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Evaluating Force Majeure Clauses in Connection with the COVID-19 Outbreak

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As governments and businesses take action to mitigate the impact of COVID-19, companies must consider whether and to what extent their existing contractual agreements oblige parties to perform while events related to COVID-19 are impacting the performance under those contracts. Many contracts contain force majeure clauses that may excuse performance in the face of COVID-19. These provisions are not uniform, and the scope of relief they afford may vary considerably based upon the language used, the jurisdictions involved, and the unique facts and circumstances of each case. We provide a brief overview here of how a force majeure clause may excuse performance with respect to COVID-19-related events.

Is the COVID-19 Outbreak a Force Majeure Under the Contract?

One way contracting parties can plan for unforeseen events is by including a clause that deals generally with "force majeure" events. "A force majeure event is an event beyond the control of the parties which prevents performance under a contract and may excuse non-performance." *Aukema v. Chesapeake Appalachia, LLC*, 904 F. Supp. 2d 199, 204-05 (N.D.N.Y. 2012) (citing *Kel Kim Corp. v. Cent. Mkts., Inc.*, 519 N.E.2d 295, 296 (N.Y. 1987)). The basic purpose of force majeure clauses is "to relieve a party from its contractual duties when its performance has been prevented by a force beyond its control or when the purpose of the contract has been frustrated." *Phillips P.R. Core, Inc. v. Tradax Petroleum Ltd*., 782 F.2d 314, 319 (2d Cir. 1985).

A first step a business should take is to read carefully any force majeure clauses in their contracts. "Application of a force majeure provision, as with any other contractual provision, starts with the words chosen by the drafters." *Stroud v. Forest Gate Dev. Corp.*, No. Civ.A. 20063-NC, Civ.A. 20464-NC, 2004 WL 1087373, at*5 (Del. Ch. May 5, 2004). Given the dramatic consequences force majeure clauses can have, courts construe them narrowly. "Ordinarily, only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused." *Kel Kim Corp*., 519 N.E.2d at 296. Indeed, some contracts may include language either specifically including or excluding outbreaks like COVID-19.

If the force majeure clause is silent as to outbreaks, nonperformance related to COVID-19 still might be covered under language defining "governmental orders or actions" as force majeure events. In such an instance, a force majeure clause may excuse nonperformance due to government-ordered limits on gatherings, quarantines or travel restrictions.

Force majeure provisions also often contain a series of specific types of events followed by general "catchall" language to capture all similar events beyond the control of the parties. Courts often confine the meaning of that catchall language "to things of the same kind or nature as the particular matters mentioned." *Id.* at 296-97.

Additionally, parties should consider their course of dealings, industry practice and other extrinsic evidence in evaluating whether a force majeure event related to COVID-19 has occurred. For instance, prior statements or representations to customers or suppliers may be interpreted as admissions, waivers, guarantees of performance or qualifications to performance, depending on the circumstances.

A Party Seeking to Rely on a Force Majeure Clause Must Demonstrate the Force Majeure Event Caused Performance to Be Impractical.

Even if COVID-19 is a force majeure event under the terms of a contract, the party seeking to excuse its performance must show that "the failure to perform was proximately caused by a contingency and that, in spite of skill, diligence, and good faith on the promisor's part, performance remains impossible or unreasonably expensive." 30 Williston on Contracts § 77:31 (4th ed.) ("Williston"). Thus, to rely on a force majeure clause, "some correlation must be drawn between the occurrence of an event and the obligation of the nonperforming party." *Gulf Oil Corp. v. F.E.R.C.*, 706 F.2d 444, 455 (3d Cir. 1983); *accord Phillips P.R. Core*, 782 F.2d at 319. Whether the circumstances disrupting performance are sufficiently correlated to COVID-19 likely will turn on the specific facts and allegations. *See, e.g., Emerald Int'l Corp. v. WWMV, LLC*, No. CV 15-179-WOB-JGW, 2016 WL 4433357, at *5 (E.D. Ky. Aug. 15, 2016) (dismissing for failure to make "any persuasive argument that a decline in the coal market can fairly be said to *cause* its inability to obtain the coal" (emphasis in original)).

A party also may need to demonstrate that performance is actually impossible or impractical. Restatement (Second) of Contracts § 261 cmt. d (1981). As a general rule, force majeure clauses "typically operate to excuse a party's future performance that has been rendered impossible by an unforeseen event." *In re Cablevision Consumer Litig.*, 864 F. Supp. 2d 258, 264 (E.D.N.Y. 2012) (New York law). In contrast, "[n]onperformance dictated by economic hardship is not enough to fall within a force majeure provision." *See* Williston § 77:31. Courts have explained that "'impracticability' means more than 'impracticality.' A mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, does not amount to impracticability since it is this sort of risk that a fixed-price contract is intended to cover." *Id.* Courts have also explained that a force majeure clause "does not excuse performance for economic inadvisability, even when the economic conditions are the product of a force majeure event." *OWBR LLC v. Clear Channel Commc'ns, Inc.*, 266 F. Supp. 2d 1214, 1223 (D. Haw. 2003). Whether the particular circumstances of a COVID-19 incident render performance impossible or impractical will depend on the specific facts and may vary by jurisdiction.

"Furthermore, a party is expected to use reasonable efforts to surmount obstacles to performance, and a performance is impracticable only if it is so in spite of such efforts." Restatement (Second) of Contracts § 261 cmt. d (1981). Thus, "in order to use force majeure events to excuse nonperformance, [a party] must show that it tried to overcome the results of the events' occurrences by doing everything within its control to prevent or to minimize the event's occurrence and its effects." *Gulf Oil Corp.*, 706 F.2d at 454.

Companies Should Determine Whether and When to Give Notice of a Force Majeure.

A party whose performance is frustrated by the COVID-19 outbreak (or resulting government restrictions) should promptly provide notice to its counterparties that it is altering or suspending its performance under the force majeure clause of its contract. Once again, the party should check the exact terms of the contract to determine what notice is necessary, as force majeure clauses often contain explicit requirements for both the form and timing of the notice. Even if a party has missed the notice deadline, it may not have lost its ability to invoke the protections of the force majeure clause. Depending on the specific contractual language, a notice provision may be construed as a duty to be performed under the agreement, but not "a condition precedent to a force majeure defense." *Toyomenka Pac. Petroleum, Inc. v. Hess Oil V.I. Corp.*, 771 F.Supp. 63, 67-68 (S.D.N.Y. 1991).

Companies May Have Legal Protections Beyond Force Majeure Clauses.

If a contract does not contain a force majeure provision that covers the COVID-19 outbreak, a party may have other protections available under other legal doctrines, such as Common Law (*e.g.*, frustration of purpose), Uniform Commercial Code, international law (e.g., Section 79 of the United Nations Convention on Contracts for the International Sale of Goods), or other contractual provisions. Companies whose performance has been or may be disrupted by COVID-19 and its effects should consider these alternative protections in addition to the application of force majeure clauses.

Conscious of the human, operational and financial strain that coronavirus is placing on businesses and organizations worldwide, Jenner & Block has assembled a multi-disciplinary Task Force to support clients as they navigate the legal and strategic challenges of the COVID-19 / Coronavirus situation.

For additional information and materials, please visit our COVID-19 / Coronavirus Resource Center.

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