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PERSPECTIVE

Is the force majeure clause about to go viral during the pandemic?

By Elizabeth Martyn

Almost all contracts have a force majeure clause toward the end, lost in the middle of the other standard conditions that people rarely read. The purpose of the clause is to excuse or allow delayed performance due to an act of God or third parties that was not the fault of either party. The combination of COVID-19 and responsive governmental orders undoubtedly will lead to parties to a contract invoking the clause.

Previous articles indicate that if COVID-19 is a force majeure event, it is one like no other ever litigated: a worldwide pandemic, occurring in continuing phases, with no known cure or end, and a waterfall of events, specifically including social and economic shut down of most the United States and a number of other countries.

"Force majeure" is a French term first used in the Code Napoleon, and means "superior force." If you prefer Latin, it's "vis major." The same provisions, without the fancy name, may be found in the performance provisions of contracts. The purpose of the provision is to address an intervening cause for nonperformance beyond the control of one or both parties. The basic components of the clause are:

1. One or both parties are excused from either timely performance under the contract or possible performance at all; usually it is the party providing the goods or services.

2. Performance may be delayed or even excused for a list of reasons which may include specified events such as natural disasters or epidemics, violence, government action, labor issues, and shortages. However, often a catchall phrase, such as "acts of God" or "events beyond the control of the parties" will be added.

3. If the event occurs, the language sets out the party's obligation for notification and mitigation, i.e., if a force majeure event occurs, the party who has tried to and cannot perform should contact the paying party and ask for an extension of time.

4. If the event occurs and the party requests an extension of time, is either party entitled to damages?

The typical force majeure clause may raise more questions than it answers in light of the current COVID-19 situation: Which parties are covered, since almost certainly (unlike a strike) both parties are affected? What if the contract only has a catchall phrase instead of a listed event? Some courts have declined to apply a catchall phrase when there is a long list of trigger events.

Was the virus the triggering event, or was it the stay-at-home order? Can you have force majeure twice: first for the lockdown orders and then for workers' illnesses? Or, for essential businesses and workers, is the triggering event just the threat of contagion and possible death? Is the real issue economic — performance may be possible but it will be delayed and almost certainly will cost more.

California case law provides that a "mere increase in expense does not excuse the performance unless there exists 'extreme and unreasonable difficulty, expense, injury, or loss involved.'" *Butler v. Nepple*, 54 Cal. 2d 589, 599 (1960) (regarding increased costs for casing during a steel strike); *see also City of Vernon v. City of Los Angeles*, 45 Cal. App. 2d 710 (1955) (regarding construction of alternative sewer facilities after state intervention, stating that "A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.")

In contrast, in *Warner Brothers Pictures v. Bumgarner*, 197 Cal. App. 2d. 331 (1961), the court examined what constituted force majeure sufficient to avoid payment to James Bumgarner (aka James Garner) for filming "Maverick." Warner Brothers claimed that the writers' strike was a force majeure event excusing performance under his contract; he was able to show that the strike had no effect on the filming of the series, and thus force majeure did not apply.

For example, an employer's expense of setting up the ability to work remotely is reasonable mitigation that does not constitute "extreme and unreasonable difficulty or expense." But what if workers cannot work remotely because they have children no longer in school or choose not to work because they receive more funds from unemployment or from the Coronavirus Aid, Relief, and Economic Security Act.?

Going forward, COVID-19 and the subsequent governmental orders have moved from an unexpected and intervening force and are now the "new normal."

Should you include a force majeure clause in your contract templates or modify the one you have)? While nonperformance can be dealt with on a case-by-case basis, you probably should review the any "standard" clause you have in light of greater precision for the type of contract at issue. What events should be included or excluded? Should you remove an "epidemic" or "pandemic" that is already occurring? Will there be excused delay but not performance? Which party notifies the other and how? Should payment be withheld until performance occurs? Will payment be returned if the contract is not performed? What is a fair allocation of the risk between the parties when both are dealing with a catastrophic event that previously was unknown? ■

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