Tucker Ellis LLP

CLIENT ALERT

CORONAVIRUS IMPACT AND CONTRACT PERFORMANCE: UNDERSTANDING OPTIONS

MARCH 17, 2020

WHAT YOU NEED TO KNOW

- The novel coronavirus (COVID-19) continues to have an unprecedented effect on economies and business operations throughout the world. Although disease outbreaks such as Ebola and Severe Acute Respiratory Syndrome (SARS) have rattled communities and industries in the past, COVID-19 presents economic and transactional challenges on a much larger scale.
- Widespread government-ordered shutdowns, voluntary business closures, and disrupted supply chains will likely impact businesses of all sizes for months to come. These disruptions promise to create difficulties with businesses' existing contracts, most notably, implicating the force majeure provisions or other common law excuse-of-performance doctrines.
- Companies should review their contract portfolios today – especially vendor and customer agreements – to evaluate the potential risks and opportunities associated with force majeure provisions and common law performance defenses on all future operations.

THE PURPOSE OF FORCE MAJEURE

Contracts largely are a means to allocate risk between parties. Provisions in contracts anticipate, and preemptively resolve, potential situations that may arise. Among the common risk-shifting provisions included in contracts is the force majeure clause.

Force majeure, Latin for "superior force," is a contractual provision that excuses or suspends the performance of obligations considered within an agreement when a certain circumstance outside the control of the parties occurs. While some force majeure clauses are broader than others, many contracts specifically contemplate a list of events that will trigger application of this clause, like war, an act of terrorism, an earthquake, a flood, government restrictions, or other "acts of God."

In Ohio, a party can only rely on a force majeure clause when it is expressly written into a contract. *See Haverhill Glen, L.L.C. v. Eric Petroleum Corp.*, 7th Dist. No. 14 HA 0022, 2016-Ohio-8030, 67 N.E.3d 845. Whether the clause applies to a given situation will depend on a close analysis of the language at issue. Some clauses are drafted to be broad and non-exhaustive, while others are narrow and apply only to the particular events listed within them.

When a court interprets whether a set of circumstances is covered by a broad, catchall phrase, it is likely to consider the foreseeability of the event at issue. In other words, could the party desiring to invoke the clause and avoid performance anticipate that the event was about to occur? If so, the court will likely deny application of the force majeure clause.

On the other hand, when a court interprets whether a set of circumstances is covered by a specific event listed within the clause, it is more likely to stick to a close reading of the contract, regardless of foreseeability. In addition, under Ohio law, to rely on a force majeure clause to excuse a party's nonperformance, the event must be beyond the party's control and without its fault or negligence. *See Stand Energy Corp. v. Cinergy Services, Inc.*, 144 Ohio App.3d 410, 416, 760 N.E.2d 453, 457 (1st Dist.2001).

FORCE MAJEURE AND COVID-19

So, is the current COVID-19 pandemic contemplated by force majeure clauses?

Perhaps. Whether COVID-19 excuses performance under a force majeure clause requires a tailored interpretation of the specific contract language at issue. Most force majeure provisions include two events that may apply to the coronavirus: government acts and epidemics/pandemics.

COVID-19 will likely excuse performance when the contract expressly contemplates unforeseen government acts within its force majeure provisions. Sudden prohibitions – such as limiting the number of people permitted to attend a public gathering as a way to mitigate the spread of the virus – should implicate this type of express clause.

In addition, the past epidemics caused by SARS and Ebola have made it increasingly common to include epidemics or pandemics as an accepted force majeure event. As decided by the World Health Organization on March 11, 2020, the current COVID-19 crisis now qualifies as a pandemic.

Even if COVID-19 is not expressly covered within the contract, the pandemic may still be covered under broad, catchall language. If the provision includes events such as "any similar event beyond the reasonable control of the party," there is a possibility that COVID-19 may excuse performance.

WHAT TO DO

First, review all contract portfolios with a focus on vendor and customer agreements to consider the potential risks and opportunities associated with force majeure provisions.

If you desire to implicate the force majeure clause: Notice is paramount. If the COVID-19 pandemic has caused or will cause your nonperformance on a contract that contains an applicable force majeure clause, you must give notice to the other contracting parties to trigger protection. Your notice should be provided as specified in the applicable contract and as soon as practically possible. In the meantime, you should take actions to mitigate the harm caused by the circumstances.

If you received notice that a party with whom you have contracted desires to implicate the force majeure clause: Have a professional interpret the contract's language as soon as possible. If you have received notice that a contractual party is invoking the force majeure clause, your options may be limited by the terms of the contract. It may be possible to terminate the agreement or modify the agreement and accept partial performance; however, professional advice should be sought before any such action is taken. Similar to those seeking to have their performance excused, you must also do everything practicable to mitigate the harm caused by the circumstances.

OUTSIDE THE BOX: WHEN FORCE MAJEURE DOES NOT EXCUSE NONPERFORMANCE

The absence of a force majeure provision in a contract does not necessarily foreclose the application of other potential common law excuse-of-performance doctrines.

For example, both buyers and sellers of goods that transact under the Uniform Commercial Code (UCC) should be aware of UCC Section 2-615 and the Ohio equivalent, Ohio Revised Code (O.R.C.) Section 1302.73. This section governs when performance under a UCC contract becomes impractical. As long as each party takes specific precautions, such as a supplier fairly allocating supply to its customers and providing notice, the law allows nonperformance when an event occurs that both parties had assumed would not occur when they entered the agreement. COVID-19 may be a good example of the type of event – a pandemic and government prohibition of several usual activities – that contracting parties assumed would not occur at the time they entered a contract. *See, e.g., Bruno v. Piedmont Plant Co.,* 9th Dist. Lorain No. C.A. 3992, 1986 WL 8537 (enforcing this O.R.C. Section 1302.73 defense and discussing some of its requirements).

If your agreement does not fall within the UCC, you might look toward common law doctrines instead. At least one of the common law doctrines of impossibility, impracticability, or frustration of purpose may apply when, as in the instance of COVID-19, an unexpected event arises that either (a) renders performance of the contract impossible, illegal, or impractical, or (b) destroys a party's purpose for entering into the agreement.

KEY TAKEAWAYS

- The applicability of force majeure provisions is highly dependent on specific contract language. Some formulations are broad and contain catchall provisions; others are narrow and limited to a specific list of events. The outcome will vary drastically based on the language of the provision agreed upon by the parties.
- Companies should collect and review key vendor and customer agreements now to assess the risk that parties may trigger force majeure provisions.
- Even if the doctrine of force majeure is not exactly applicable to a given circumstance, other legal doctrines such as impracticability or frustration of purpose may apply.
- Understanding rights and risks today will allow companies to proactively engage vendors and customers in potential modifications to key contracts and avoid protracted litigation over force majeure provisions in the future.

ADDITIONAL INFORMATION

For additional information, please contact one of the following Tucker Ellis attorneys:

- **Chris Hewitt** | 216.696.2691 | christopher.hewitt@tuckerellis.com
- **Jayne Juvan** | 216.696.5677 | jayne.juvan@tuckerellis.com
- **John Lewis** | 216.696.5325 | john.lewis@tuckerellis.com
- **Seth Linnick** | 216.696.4976 | seth.linnick@tuckerellis.com
- **Brian O'Neill** | 216.696.5590 | brian.oneill@tuckerellis.com
- **Katya Cronin** | 216.696.2352 | katya.cronin@tuckerellis.com
- **Savannah Fox** | 216.696.3950 | savannah.fox@tuckerellis.com
- **Lauren Lipsyc** | 216.696.3859 | lauren.lipsyc@tuckerellis.com