

Contract Disputes from COVID-19 and Force Majeure

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Introduction



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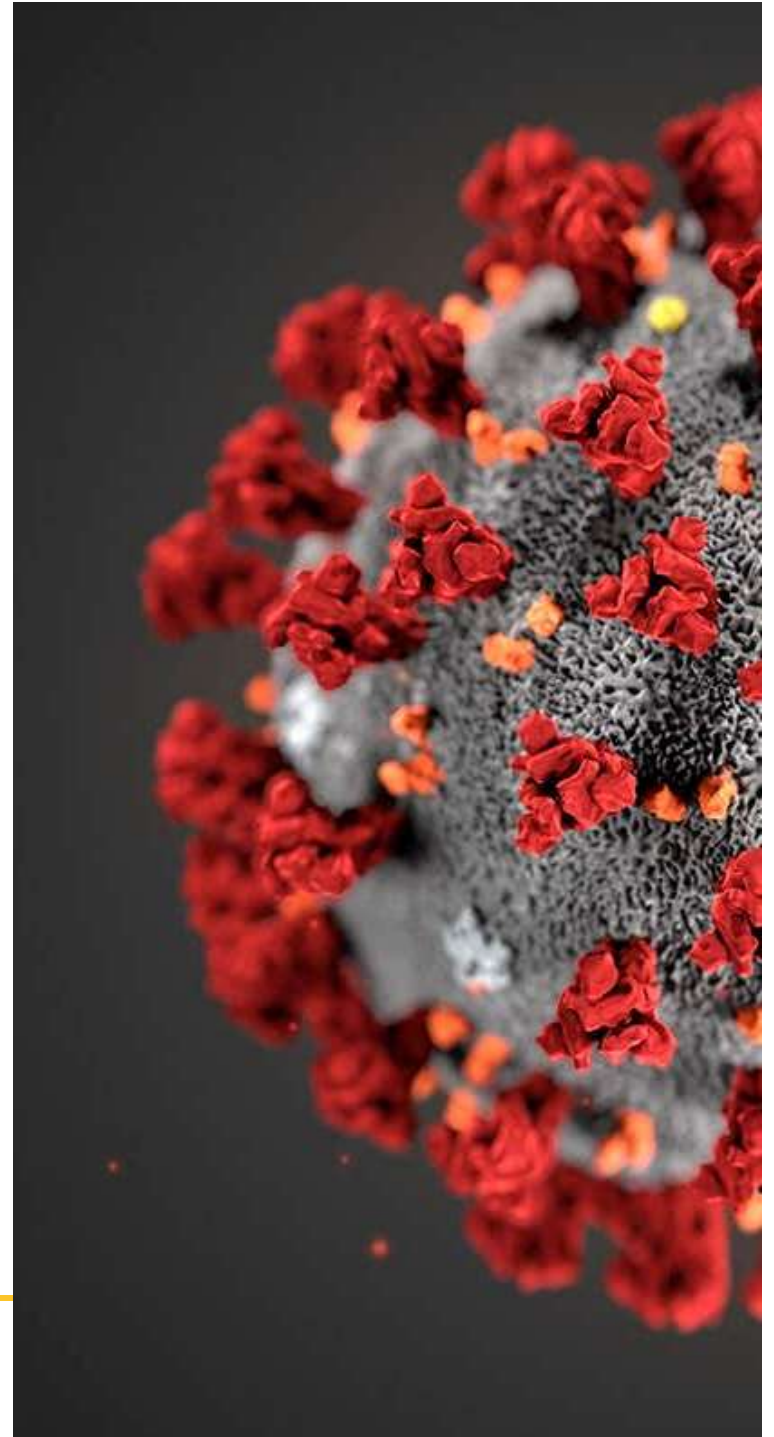
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Force Majeure

A party to a contract may under certain circumstances be excused from performing a contractual obligation when the failure to perform is caused by a “fortuitous event”—i.e., force majeure or an “act of God”—that makes performance impossible.

Contracts often contain force majeure provisions, which will control in the event of a dispute over performance obligations. If the contract lacks a force majeure provision, or if the provision fails to address a particular event, such as a pandemic, specific default rules may apply depending on the jurisdiction, governing law, and industry.



“ The contract contains a force majeure provision ”

The contract contains a force majeure provision

The contract controls

If the contract contains a force majeure or similar provision, it will govern the effect of the event on the parties' obligations.

The contract contains a force majeure provision

Enumerated force majeure events

Does the force majeure provision specifically reference “pandemic,” “disease outbreak,” “government declaration,” or similar events? What is an “act of God?”

The contract contains a force majeure provision

Catch-all clauses

A catch-all clause that follows a list of events, such as “any other unforeseen events,” will likely be narrowly interpreted to be limited categorically to the type of enumerated events that precede the catch-all clause.

The contract contains a force majeure provision

Performance standards

Is there a requirement that performance must be “prevented” or “impossible” or “commercially impracticable” as a result of a force majeure event?

The contract contains a force majeure provision

Unilateral vs. Bilateral Impossibility

Does the force majeure provision apply if either party's performance is affected, or only one party's performance?

The contract contains a force majeure provision

Subjective vs. Objective Impossibility

Does the force majeure provision contain a subjective or objective performance standard?

The contract contains a force majeure provision

Causation

Does the force majeure provision contain language with respect to causation? *E.g.* impossible performance must be “caused by” a force majeure event?

The contract contains a force majeure provision

Multiple Force Majeure Clauses

Does the contract contain multiple references to force majeure events in different sections of the contract?

Sample Force Majeure Clauses

MSA

Neither party hereto shall be liable for damage to the other party hereto for the failure by such party to perform its obligations hereunder with respect to any Work (other than the obligation to pay money) to the extent that, and for so long as, such party's inability to perform is due to an event or condition that is beyond its reasonable control (a "force majeure" event or condition) which may include but is not limited to acts of God, strikes, lockouts or other industrial disturbances, acts of the public enemy, sabotage, wars, blockades, insurrections, riots, epidemics, lightning, earthquakes, floods, fires, arrests, restraints of rulers and peoples, civil disturbances, and the binding order for any court or governmental authority which has been resisted in good faith by reasonable legal means, and which, by the exercise of due diligence, such party is unable to prevent or overcome. Such causes or contingencies affecting the performance by the parties hereto, however, shall not relieve either party of liability in the event of its concurring negligence or in the event of its failure to use diligence to remedy the situation and remove the cause in an adequate manner and with all reasonable dispatch, nor shall such causes or contingencies affecting the performance of this Agreement relieve any party of liability unless such party shall give notice and full particulars of the same in writing or by written electronic communication to the other party as soon as possible after the occurrence relied on, and like notice shall be given upon termination of such "force majeure" conditions.

- Starts with broad lead-in, with specific examples following
- Lists epidemics and government restriction
- Negligence carve out
- Diligence to remedy requirement
- Notice requirement
- No termination
- No payment obligation carve out

Sample Force Majeure Clauses

Mark-up MSA

Neither Operator nor Contractor shall be responsible to the other for any delay, damage or failure ***caused by a*** Force Majeure Event, except for the duties to (i) make payments when due, and (ii) ~~pay any applicable force majeure rate, and~~ (iii) indemnify hereunder. As used in this Contract, "Force Majeure Event" ***includes acts of God, action*** of the elements, warlike action, terrorism, insurrection, revolution or civil strife, piracy, civil war or hostile action, national strikes, acute and unusual labor, material or equipment shortages, or ***any other causes (except financial) beyond the control*** of the Party claiming the occurrence of a Force Majeure Event and that was not caused by the negligence or misconduct of the Party claiming force majeure, by the failure of such Party to comply with any applicable laws or by any breach of this Contract or the applicable Work Order by such Party. In the event of Force Majeure, ~~Contractor's rates shall be the applicable Force Majeure rates set forth in the applicable Work Order or, if none are set forth in the Work Order, as set forth in Contractor's National Price Book. Either the affected~~ Party will notify the other in writing within ~~ten five~~ (105) days of the occurrence of any Force Majeure Event. A Party's relief from responsibility for performance as provided in this Section 7.0 is conditioned upon such Party taking all commercially reasonable actions to mitigate against the impacts of the Force Majeure Event and the prompt resumption of performance by the Party claiming force majeure when such Party is able to do so.

- Starts with specific examples, then followed by broad catch-all
- Mutual
- Contractor asked for a FM rate
- Negligence or misconduct carve out
- Notice provision
- Obligation to mitigate
- No termination right if duration of FM continues
- Includes payment exception
- No term extension

Sample Force Majeure Clauses

Services Agreement

Notwithstanding anything to the contrary in this Agreement, neither party shall be liable to the other or be deemed to be in breach of this Agreement for any failure or delay in performance under this Agreement when such failure or delay is caused in whole or in part by a “Force Majeure Event” which shall be defined as any event beyond the control of a party, including, but not limited to: labor dispute, trouble or strike, riot, vandalism, sabotage, terrorist act, war (whether declared or undeclared), inclement weather, storms, flood (whether natural occurring or manmade), tidal surge or tsunami, landslide, earthquake, fire (whether natural occurring or manmade), explosion, power shortage or outage, fuel shortage, railroad embargo, congestion or service failure, government regulation or action, embargo, railroad or marine expropriation or appropriation, failure or delay of manufacturers or persons from whom a party is obtaining machinery, equipment, materials or supplies to deliver the same, or unplanned maintenance at the Facility or breakdown of machinery or equipment. In the event of a Force Majeure Event resulting in a service failure caused by damage or unfitness of the Facility infrastructure, the Services Fee and the other fees and charges payable by Customer hereunder shall be pro-rated or suspended for those services which Operator is unable to perform under this Agreement as a result of such Force Majeure Event until such services are restored. In the event of a Force Majeure Event that provides Customer with maximum relief from the Services Fee, the Term shall be extended by the same number of days as the duration of such Force Majeure Event. Nothing herein shall be deemed to relieve Customer of any payment obligation under this Agreement by reason of a Customer invoked Force Majeure Event.

- Mutual
- Starts with broad lead-in, with specific examples following
- No pandemic specific enumeration, but government authority
- Pro-rated reduction in fee if Operator FM, but if full relief from fee, then Term is extended
- No termination right if duration of FM continues
- Customer not excused from payment if Customer invokes FM

Sample Force Majeure Clauses

Supply Agreement

CONTRACTOR shall not be liable to COMPANY for any loss or damage suffered by COMPANY, directly or indirectly, as a result of CONTRACTOR's failure to deliver or delay in delivering the equipment or failure to perform, or delay in performing, any other term or condition hereof, where such failure or delay is **caused by fire, flood, natural disaster**, labor trouble (including without limitation strike, slowdown and lockout), war, riot, civil disaster, hurricanes, embargo, government regulations or restrictions of any and all kinds, **expropriation of plant by federal or state authority**, interruption of or delay in transportation, power failure, **inability to obtain materials and supplies**, accident, explosion, act of God, or other causes of like or different character beyond CONTRACTOR's control. The time for delivery specified herein shall be extended during the continuance of force majeure conditions and for a mutually agreed reasonable time thereafter.

- Contractor friendly
- Starts with specific examples, then followed by broad catch-all
- One sided
- No pandemic specific enumeration, but government authority
- Delivery time extended by FM period, but not contractual term
- No termination right if duration of FM continues
- No payment/economic condition exception

Sample Force Majeure Clauses

Construction Agreement

“Force Majeure” shall mean causes reasonably outside of and beyond the control of the Party affected thereby, whether or not foreseeable, such as, but not limited to, acts of God, acts of public enemies, fire, war or civil disturbance, insurrection, blockades, strikes, riots, weather, epidemics, landslides, lightning, federal, state or local governmental intervention not caused due to the acts or omissions of either party, earthquakes, floods and/or washouts, explosions, inability to reasonably obtain materials because of any event affecting a material supplier’s performance, loss or shortage of transportation facilities, commandeering of raw materials or products or plants or facilities by a government, labor disputes involving a general stoppage of work on the job, rules or regulations or orders or acts of Governmental Authority, and in each case not involving the fault or negligence of a Party.

It is agreed that in the event Contractor or Company are rendered unable wholly or in part by Force Majeure to carry out their respective obligations hereunder, then the Party claiming Force Majeure shall give notice of the full particulars of such Force Majeure event in writing to the other Party as soon as practicable after the occurrence of the cause relied upon. The obligation of the Party giving such notice, so far and only insofar as affected by such Force Majeure, shall be suspended during the continuance of any inability so caused, but for no longer period, and such cause shall be remedied with all reasonable dispatch. Neither Party shall be liable for any kind or nature whatsoever for any loss, damage, delay or failure in performance of this Agreement, including, but not limited to, delay, or any damages where such damage, delay or failure to perform its obligations hereunder is, either directly or indirectly, wholly or partly, caused by a Force Majeure event. This obligation to remedy shall not require the settlement of labor matters when such course is inadvisable in the judgment of the Party claiming same as a Force Majeure.

- Mutual
- Starts with broad lead-in, with specific examples following
- Epidemic and government authority enumeration
- Obligation is suspended
- No termination right if duration of FM continues
- No payment exception

Sample Force Majeure Clauses

Lease Agreement

If performance of this Agreement or of any obligation hereunder is prevented or substantially restricted or interfered with by reason of an event of Force Majeure (defined below), the affected Party, upon giving notice to the other Party, shall be excused from such performance to the extent of and for the duration of such prevention, restriction or interference, and the Term or any other time periods herein shall be extended for such period of time. The affected Party shall use its reasonable efforts to avoid or remove such causes of nonperformance and shall continue performance hereunder whenever such causes are removed. “**Force Majeure**” means fire, earthquake, flood, or other casualty, condemnation or accident; strikes or labor disputes; war, acts of terrorism, civil strife or other violence; any law, order, proclamation, regulation, ordinance, action, demand or requirement of any government agency or utility; or any other act or condition beyond the reasonable control of a Party hereto. In no event shall lack of Grantee funds constitute a Force Majeure event and a Force Majeure event may not excuse Grantee’s performance of payment obligations due Owner under this Lease.

- Mutual
- Starts with specific examples, then followed by broad catch-all
- No epidemic/pandemic enumeration but includes government authority enumeration
- Obligation is suspended
- No termination right if duration of FM continues
- Payment exception

Sample Force Majeure Clauses

Broader Payment Exceptions

“*Force Majeure*” means (a) an act of God or public enemy, hostilities, fire, explosion, perils of the sea, lightning, earthquake, storm, flood, drought, war (declared or undeclared), revolution, insurrection, sabotage, riot, vandalism, act of piracy, act of terrorism, sabotage, blockade, embargo, accident, *epidemic or quarantine*, (b) an act, omission, order or judgment by a Governmental Authority that prevents or delays performance of a Party’s obligations under this Agreement and/or the Project Agreements, (c) a strike, lockout or other labor unrest or (d) any other cause, condition, *event or circumstance beyond the reasonable control of, and not due to the fault or negligence of*, the Party claiming Force Majeure and *which could not have been avoided or prevented by such Party’s reasonable and diligent foresight, planning and implementation*, including loop currents and moratoriums imposed by a Governmental Authority. Force Majeure shall not include (i) subcontractor or equipment failures or delays, except to the extent resulting from any of the foregoing causes, or (ii) *the inability of a Party to be profitable or to secure funds, arrange bank loans or other financing or to obtain credit*.

- Starts with specific examples, then followed by broad catch-all
- Includes epidemic and quarantine and government authority
- Negligence carve out and foresight carve out
- Carves out equipment delay/failures
- Carves out inability to be profitable or to secure funds

“ The contract *does* ”
not contain a force
majeure provision

If the contract does not contain a force majeure provision, and if the event was not reasonably foreseeable at the time the contract was made considering the parties' subjective knowledge and commercial relationship, the event may be a "fortuitous event" that justifies contractual relief, depending on a number of factors:

- Impossible performance
- Partially impossible performance
- Delayed performance
- Performance before event
- Reasonable alternatives
- Fault preceding event
- Assumption of risk
- Business risk
- Adequate assurance
- Sale of goods
- Lease

The contract does not contain a force majeure provision

Impossible performance

If a party's "entire performance" is "truly impossible" and "insurmountable," the party may be entitled to terminate or dissolve the contract.

The contract does not contain a force majeure provision

Partially impossible performance

If a party's performance is only partially impossible, and if partial performance is still of value to the counterparty, the counterparty's performance may also be reduced proportionally; if partial performance is not of value, termination is possible.

The contract does not contain a force majeure provision

Delayed performance

If a party's performance is delayed temporarily, the party may remain bound to perform once the impediment ceases (without owing damages resulting from the delay), if delayed performance is still of value to the counterparty.

The contract does not contain a force majeure provision

Performance before event

If either party rendered partial performance before the event, and the contract is subsequently dissolved, the performing party may be entitled to the value of its performance.

The contract does not contain a force majeure provision

Reasonable alternatives

If a party claims it was prevented from performing, it may have to establish that it pursued “reasonable alternatives” to perform as a prerequisite to obtaining relief.

The contract does not contain a force majeure provision

Fault preceding an event

If a party was in default before the event, relief may be precluded.

The contract does not contain a force majeure provision

Assumption of risk

If a party assumed the risk of the event, relief may be precluded.

The contract does not contain a force majeure provision

Business risk

If nonperformance resulted from a reasonably anticipated “business risk,” “downturn,” or “economic impracticability,” rather than from COVID-19, relief may be precluded.

Impracticability of Performance and Frustration of Purpose - Restatement (Second) of Contracts § 261

- After contract is formed
 - § 266 – if fact existed at time of formation but party had no reason to know and non-existence was assumption at formation, no duty to perform arises.
- Party's performance is made impracticable
 - Extreme and unreasonably difficulty and expense, injury, or loss
- *Without his fault*
- By the occurrence of an event not anticipated at the time of formation
 - § 262 – death or incapacity of a *particular person* necessary for performance
 - § 263 – failure to come into existence, destruction, or deterioration making performance impracticable of a *specific thing* necessary for performance
- Duty to perform is discharged
- Unless the language or circumstances indicate to the contrary
- § 272 – court may grant relief on such terms as justice requires

UCC § 2-615

Excuse by Failure of Presupposed Conditions

- (a) Delay in delivery in whole or in part by a seller who complies with (b) and (c) below, is excused if performance is made impracticable by
 - Occurrence of contingency the non-occurrence of which was a basic assumption on which the contract was made, or
 - By good faith compliance with a foreign or domestic government regulation or order whether or not later proved to be invalid
- (b) where the cause affects only part of seller's capacity to perform, he must allocate production among customers and his own requirements in any manner that is fair and reasonable
- (c) the seller must notify the buyer seasonably of delay or non-delivery, or of estimated quota of allocation made available under (b).

Does the Agreement Have a Change in Law Provision?

Example:

- **Change in Law** – If after the Effective Date of this Agreement, a change in law or regulation, change in application or interpretation of a law or regulation, or, introduction of any new law or regulation (“Change in Law”) causes additional costs or delay to Contractor in the performance of the work under the Agreement, then Contractor shall be entitled to an extension of time in which to complete the work, and be compensated by Company for any additional costs reasonably incurred by the Contractor as a consequence of the Change in Law. If any Change in Law renders Contractor’s ability to perform its obligations under the Agreement impossible, Contractor may terminate the Agreement without penalty, and Contractor will be entitled to compensation from Company pursuant to the terms of Clause _____ (Termination for Convenience) of this Agreement.
- Change in law or regulation
- Or change in application or interpretation of law (jurisprudence or agency interpretation)
- Introduction of new law or regulation
- Causes Increased costs to comply or delay
- Extension of time
- Compensation for increased costs
- Impossibility – right to terminate without penalty
- Termination for Convenience

Adequate Assurance / UCC § 2-609

- Applies to tangible goods.
- Under UCC § 2-609, a demand for adequate assurances can be made if one party is reasonably insecure that the other will not perform.
- It is rarely used.
- In contracts involving both goods and services, courts may focus on the portion of the contract in dispute.
- If adequate assurance is not provided in a reasonable period of time, not to exceed 30 days, then the requesting party can treat the contract as terminated and seek damages.

Adequate Assurance / UCC § 2-609

- Adequate assurances can include letters of credit, warranties, access to books and records and other credit assurances
- Insecurity is a question of fact – but during COVID with parties indicating they cannot perform, this is likely enough
- Demand can be used offensively or defensively to a declaration of force majeure
- There are no cases addressing interplay between a demand for adequate assurance and a force majeure event as UCC § 2-609 is rarely used
- In drafting a demand for adequate assurance, consideration should be given as to avoiding admittance of a force majeure event

Lease Context

- Most real property leases will contain force majeure clauses
- However, most will likely not include pandemics/epidemics, and will likely carve out or take exception to a tenant's payment obligations
- Often difficult to claim force majeure in a real property lease context
- May be less difficult if no exception to payment of rent
- More often, tenants are arguing that performance by landlords is impossible regarding delivery of the premises due to government closures or potentially eminent domain
- Forbearances are being offered as well

Drafting Going Forward

- Consider duration/time restrictions
- Termination rights
- Notice provisions
- Review state law regarding broad lead in versus specific examples
- Negligence carve out
- Mitigation obligation
- Defining event to include pandemic/quarantine
- Reduction of pro-rata costs for partial prevention
- Establishing a standard – impossible versus impracticable
- Excluding payment, profitability, and other economic events from the force majeure definition of suspension of obligations
- Extending term during event
- Remember adequate assurance/insecurity rights under the UCC

Conclusion

Proactively review your clients' force majeure contractual provisions to either assert a force majeure event or prepare to respond one.

Other resources:

- Jones Walker Force Majeure Check List
 - See Graham Ryan's Jones Walker webpage
- Jones Walker Disaster Prep and Recovery Blog
www.disasterprepandrecovery.com

Thank You



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Graham Ryan is a partner in the Litigation Practice Group. Graham resolves complex business disputes through civil litigation and appeals in federal and state courts for a diverse group of clients spanning numerous industries.

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Practices

- Appellate Litigation
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