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Force Majeure & the Coronavirus Pandemic's Effect on Contractual Obligations

Mack Miner*

In the two years since the Covid-19 pandemic began to emerge worldwide in early 2020, Covid-19 has made a lasting impact on the legal field, specifically in regards to contract disputes.¹ From supply chain disruptions, to millions of Americans out of work,² to individuals transitioning to work remotely, businesses across the world were struggling to uphold their contractual obligations. As it began harder to fulfill the obligations of contracts, parties looked for specific language that excused performance. An older boilerplate type clause began to be a consistent life preserver: force majeure.³ Force majeure, as an old doctrine often difficult to exercise, provides parties some relief in performance of contracts when invoked successfully.⁴

Force majeure refers to doctrine in the law of contracts that excuses a party from a contracting obligation when an unpredictable event occurs and is outside the control of either party.⁵ Force majeure clauses are often drafted into sales contracts, but when there is no clause in the contract the Uniform Commercial Code ("U.C.C.") will stand in as a gap filler. The U.C.C. is adopted in a majority of states and governs the sale of goods, providing language applicable to force majeure in §§ 2-613 through 2-615.

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¹ Erin Webb, *Analysis: No Longer Unforeseeable? Force Majeure and Covid-19*, BLOOMBERG LAW (Nov. 1, 2021), <https://news.bloomberglaw.com/business-and-practice/analysis-no-longer-unforeseeable-force-majeure-and-covid-19>.

² Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (Mar. 17, 2021), <https://www.nytimes.com/article/coronavirus-timeline.html>.

³ Denis Demblowski, *Analysis: Force Majeure Emerges as a Major Force*, BLOOMBERG LAW (May 18, 2020), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-force-majeure-emerges-as-a-major-force>.

⁴ Webb, *supra* note 1.

⁵ Peter Siviglia, *Force Majeure Helpful Practice Hints*, N.Y. ST. BAR J. 52 (Nov. 1996).

Section 2-613 allows a party to avoid a contract when goods suffer a total casualty under no fault of either party and before the risk of loss passes to the buyer.⁶ Sections 2-614 and 2-615 allow parties to get out of contracts when they are impracticable to perform after an event unforeseen and at no fault of either party.⁷ Because force majeure events are uncontrollable and impossible to predict, they are generally referred to as “acts of God” events.

As previously stated, force majeure is a contractual provision, and in the United States a force majeure clause must be evoked contractually, not under common law.⁸ A force majeure clause comes into play when an “act of God” occurs and the event is outside the reasonable control of the party invoking the clause.⁹ Invoking force majeure allows a party to avoid meeting obligations in the contract without being found in breach of the contract.¹⁰ There are certain commercial transactions that routinely rely on force majeure clauses and certain events that typically cause them to be exercised. Contracts in real estate development and financial dealings have implemented a force majeure clause during a natural disaster or an economic impact, respectively.

Why might a party include a force majeure clause in their contract? Much like most contractual provisions, mitigating risks and potential issues is a big reason parties include the clause into their contracts.¹¹ Force majeure

⁶ U.C.C. § 2-613; Jonathon D. Nelson, *COVID-19 & Force Majeure*, 34 COM. L. WORLD 31 (2020).

⁷ U.C.C. §§ 2-614, 2-615(a); Nelson, *supra* note 6.

⁸ Swata Gandhi, *Force Majeure and Contracting Strategies for the Covid-19 Era*, THE PRAC. LAW. (Aug. 2021).

⁹ ROBERT M. STONESTREET, 30 E. MIN. L. FOUND. § 5.04 (2009).

¹⁰ Ellen M. Gilmer, *Coronavirus as an Act of God: Force Majeure Clauses Explained*, BLOOMBERG LAW (Mar. 27, 2020), https://www.bloomberglaw.com/product/corporate/bloomberglawnews/bloomberg-law-news/BNA%20000001711730d7fbab73173ae8d40001?bna_news_filter=bloomberg-law-news.

¹¹ J. Hunter Robinson et al., *Use the Force? Understanding Force Majeure Clauses*, 44 AM. J. TRIAL ADVOC. 6 (2020).

clauses allow parties to worry less during situations where performance on a contract is beyond their control.¹² Allowing parties to suspend performance guarantees more time to make good on the contract. However, when a party uses force majeure to extend the time they can perform, they are not guaranteed additional money for the loss of products or time spent on the contract.¹³

The Covid-19 pandemic produced numerous questions surrounding how force majeure applies in a pandemic, especially in contracts where the provision makes no mention of a pandemic related “act of God.” Different courts have taken different approaches to addressing how the Covid-19 pandemic can be read into or out of a force majeure clause. In Illinois, a restaurant owner successfully defended against delinquent rent payments by tying Illinois’s Covid-19 stay-at-home order with the contract’s force majeure provision.¹⁴ The contract’s force majeure clause excused either party from performance when the performance is prevented by “laws, governmental action or inaction, orders of government.”¹⁵ The court tied this language to Illinois Governor J. B. Pritzker’s stay-at-home order, which stated that all Illinois restaurants must suspend on-premise services.¹⁶ Other courts have categorized the Covid-19 pandemic under an “act of God” event. In 2021, the Southern District of New York found that the Covid-19 pandemic fell under the “natural disaster” umbrella, large enough to trigger a force majeure event.¹⁷

¹² *Id.*

¹³ *Id.*

¹⁴ Jamie Gottlieb Furia & Justin Corbalis, *INSIGHT: Covid-19, Force Majeure, and Impossibility—Still a High Bar to Win*, BLOOMBERG LAW (July 2, 2020) (citing *In re: Hitz Rest. Grp.* (Bankr. N.D. Ill. June 2, 2020), <https://news.bloomberglaw.com/esg/insight-covid-19-force-majeure-and-impossibility-still-a-high-bar-to-win>).

¹⁵ *In re Hitz Rest. Grp.*, 616 B.R. 374, 377 (Bankr. N.D. Ill. 2020).

¹⁶ *Id.*

¹⁷ John McIntyre, *Courts Are Excusing Contract Nonperformance Due to the Pandemic*, BLOOMBERG LAW (April 8, 2021), <https://news.bloomberglaw.com/us-law-week/courts-are-excusing-contract-nonperformance-due-to-the-pandemic>.

Force majeure has become a hot topic in contracting during the rise of the Covid-19 pandemic. Many businesses and contracting parties have been unable to perform their contractual obligations due to the Covid-19 outbreak.¹⁸ Due to the unprecedented nature of the Covid-19 pandemic, drafters have been given the ability to take a new look at old language.¹⁹ Going forward, contracting parties should take a lesson from the pandemic and prepare for post-Covid-19 force majeure clauses. There are a few specific takeaways drafters should keep in mind. Drafters should consider defining what direct effects a pandemic may have on the contractual obligations. Adding a pandemic or endemic related provision can help mitigate loss in the event that another strain of the coronavirus crops up, but Covid-19 has shown to produce additional effects on contracts. Explicit language on government orders as described in the Illinois case can help ensure parties are relieved when a government's reaction towards a pandemic causes the delay.²⁰ Further, drafters should focus on what remedy is desired in a scenario that requires the force majeure provision to be implemented. Remedies could include a complete termination of the contract or a delay in performance for a specified period of time.²¹ Revised remedy language may be beneficial to parties wanting to avoid a force majeure event. For example, a party seeking to enforce the contract and avoid an excusal via force majeure should consider drafting a time extension as the only remedy available.²² This could allow parties to delay obligations but avoid rescission or termination of the contract under a force majeure event.²³

¹⁸ McDermott Will & Emery LLP, *Force Majeure Fast Facts under New York Law: Excerpts from the Force Majeure Global Guide*, BLOOMBERG LAW (Sept. 8, 2020), <https://www.bloomberglaw.com/document/X5LEVJ7O000000?jcsearch=gmd45ikihm#jcite>.

¹⁹ Anthony Meagher & Joe Kernan, *Contract Clauses: Force Majeure, Termination and Suspension in the COVID Era*, BLOOMBERG LAW (Aug. 12, 2020), <https://www.bloomberglaw.com/document/XE1TEIAS000000?jcsearch=hdf45jkgej#jcite>.

²⁰ *Id.*

²¹ Furia & Corbalis, *supra* note 14.

²² Meagher & Kernan, *supra* note 19.

²³ *Id.*

As the world comes out of the Covid-19 pandemic, contracting parties should consider revisiting their force majeure clause to make sure they read less like boilerplate language and reflect the effects seen under the pandemic. Under the U.C.C. standard, to invoke a force majeure clause, the event has to be unforeseeable. Now that modern society has lived through a memorable pandemic, the idea of another pandemic occurring in the future is quite foreseeable. Courts could begin to reject ambiguous “catch-all” force majeure clauses that only include unforeseeable events relating to natural disasters and government action or inaction. In the aftermath of an unforeseeable pandemic, lawyers should adjust and begin to reimagine the unimaginable.

Edited by Alex Beezley