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INTERPRETATION OF *FORCE MAJEURE* CLAUSES IN BUSINESS CONTRACTS DURING THE COVID-19 PANDEMIC

An often overlooked contract provision is getting a lot of attention these days in interpreting excuses for delays in performance. Buried generally toward the end of many contracts is a "force majeure" clause. "Force majeure," meaning extraordinary or superior force, refers to events and circumstance beyond our control. Here is a typical clause in a relatively simple form:

> The parties shall be released from their obligations in the event governmental orders or conditions arising out of a state of national emergency, labor strike, acts of war, whether or not declared, natural disasters (earthquake, fire, flood), acts of terrorism or mass crime, whether domestic or foreign, whether or not politically motivated, and whether or not directed specifically at the parties or the parties' property, occurring beyond the parties' control, result in delay or impossibility of performance by either party.

The clause excuses performance by any party to a contract when performance is difficult or impossible or merely impeded and therefore delayed due to unexpected and unforeseen circumstances beyond the parties' control.

Not every contract contains or requires a *force majeure* clause. The clause has little relevance, for example, in contracts terminable at will. And even without it, contract laws and jurisprudence can excuse performance based on "impossibility of performance," or based on frustration of purpose, as, for example, by a pandemic that shuts down our economy, thwarting any reason a party would have for entering into the contract in the first place.

A court will determine whether a contract should be voided or refined based on whether the event makes it impossible or merely difficult to perform, impossibility being a higher standard. A court will examine the nature of the risk in light of the subject matter of the contract. For example, could the COVID-19 pandemic be cited to excuse performance under a contract to produce and deliver N95 masks, ventilators, etc.? Given the product in question, could work or portions of work have been outsourced? Did the performing party meet industry standards for having appropriate redundancies to ensure performance, back-up personnel, alternate supply chain or other production facilities, etc.?

A *force majeure* clause removes some guesswork as to kinds of risks the parties intended not to assume but it is not the only form of protection. Other contract provisions may help limit liability for unforeseen or unintended consequences of non-performance. A warranty disclaimer, for instance, serves to limit losses to third-parties in the chain of commerce: raw materials supplier to manufacturer to wholesaler to retailer, and collateral service providers along the way (e.g., packaging and shipping). A thwarted real estate deal may trigger a similar cascade of transactions. And one can imagine a wave of cancellations surrounding major events like the Olympics, NCAA tournaments, concerts, and countless family celebrations.

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While a *force majeure* clause is not a magic bullet (and one is so sorely needed at this time), we are asked by clients to assist in contract interpretation or negotiation to allow the non-performing party a reasonable time period to perform its obligations before notice of cancellation is given effect. Or, in the case of leases, allowing a tenant to cancel a lease if, due to *force majeure*, the tenant is impeded from using the totality of the leased premises for more than, say, a two-month period. But it must be noted that these are remedies that are often found elsewhere in the lease, and under specific headings, for example, regarding premises habitability or provision of building services or premises vacancy. Inserting overly specific remedies in a *force majeure* clause may conflict with other subject matter-specific provisions. For example, many leases pointedly mandate monthly payment of rent regardless of a *force majeure* – the so-called "hell or high water" clause.

In this sense, a *force majeure* clause may ultimately serve most effectively in its current, albeit slightly ambiguous, formulation, to hold in reserve for such truly extraordinary events as the COVID-19 pandemic. Review of a party's performance obligations will certainly focus on the *force majeure* provision itself, if present in the contract. But attorney review of contracts generally is also appropriate to account for any other provisions of a contradictory or explicative nature.

The pandemic will recede and hopefully vanish, hopefully soon, but the *force majeure* provision will likely garner attention for a long time to come.

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