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PERSPECTIVE

Surviving a pandemic: Dust off the force majeure clause

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A global outbreak of COVID-19 or the novel coronavirus has hit the United States and is wreaking even greater havoc on many of its international trade partners. The health crisis has caused widespread disruption of brick and mortar business activity, event cancellations and stock market plunges.

As a result of the health crisis, organizations of all types are incurring sudden economic loss. Like the virus itself, the resiliency of ubiquitous force majeure clauses has become crucial overnight. Organizations that have incurred economic loss deriving from the COVID-19 crisis should look in their contracts to force majeure as a potential source of relief to mitigate damage.

Force majeure contract clauses seek to allocate risk between the parties when an unforeseen event makes contract performance impossible or impracticable. While impossibility and impracticability are standard curriculum for any law school contracts course, the nature of this doctrine as rarely needed, means it is not often used. As a result, boilerplate force majeure language is widely included in many contracts. The enforceability of a force majeure clause in the wake of the novel coronavirus may vary widely across circumstances.

Evaluating Whether COVID-19 Is a Covered Event

The concept of force majeure originated in civil law under the Napoleonic Code of 1804. The

force majeure doctrine is not standardized under the common law. Parties and courts look to the terms of a contract to decipher whether a force majeure defense exists and, if so, what is covered. Clauses often list a number of events that are specifically covered, such as a war or earthquake. They may specifically extend coverage to any other unforeseen event outside the parties' control.

COVID-19 has now been categorized as a pandemic by the World Health Organization and declared a national emergency by the President of the United States, titles that may increase the number of triggered force majeure provisions. However, not every force majeure clause covers pandemics, epidemics or disease outbreaks that impact production or demand. In contrast, while changes in market demand may not fall within force majeure provisions, parties might nonetheless be excused from performance where the fall in demand is secondary to another covered force majeure event. *Rexing Quality Eggs v. Rembrandt Enters.*, 360 F. Supp. 3d 817, 841 (S.D. Ind. 2018). Variations in the extent to which states read these listed covered events to be exclusive or inclusive may impact the likelihood that the novel coronavirus will be covered.

Organizations should take care to evaluate individual contracts separately. Force majeure clauses frequently protect against impossibility or impracticability of performance. Depending on how they are drafted, those clauses may also provide a specific basis on which to argue that the purpose of the contract

was frustrated. If it applies to a party's contract, this common law doctrine may prove highly useful in the pandemic scenario. Parties should look to the law of the jurisdiction where a claim might arise to evaluate whether a force majeure contract provision may either be complementary to or supersede the relief afforded for frustration of purpose. *Rembrandt Enters. v. Dahmes Stainless, Inc.*, C15-4248- LTS (N.D. Iowa Sept. 7, 2017).

Headlines in the past week are littered with news of concerts and sporting events being cancelled. Is an advertiser justified in withholding payment for ads set to be displayed at an event if the event is cancelled or no one is there to see it? A court's analysis of whether the purpose of the contract was frustrated will depend not only on the pandemic event that "frustrated" the party's performance, but also how the "purpose" of the particular contract was impacted.

Preserving Force Majeure Defenses

The economic impact stemming from the novel coronavirus is rapidly evolving day by day. Reports of newly disrupted activities are seemingly constant. In many cases, disruptions may last weeks to months while organizations try to limit the spread of the disease from person to person. While the full extent that COVID-19 will have on individual organizations is not yet understood, time may be of the essence in protecting organizations' rights under force majeure clauses.

In considering what steps to

take to preserve force majeure defenses, parties should review contract language and the law of the jurisdiction. In some instances, a party may need to affirmatively declare that it is exercising its rights under a force majeure provision to other parties and to third-party beneficiaries of the contract. The appropriate time in which to declare a force majeure will depend on a number of factors, including the language of the clause, the specific reason that performance has become impossible or impracticable, and the date that a party is expected to perform.

Organizations that intend to stand on force majeure defenses should also consider mitigation techniques. Force majeure clauses frequently include an obligation on the parties to make a good faith effort to perform contractual obligations. Some provisions specifically require parties to mitigate damages where an unforeseen event prevents the party's performance. It may therefore be prudent to analyze at the forefront the extent to which damages can be mitigated. For example, organizations may evaluate whether it is practicable to postpone rather than cancel an event or maintain a baseline level of performance.

While the extent of the damage is yet to be seen, organizations can begin immediately to review contracts and preserve rights that may be critical to recovering for losses suffered as a result of the COVID-19 pandemic. ■

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