COVID-19: APPLICABILITY OF FORCE MAJEURE CLAUSES IN THE UNITED STATES

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On March 11, 2020, the World Health Organization declared the novel coronavirus (COVID-19) a global pandemic. As of March 18, 2020, the United States had reported at least 5,881 cases of COVID-19, including 107 deaths. Those numbers were expected to rise rapidly. The virus had spread into all 50 states and the District of Columbia. Many states and major metropolitan areas, including Los Angeles, New York, the District of Columbia, Dallas, Seattle, and Miami were under states of emergency. The city of San Francisco was completely locked down. Local governments in many areas banned large gatherings and closed restaurants, bars, and public spaces. School districts across the country have even cancelled school indefinitely.

These unprecedented events have resulted in the large-scale cancelations of events, gatherings, conferences, and the like and disrupted the supply chain in the United States. While health and safety risks should be the paramount concern, the economic impact of this pandemic cannot be ignored. Companies should, therefore, carefully review and understand their contracts and the potential applicability of force majeure clauses commonly found therein.

A force majeure clause is a provision of a contract that excuses a party from performance if an extraordinary event prevents one or both parties from performing their obligations. Literally "force majeure" translates from French as a "superior force." A force majeure provision is never implied under common law and will only arise in contracts where the parties have specifically agreed to it. The applicability of a force majeure clause is highly dependent on the specific wording of the clause and the circumstances existing at the time the clause is invoked. In analyzing whether a specific force majeure clause has been triggered by COVID-19, there are three general issues common to most clauses that should be considered.

First, how does the contract define force majeure? In other words, does COVID-19 qualify as an event that triggers the applicability of the clause? Most force majeure clauses include a laundry list of items that qualify and typically include "acts of God," "war," "disaster," "government regulations," "strikes," "civil disorder," and "curtailment of transportation facilities." Following the terrorist attacks on September 11, 2001, many companies began to include "acts of terrorism" as a force majeure trigger.

Some clauses include language specific to "pandemics," "epidemics," "illness," or "disease," but many do not. The fact that such specific references are often not included should not be surprising—the United States has not seen a health-related emergency of this nature in recent years. To be sure, parties that are currently negotiating force majeure clauses are likely to address COVID-19 with specific language.

The fact that certain specific terms are not used does not necessarily mean that COVID-19 does not qualify as a triggering event. COVID-19 may fall within another included term, such as "acts of God" or "disaster." Also, many clauses use an opening clause or catch-all language in addition to the laundry list of triggering events. For example, a clause may state that the contract is subject to termination "on the occurrence of any circumstance beyond the control of either party" and then include a list of examples. Additionally, a clause might use the phrase "any other emergency" or "any similar event." These types of phrases broaden the types of triggering events and would make it easier to invoke the clause in the case of COVID-19. Moreover, given the travel restrictions resulting from COVID-19, there might be a sufficient "curtailment of transportation facilities" to trigger the clause, and, state and local declarations of emergency, closures, or bans might be considered "government regulations" that trigger the clause. In addition to assess the specific language, parties should consider the applicable state's force majeure law as well, as some states have authorities that interpret the scope of specific terms.

Second, assuming COVID-19 qualifies as a triggering event, a party must analyze what impact the triggering event has on the party's required performance. It is common for force majeure clauses to require that the triggering event make performance "illegal or impossible." Depending on the circumstances, these can be high standards to meet. Some contracts contain lesser standards, requiring performance to be "inadvisable," "impractical," or "commercially unreasonably." Some require that the party's performance be "materially affected." In the case of certain event contracts, the clause might require, for example, the triggering event to prevent attendance of a certain percentage of attendees.

In analyzing issues related to illegality and impossibility, a party must take into consideration the specific facts and circumstances in existence at the time the triggering event occurs. For example, the location for performance must be taken into account. As noted, there are currently bans on large public gatherings in many cities that would make it impossible and/or illegal to hold such an event. That may not be the case in other geographic locations, and the situation is extremely fluid with government regulations, bans, states of emergency, etc. changing on a daily basis. In the case of supply chain disruption, the inability to timely obtain key components from China or other areas significantly impacted, for example, might make performance within the stated timeframe impossible.

Third, in the event a party decides to trigger a force majeure clause, there are often notice provisions in the contract. Many contracts require notice within 10 days of learning of the triggering event. Other contracts may have notice provisions that require notice "as soon as possible," while others may contain no notice provision at all. The requirement to give notice raises at least two issues. First, what event actually triggers the notice period? The general public is aware of the existence of COVID-19 and has been aware since the outbreak first became known in China. So, a party must consider what the triggering event for notice will be. It might be the declaration of a pandemic, the presence of a state of emergency, or government ban in a particular location or a myriad of other events.

As an exercise in mitigating the losses associated with business disruption, we recommend that businesses concerned about disruptions to their supply chains or travel related to COVID-19 work with their attorneys to immediately conduct an audit of their contracts. In addition to analyzing those contracts as it relates to the three issues identified above, parties analyzing force majeure clauses may also want to consider the following:

- It may be necessary to document the interruption to your business in order to defend the invocation of a force majeure clause, so keep good records;
- Review your insurance coverage and understand if your policy contains business interruption or other coverage that might assist in a force majeure situation;
- Consider whether there are alternative methods of performance, delayed or postponed performance, or other ways to mitigate damages;
- Contemplate whether your future contracts should be modified in order to ensure they can be invoked under similar circumstances in the future;

The specific facts and circumstances of the COVID-19 outbreak will continue to change and develop over the next days, weeks, and months, and the analysis of force majeure clauses as they apply to COVID-19 will continue to evolve as well. K&L Gates is happy to help guide you through the force majeure analysis.

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