

Force Majeure in the age of coronavirus

Top 5 questions to consider when analyzing your business agreements

By Adam Schramek | March 2020

From South by Southwest (SXSW) in Austin to the Electronic Entertainment Expo (E3) in Los Angeles to the International Auto Show in New York, numerous industry meetings and conferences are being canceled or postponed due to the novel coronavirus pandemic. Similarly, many supply chains and business arrangements are being disrupted. This is leading many businesses to ask whether their contractual force majeure clauses apply. Below are five key questions to ask when analyzing this issue.

What does your force majeure clause actually say?

There is no single “standard” force majeure clause. Just because your business may include force majeure clauses in its contracts does not mean they are necessarily all uniform. While a force majeure clause may be one found in the “standard” terms and conditions of a contract, they remain subject to negotiation like any other term. The iterations of specific events of force majeure can vary widely, particularly between industries. And businesses allowing non-attorneys to negotiate agreements, particularly matters relating to special event space and hotel agreements, may be surprised at the terms of the clause they are facing.

Can I rely on coronavirus being an unforeseeable “Act of God”?

Force majeure clauses often list specific items that will qualify as an event of force majeure, such as strikes, wars and riots. Many

such clauses will include an “Act of God” in the list, which would seem to describe a global pandemic. But case law on what does or does not qualify as Act of God varies across the country. Some jurisdictions have opinions suggesting that Acts of God may be limited to matters solely caused by forces of nature. *See, e.g., McWilliams v. Masterson*, 112 S.W.3d 314, 320 (Tex. App. – Amarillo 2003, pet. denied). Most jurisdictions require the Act of God to be unforeseeable. *See, e.g., United States v. Winstar Corp.*, 518 US 839, 905–907 (1996). Foreseeability is often disputed, with the decision dependent on the level of abstraction ultimately adopted by the decision maker (*e.g.*, general viral outbreak vs. coronavirus pandemic). Suffice it to say, whether a force majeure clause that specifically references Acts of God will apply to a coronavirus cancellation or interruption is highly fact and jurisdiction specific.

Having a force majeure clause that specifically references epidemics or pandemics will be the most helpful to a party wanting to obtain relief from a contractual obligation as a result of the coronavirus pandemic. However, few contracts outside of the healthcare industry typically have such specific references.

Was performance made impossible, impracticable or illegal?

Different force majeure clauses use different standards to tie the force majeure event to contractual performance. The three most common are impossibility, impracticability and illegality. Which of these standards is in a contract will drive the analysis of its applicability. For example, a court could conclude that holding a particular event was impracticable but not necessarily illegal. There are also many factual permutations that could drive this analysis. For example, a US event focused on the Chinese market may very well have become impossible after the implementation of the Chinese travel ban. See Presidential Proclamation 9984.

Does your clause have a catchall provision?

Many force majeure clauses not only list a number of specified events but have catchall clauses such as “any other event beyond the reasonable control of a party.” However, some clauses use phrases such as “any other like events.” The latter phrasing is more narrowly interpreted by many courts. See, e.g., *Kel Kim Corp. v. Central Markets, Inc.*, 519 N.E.2d 295, 296 (N.Y. 1987). Having any sort of catchall clause will be of assistance in claiming an event of force majeure connected to the coronavirus pandemic. However, case law interpreting these provisions also vary among jurisdictions, with some courts limiting their scope by adding additional requirements, such as lack of foreseeability. See, e.g., *TEC Olmos, LLC v. ConocoPhillips Co.*, 2018 WL 2437449, at *6 (Tex. App. – Houston May 31, 2018); *Rochester Gas and Elec. Corp. v. Delta Star, Inc.*, 2009 WL 368508, at *8–10 (W.D.N.Y. 2009).

Is notice required and did you properly give it?

Force majeure clauses vary in their notice requirements. Some require notice within a certain timeframe of the occurrence of an event of force majeure, whereas others only require prompt or “reasonably” prompt notice. In the context of the coronavirus pandemic, one important consideration for any notice provision will be when “the event” of force majeure occurred. Was it when the World Health Organization (WHO) declared the coronavirus outbreak a pandemic? Was it when a travel ban was entered? Was it when a local city regulation was enacted? Determining what the force majeure event is and when it occurred will be key in determining when notice was required.

Final Thoughts

While force majeure clauses are generally construed narrowly, the coronavirus pandemic is unprecedented in our nation’s recent history. How public policy considerations will impact the judicial analysis of force majeure clauses going forward remains to be seen. The law is developed with the benefit of 20/20 hindsight, and right now nobody knows how the pandemic will end.

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