintiffs should understand, however, that filing such a declaratory judgment action will almost certainly cause the defendant to file a counterclaim seeking damages for the contract breach.

Force majeure relief is a contractually bargained for right. If the contract does not contain a force majeure provision, a court will not read it into the contract. Non-performing parties without a force majeure provision in the contract may still rely on the common law defenses impossibility of performance or frustration of purpose, but such defenses will require a greater factual showing than a defense based on a contractual force majeure provision.

Assuming the contact has force majeure provision, the case law makes clear the exact wording of the clause matters greatly. Thus, to begin to determine the strength of a force majeure defense, the clause must be examined. The cases provide that force majeure provisions are read narrowly. So, the more specific the clause is to the COVID-19 events, the greater the non-performing party's chance of success.

If the force majeure clause expressly provides that a pandemic or disease is a force majeure event, that surely would make the case easy, but we have seen no such cases or clauses. If the force majeure clause makes pollutants or contaminants a force majeure event, that increases the defense's likelihood of success. But in the face of such language, a general allegation of the COVID-19 pandemic will not be nearly as likely to succeed as an allegation that the presence of coronavirus directly prevented a party from performing.

The strongest cases will allege and prove coronavirus was actually present at the non-performing party's business or in its supply chain.

Typically, force majeure clauses refer to "acts of God" as a force majeure event. Is COVID-19 an act of God? That may prove harder to demonstrate than one might think. Disease and its interruption of business is not unheard of, even in recent history. There was the SARS outbreak in 2003, the H1N1outbreak in 2009, the MERS outbreak in 2012, the Ebola outbreak in 2014 and various avian flu outbreaks, some of which wreaked havoc with the poultry industry. Parties asserting force majeure will likely meet arguments that because there is precedent for pandemics and outbreaks of dangerous diseases, they cannot be considered the kind of unimaginable events to which a general force majeure clause using the phrase "act of God" should apply.

Phrases of inclusion like "such as" or "including" or "for any reason" are also less helpful to non-performing parties than it might initially appear. Consistent with the practice of reading force majeure clauses narrowly, courts read lists of sample force majeure events with inclusive language to mean the unincluded events must be similar to the included events. Thus, Courts are more likely to read a force majeure clause excusing non-performance for act of God, including storms, floods, and hurricanes to also include tornados than to include COVID-19. In this vein, courts are very unlikely to find force majeure based upon financial hardship or changed economic circumstances alone. Indeed, force majeure arguments were largely unsuccessful when they were made in the wake of the 2008 financial crisis.

One avenue that may prove fruitful for non-performing parties invoking the force majeure defense is government action. As the COVID-19 crisis grew, Governor Cuomo issued a series of executive orders first limiting, and then closing, all non-essential businesses in New York. A non-performing party that can show it was lawfully prohibited from fulfilling its contractual obligations because of one of these executive orders has a stronger case. A government order is literally a "superior force" preventing a contracting party's performance. Some force majeure clauses expressly refer to "government action" as an example of force majeure. Cases where government action language is present will be even stronger cases for the application of force majeure, but the absence of such language is not necessarily fatal.

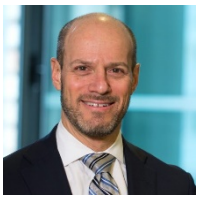
In addition to inclusive language, force majeure clauses sometimes include exclusive language. A typical obligation that force majeure clauses exclude is a financial obligation. Leases, for example, often expressly exclude the obligation to pay rent from the list of possible force majeure events. The likely rationale is that the parties have placed the risk of the inability to pay rent on the tenant, which will remain in possession of the property while the landlord will still have the obligation to pay taxes, utilities, and possibly a mortgage. Hence, it is critical to understand what the contract excludes from the list of potential force majeure events.

Finally, in order to determine if a force majeure claim is likely to succeed, it is critical to understand the "facts on the ground." The non-performing party's likelihood of success increases if the non-performing party's inability to perform occurred after any government shut down

order. Similarly, the non-performing party's likelihood of success increases if it can show the presence of COVID-19 at its business or in its supply chain.

As the COVID-19 crisis plays out, we expect that a number of force majeure cases will be litigated. We will continue to follow and report of these developments.

For more information or if you have any questions about how this new development may affect your business, please contact Howard Koh.



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