BRACEWELL

Revisiting Force Majeure and Other Contractual Considerations Amid COVID-19

Update

November 02, 2020 | 6 minute read

In addition to the tragic human toll that it has caused, the coronavirus pandemic has also wreaked havoc on businesses throughout world, leaving countless companies and individuals unable to perform their contractual obligations. While many businesses have reopened since our last client alert on this topic, others have experienced new interruptions amid new spikes in COVID cases. As a result, force majeure and its common law relatives—the doctrines of impossibility and frustration of purpose—remain poised to become a focus of business litigation for years to come.

Force Majeure

Once a party to a contract has made a promise to perform, it must fulfill its promise even where unforeseen circumstances, including an act of God, make performance burdensome, difficult, or more expensive. If the party fails to perform, it usually is responsible for damages to the other party.

However, if the contract contains a force majeure provision, unexpected events could provide a defense to a party's failure to perform. While it is tempting to assume that the global catastrophic effects of COVID-19 would easily invoke force majeure, the validity of the defense, which courts will narrowly construe, relies upon the specific language of the applicable force majeure provision and the factual circumstances of the parties' contract. Simply put, because force majeure is a matter of contract, the language in the parties' agreement determines when and to what extent force majeure will excuse performance in that particular contract.

This is best illustrated by an examination of a typical provision that became the subject of a recent dispute involving a lease to operate a restaurant and catering facility at a state-owned park: It provides:

If either State Parks or Lessee shall be delayed or prevented from the performance of any act required by this Lease by reason of acts of God,

Related People

David A. Shargel
Partner
NEW YORK
+1.212.508.6154
david.shargel@bracewell.com

Matthew G. Nielsen
Partner
DALLAS
+1.214.758.1039
matthew.nielsen@bracewell.com

W. Stephen Benesh
Partner
AUSTIN
+1.512.494.3680
steve.benesh@bracewell.com

Related Practices

Litigation

Public Finance

weather, earth movement, lockout or labor trouble, unforeseen restrictive governmental laws, regulation, acts or omissions, or acts of war or terrorism which directly affects the Licensed Premises and/or facilities and services of Jones Beach State Park, riot or other similar causes, without fault and beyond the reasonable control of the party obligated, performance of such act, including payment of all License Fees and R & R deposits due, shall be permanently excused for the period of the delay and the period for the performance of such act shall be extended for a period equivalent to the period of such delay, at which time all payments due shall be resumed.

Like nearly every other force majeure clause, this example includes a list of triggering events that might excuse performance. Assuming a party claims that, during the peak of the coronavirus and the effects of government shutdown orders—or now with spikes in the virus potentially leading to new interruptions—it cannot perform its obligations, this clause might serve to excuse performance because it includes “unforeseen restrictive governmental laws” as a triggering event.

But had that language not been included, the application of this type of provision to COVID-19 becomes far less clear. While the pandemic may seem like an act of God, courts have historically defined that term narrowly. Texas courts, for example, have long defined it as “accidents produced by physical causes which are irresistible; as, for example, winds and storms, or a sudden gust of wind, by lightning, inundations, or earthquakes, sudden death or illness.”[1] Similarly, New York views an act of God as “an unusual, extraordinary and unprecedented event,” denoting “those losses and injuries occasioned exclusively by natural causes, such as could not be prevented by human care, skill and foresight.”[2] As pandemic-related litigation unfolds it remains to be seen whether an inability to perform based on COVID-19 would be considered an act of God. Even if the illness itself is deemed an act of God, performance-impeding issues like restrictions on business openings may be labeled a human reaction to the virus, not the act of God itself.

Other triggering events that may apply to COVID-related performance include the obvious—pandemics, epidemics and disease outbreaks—as well as events like labor shortages, where employees are not available to work due to stay-at-home orders or illness spread within a factory. The bottom line is that, in order to provide an effective defense, the force majeure provision must generally include a triggering event that applies to the COVID-related basis for nonperformance.

Many force majeure provisions also include “catch call” language such as “or other similar causes,” as in the example provided above. Catch-all provisions must be interpreted within the context of the provision as a whole, and the legal maxim of *ejusdem generis* may apply: the catch-all will be interpreted to include only items of the same kind as those listed. Thus, a force majeure provision listing storms, earthquakes, floods “and similar events” may not be interpreted

to include events related to COVID-19. On the other hand, some contracts provide more expansive catch all language, capturing any event outside of the reasonable control of the parties.

Courts analyzing attempts to rely upon catch-all language, including in Texas and New York, may also consider the foreseeability of the triggering event.[3] Given prior epidemics and pandemics, including the 2009 H1N1 pandemic, it remains to be seen how courts will determine the foreseeability of COVID-19.

The presence of an applicable triggering event is only the first step in the process of determining whether a party has a valid defense to nonperformance. Unless the force majeure provision provides otherwise, courts generally require that performance be rendered impossible, and not merely more difficult or expensive. For example, a party obligated to manufacture a product may not be able to invoke force majeure where sourcing a component has been made more difficult, but not impossible, due to the pandemic. Issues of causation must also be considered, and language appearing in typical force majeure provisions stating that nonperformance must be "by reason of" or "caused by" requires a showing of direct causation.

These issues aside, parties seeking to invoke a force majeure provision must carefully consider what performance is actually excused. For example, force majeure language in commercial leases will typically exclude the payment of rent, meaning that even amidst the occurrence of a triggering event, rent must still be paid. Parties must also think about what happens when the force majeure event ends. By way of illustration, the example provided above makes clear that performance is excused only during the "period of the delay."

Parties attempting to rely upon a force majeure provision must also follow any applicable notice provisions or risk losing the ability to invoke the defense. Depending upon the contractual language, force majeure provisions typically mandate that notice be provided within a certain period of time following the force majeure event, and some require that period updates on the force majeure condition be provided.

In litigation arising from the effects of COVID-19, courts have already begun to tackle issues related to force majeure and impossibility. For example, in *Palm Springs Mile Associates, Ltd. v. Kirkland's Stores, Inc.*, a federal court in Florida cast doubt on a tenant's ability to claim that a COVID-related force majeure event prevented it from paying rent, observing that "Kirkland . . . has failed to point to factual allegations in the complaint that show the government regulations themselves actually prevented Kirkland from making rent payments."[4] Similarly, in *Future St. Ltd. v. Big Belly Solar, LLC*, a Massachusetts court rejected an argument by a distributor of solar recycling bins that it could not perform its contractual obligations due to COVID-19.[5] These cases highlight the need to establish causation between the force majeure event and the performance at issue.

Alternatives to Force Majeure

Parties to contracts without force majeure provisions are not without a remedy, as the common law doctrines of impossibility and frustration of purpose may provide a defense to nonperformance. Impossibility is exactly as it sounds, and excuses performance where it has become objectively impossible. In addition, the impossibility must be the result of an event that was unforeseen and could not have been addressed by the contract. Similar to force majeure provisions discussed above, mere economic difficulty or burden is not enough to invoke impossibility.

In some circumstances, applying these narrow standards to COVID-related nonperformance will be straightforward, as in the case of a vendor who was unable to provide event services on a specified date due to the government's stay at home orders. But the analysis becomes murkier in other hypothetical scenarios, such as a purchasing party to a real estate contract who claims that shut down orders made a scheduled closing impossible. The seller may assert that the closing could have taken place virtually, or that the purchaser is now trying to escape a contract that has become an economic burden. Such factual issues are likely to be the subject of future litigations. It is worth noting that some courts also recognize the doctrine of impracticability, although there is little functional difference between impracticability and impossibility.

Short of impossibility, frustration of purpose may also provide an avenue to relief. This doctrine, also narrowly construed, provides a defense to nonperformance where a change in circumstances makes one party's performance virtually worthless to the other, frustrating the purpose of making the contract. As explained by one court, "the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense."[6]

Practical Considerations

Based upon the nuances discussed above, parties seeking to invoke force majeure or common law doctrines to excuse performance should keep several practical considerations in mind:

- Provide timely notice of the force majeure event, and consider doing so even if it is not required;
- Communicate with the counterparty;
- Maintain detailed records related to non-performance, including a timeline of events leading to the inability to perform, copies of relevant government orders and pronouncements, efforts to avoid the force majeure event or identify alternative means for nonperformance, and efforts to negotiate substituted performance.

Similar steps should be taken by the party who will be defending against the invocation of force majeure:

- Provide a timely response to any notice, and be sure to keep responses realistic, professional and performance-oriented, keeping in mind that any response will likely be filed with the court should litigation occur;
- Keep detailed records relating to the nonperformance, including a timeline of events that may provide a counter-narrative, the availability of alternative means for non-performance and, perhaps most importantly, evidence of damages.

Drafting Considerations Going Forward

Parties currently negotiating contracts should also be sure to address the implications of the ongoing pandemic. Drafting considerations amid COVID-19 include:

- Defining the triggering events to include (or exclude) events such as "disease", "pandemic", "epidemic", "public health crisis" and "state of emergency";
- Avoiding overreliance upon "act of God";
- Considering the effect of doctrines like *ejusdem generis*
- *Crafting language making it clear what will happen at the end of the force majeure event, including whether the event permits termination versus a temporary suspension of performance; and*
- *Considering whether to address disruptions to supply chains, labor force and/or access to financing.*

To conclude, Bracewell's litigation team has extensive experience representing clients in complex commercial disputes and arbitrations. Should you have any questions related to force majeure or other points from this article, please feel reach out to David Shargel, Matthew Nielsen or Steve Benesh.

---

[1] Morgan v. Dibble & Seeligson, 29 Tex. 107, 111 (1867).

[2] Prashant Enterprises Inc. v. State, 206 A.D.2d 729, 730 (3d Dep't 1994).

[3] See, e.g, TEC Olmos, LLC v. ConocoPhillips Co., 555 S.W.3d 176, 182 (Tex. App. 2018); Goldstein v. Orensanz Events LLC, 146 A.D.3d 492, 44 N.Y.S.3d 437 (2017).

[4] Palm Springs Mile Associates, Ltd. v. Kirkland's Stores, Inc., No 20-21724, 2020 WL 5411353 (S.D. Fla. Sept. 8, 2020).

*[5] Future St. Ltd. v. Big Belly Solar, LLC, No. 20-CV-11020-DJC, 2020 WL 4431764, at *6 (D. Mass. July 31, 2020).*

[6] Crown IT Servs., Inc. v. Koval-Olsen, 11 A.D.3d 263, 265 (1st Dep't 2004).