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Professional Perspective

Force Majeure & Commercial Contracts

Jennifer Roach and Matthew Ridings,
Thompson Hine LLP

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Force Majeure & Commercial Contracts

Contributed by Jennifer Roach and Matthew Ridings, Thompson Hine LLP

The impact of the novel coronavirus on global supply chains is undisputed and grew as the outbreak spread. Affected businesses faced reduced demand, uncertain supply, slowing growth, and/or labor shortages. While it may be too soon to evaluate and quantify the full impact of Covid-19, it is clear this outbreak is not the last time businesses will encounter events outside their control that prevent or delay performance of commercial contracts.

Catastrophic events such as Covid-19 may be rare, but their impact on business can be significant. As we move further into this century, many predict that catastrophic events, including fires, droughts, or increased intensity and duration of storms and hurricanes, will become more frequent as a result of climate change, causing more disruption to economies.

A force majeure provision is often an afterthought: a careless boilerplate tacked onto the end of an agreement. The disruption to the global markets caused by Covid-19 demonstrates, however, that force majeure provisions are critically important for businesses that are attempting to navigate a catastrophe, and are deserving of more careful consideration.

Force Majeure Defined

Force majeure clauses routinely appear in commercial contracts and provide for a defense to liability when a specified event occurs that is beyond the control of the parties and prevents or delays performance. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 507 (2005). Force majeure clauses are typically drafted to identify specific events that may excuse performance. They often require that the events be beyond the reasonable control of the parties and that the events were not reasonably foreseeable. In general, force majeure becomes relevant when an "act of God" or other extraordinary event prevents performance.

Evaluating Application of Clauses

Force majeure was historically not implied under English common law; accordingly, in most parts of the U.S., the concept of force majeure exists only in contract. This means that unless the circumstances fall within the narrow common law doctrine of impossibility, no "doctrine" of force majeure will be implied if a clause is not included in the contract. *Commonwealth Edison Co. v. Allied-General Nuclear Servs.*, 731 F. Supp. 850, 855 (N.D. Ill. 1990) (Posner, J.).

Because force majeure is a contractual doctrine, the standard rules of contract interpretation are applied to force majeure clauses, and the language of the clause is determinative of its scope and application. Thus, unless the force majeure provision is found to be ambiguous, the plain language of the clause will control, and the court cannot rely on extrinsic evidence to interpret the provision. *Perlman v. Pioneer P'ship*, 918 F.2d 1244, 1248 (5th Cir. 1990).

In most cases, there has been little dispute that in order to qualify as a force majeure, the event at issue must be beyond the control of the party claiming a force majeure. The issue of ambiguity much more frequently arises in the context of whether an event must be unforeseeable to qualify as a force majeure. Compare, e.g., *Gulf Oil Corp. v. Fed. Energy Reg. Comm'n*, 706 F.2d 444, 453-54 (3d Cir. 1983) (requiring a force majeure event to be unforeseeable) with *Sabine Corp. v. ONG Western, Inc.*, 725 F. Supp. 1157, 1170 (W.D. Okla. 1989) (finding that nothing in the contract required the event to be unforeseeable to qualify as a force majeure).

A recent case from Texas takes yet another approach, holding that if an event is specifically identified in the force majeure clause, the event need not be unforeseeable, but if the event fell under a "catch-all" force majeure provision, it must be unforeseeable in order to qualify as a force majeure. *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 184 (Tex. Ct. App. 2018).

Although the decisions relating to force majeure often reach different results and contain conflicting analyses, the one common thread is that a court will not save a party from its own haphazard contract drafting. A force majeure clause is, in essence, a bargained-for allocation of risk among the parties that will not be disturbed by a court, even in the event of a disaster—or, more accurately, especially in the event of a disaster. *Eastern Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957, 991-992 (5th Cir. 1976). This has implications both for a declaration of a force majeure and for the drafting of the clause.

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Courts and Covid-19

Although there are very few modern cases considering whether a pandemic or an epidemic can qualify as a force majeure, the courts will likely follow the same approach as with any other catastrophic event and look at the language of the parties' agreement. In some agreements, the force majeure provision will specifically define a force majeure to include epidemics or quarantine restrictions, in which case the COVID-19 outbreak would almost certainly be considered a force majeure. See, e.g., *Kyocera Corp. v. Hemlock Semiconductor, LLC*, 313 Mich. App. 437, 441 (2015).

More frequently, however, a force majeure provision does not include any specifically identified events, will list only acts of God, or include a catch-all provision a party may assert that applies to the COVID-19 virus. A "typical" force majeure clause was discussed by the Minnesota Supreme Court in *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 439 (Minn. 2008), which provided that neither party "will be liable for delays" that are "caused by acts of God or government authority, strikes, accidents, explosions, floods, fires, or the total loss of manufacturing facilities or any other cause that is beyond the reasonable control of that party." With a similar clause, a party facing supply disruptions would be left to argue whether Covid-19 falls within an act of God or the catch-all provision of the clause. As an act of God, there is little case law that is often conflicting, leading to considerable uncertainty. Compare, e.g., *Phelps v. School Dist.*, 221 Ill. App. 500, (Ill. Ct. App. 1921) (holding that a public epidemic is not an act of God) with *Sandry v. Brooklyn Sch. Dist.*, 47 N.D. 444, 451 (1921) (holding that an epidemic is an act of God that excuses performance).

Within the catch-all provision, courts are guided by the interpretative doctrine of *ejusdem generis*, which provides that the catch-all is limited to the same general kind or class of those things which are specifically mentioned. *TEC Olmos*, 555 S.W.3d at 185. Although the interpretation of any clause would be highly fact-specific, the Virginia Supreme Court has held that a force majeure provision excusing performance because of "breakdown, fire, high water, washout, or from any other cause whatsoever beyond its control" did not apply to an illness of the workers because, applying *ejusdem generis*, that the purpose of the clause was to protect against physical disability of the factory. *Standard Ice Co. v. Lynchburg Diamond Ice Factory*, 129 Va. 521, 532 (1921).

Guidance on Drafting Provisions

Critically, these issues of interpretation can be avoided with careful thought during the drafting process. The force majeure provision is a risk-shifting provision and should be considered accordingly, with careful attention paid to your client's interests. To be protected against uncertainty and risk, the force majeure provision should clearly address:

- Do your client's interests require a force majeure provision in the agreement? If so, should it be written broadly or narrowly?
- Do the parties intend to have force majeure apply to events that could be considered foreseeable? This may be especially important if weather-related incidents are common in the geographic area or during the time of performance.
- Is the clause intended to excuse performance only where performance is impossible, or where performance is merely difficult or more costly?
- Should the clause contain a specified list of events that constitute a force majeure, or is a broader definition appropriate? Are there events your client has experienced previously that should be specifically identified?
- Is the inclusion of a catch-all provision desirable? If so, do the parties intend to disclaim the doctrine of *ejusdem generis*?
- How long may the force majeure event continue before a party has the right to cancel the agreement?
- Will other typical contract clauses be affected by the types of catastrophic events included in the force majeure? For example, will the catastrophic event be considered a material adverse effect or material adverse change? Will closure of a party's business provide good cause for termination of the relationship?

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Conclusion

For many businesses, an epidemic, natural disaster, or catastrophe that gives rise to a potential force majeure is, thankfully, a rare event. Just because it is rare, however, does not mean that it is undeserving of attention or careful thought. A well-drafted force majeure provision can mean the difference between long and costly litigation with significant liability and a complete defense to a breach of contract claim.

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