IS CORONAVIRUS A FORCE MAJEURE EVENT?

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INTRODUCTION

Companies are confronting a profoundly changed environment as a result of the Coronavirus (COVID-19) crisis and various governmental reactions to it, which seem to present new and difficult issues on a daily basis. One developing issue is whether the Coronavirus or governmental actions in response to it qualify as a "force majeure" or similar event that may suspend or excuse performance of contractual obligations during the duration of this emergency. While the answer obviously depends on the language of the contract and governing law, several key considerations will inform that determination.

A "force majeure" provision is typically one that excuses performance of a contract due to events outside of a party's control. *See* 30 WILLISTON ON CONTRACTS § 77:31 (4th ed.) ("A party relying on a *force majeure* clause to excuse performance bears the burden of proving that the event was beyond its control and without its fault or negligence."). If the applicable provision identifies epidemics or governmental actions as qualifying events, the Coronavirus would seem to qualify in the abstract given the directives by the Centers for Disease Control and World Health Organization and the "shelter-in-place" orders issued by California, New York, Illinois, Michigan, and other local and state governments.

FORCE MAJEURE: GENERAL PRINCIPLES

That does not end the analysis, however. Several general principles broadly apply to the applicability and interpretation of *force majeure* provisions. First, *force majeure* clauses are

construed narrowly, and in many jurisdictions will usually only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically identified. *See In re Cablevision Consumer Litigation*, 864 F. Supp. 2d 258, 264 (E.D.N.Y. 2012). Closely related is the concept of foreseeability: was the event foreseeable by the promisor during the time of contracting? If the answer is "yes," and no provisions were made to protect against its occurrence, a *force majeure* provision may not provide relief. *See Watson Laboratories, Inc. v. Rhone-Poulenc Roar, Inc.*, 178 F. Supp. 2d 1099, 1111-14 (C.D. Cal. 2001) (after discussing cases on both sides of the question of whether the element of foreseeability should be read into *force majeure* provisions, finding that under California law suppliers could not rely on their *force majeure* clause "to excuse their performance because the shut down of the Centeon plant was both entirely foreseeable and not encompassed within the force majeure clause"). *See also URI Cogeneration Partners, L.P. v. Bd. of Governors for Higher Educ.*, 915 F. Supp. 1267, 1287 (D.R.I. 1996) ("What distinguishes the Biblical plagues described in [the *force majeure* provision] from a failure to procure zoning permission is the question of foreseeability . . . force majeure clauses have traditionally applied to unforeseen circumstances—typhoons, citizens run amok, Hannibal and his elephants at the gates . . .").

Second, the majority position holds that nonperformance because of economic hardship will not typically fall within a *force majeure* provision, as "a mere increase in expense does not excuse performance under a force majeure provision unless there exists an extreme and unreasonable difficulty, expense, or injury." 30 WILLISTON ON CONTRACTS § 77:31. *See Butler v. Nepple*, 54 Cal.2d 589, 599 (1960) (steel strike did not excuse performance; "a mere increase in expense does not excuse the performance unless there exists extreme and unreasonable difficulty, expense, injury, or loss involved.") (quotation omitted). *Compare Route 6 Outparcels, LLC v.*

Ruby Tuesday, Inc., 27 Misc.3d 1222(A), No. 2413–09, 2010 WL 1945738, *3–4 (N.Y. Sup.Ct. May 12, 2010) (expressing doubt that the 2008 financial crisis alone could qualify under "catchall" language in *force majeure* clause: "Courts generally are reluctant to excuse contractual non-performance based on claims of economic hardship and changing economic conditions.") *with In re Old Carco LLC*, 452 B.R. 100, 104 (Bankr. S.D.N.Y. 2011) (2008 financial crisis qualified under specific "change to economic conditions" language in *force majeure* clause).

Third, a party relying on a *force majeure* provision to excuse performance under a contract typically bears the burden of demonstrating the event was both (a) "beyond the party's control" at the time of nonperformance and (b) "without its fault or negligence." *See Gulf Oil Corp. v. F.E.R.C.*, 706 F.2d 444, 452 (3d Cir. 1983) (citing *United States v. Brooks-Callaway Co.*, 318 U.S. 120, 120-21, n. 1 (1943)). *Cf. OWBR LLC v. Clear Channel Comm'n*, 266 F.Supp.2d 1214, 1224 (D. Haw. 2003) (defendants could not use 9/11 to excuse conference cancellation in February 2002: "[F]ive months following September 11, when there was no specific terrorist threat to air travel to [Hawaii], Defendants cannot escape performance under the Agreement.").

RELATED CONCEPT: IMPRACTICABILITY

Another concept related to the above principles – and which Courts often rely upon when interpreting *force majeure* clauses – is impracticability. The Restatement of Contracts, while not mentioning *force majeure* clauses specifically, provides for the discharge of contractual duties by reason of supervening impracticability:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981). Similarly, this concept likewise appears in Uniform Commercial Code § 2-615(a):

> Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

UCC § 2-615, Excuse by Failure of Presupposed Conditions. Courts often look to these concepts when interpreting *force majeure* provisions. *See B.F. Goodrich Co. v. Vinyltech Corp.*, 711 F. Supp. 1513, 1519 (D. Ariz. 1989).

CONCLUSION

As these principles demonstrate, contracting parties should be careful when assessing the applicability of *force majeure* clauses to the Coronavirus. Even if the Coronavirus may theoretically qualify as a *force majeure* event, the specific contract language and the facts surrounding non-performance will control whether it qualifies in particular circumstances.