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Force majeure provisions: Dusting off a law school exam topic for the COVID-19 pandemic



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As the COVID-19 pandemic increasingly causes business disruption across the U.S. and the world, the issue of force majeure will become increasingly relevant for lenders, developers, commercial tenants and landlords, and real estate investors. On a near-daily basis, national, state and local governments are implementing stringent containment policies. States of emergency have been declared, schools and institutions of higher education closed, travel restrictions imposed, businesses shuttered, sporting events canceled, large gatherings banned and worship services canceled. While the long-term effects of the pandemic are yet unknown, it is certain that these containment strategies will present unique legal challenges as businesses and the real estate industry are forced to adapt to the new realities presented by COVID-19, including the ability to comply with various contractual obligations.

Most obviously, retail tenants will suffer decreased sales from recommended “social distancing” or a governmental emergency order closing the business. Developers and contractors may have trouble meeting project deadlines and benchmarks due to reduced workforce and supply chain disruptions. Environmental surveys, title review, site inspections and other due diligence required for real estate closings could be delayed. All of these issues and more will present unprecedented challenges as business struggle to adapt to the new realities

presented by COVID-19. In evaluating the range of options available to deal with performance under a contract amidst the uncertainty, parties will be forced to consider how the concept of force majeure (a French phrase meaning “superior force”) will impact their rights, obligations and remedies.

What is force majeure?

Whether found in a real estate finance documents, purchase and sale agreements or commercial lease agreements, a force majeure provision defines the scope of unforeseeable events that might excuse non-performance by one or more parties to a contract. (See, e.g., *United States v. Brooks–Callaway Co.* (1943), 318 U.S. 120.) Force majeure may include both human-initiated events (e.g., wars, strikes and riots) and “acts of God” (e.g., natural disasters, pandemics and epidemics). Under Ohio law, the party invoking force majeure bears the burden of proof. *Stand Energy Corp. v. Cinergy Servs., Inc.*, 144 Ohio App. 3d 410, 416 (1st Dist. 2001).) As the court in *Stand Energy* noted, force majeure clauses are included in commercial contracts to provide flexibility in a volatile economy. But a party cannot be excused from performance merely because performance may prove difficult, burdensome or economically disadvantageous. *Id.* (citing *State ex rel. Jewett v. Sayre* (1914), 91 Ohio St. 85.)

Seven practical tips for analyzing force majeure

1. **Find and read the contract.** This may sound like simple advice, but, too often, people guess at what a contract says without actually reading it. If you anticipate performance will be an issue under a contract, find a signed copy of the contract, read it and determine whether there a force majeure provision is in place. It is also best to consult with your attorney at this stage, so there are early strategic discussions.
2. **Confirm whether the contract has a force majeure provision.** Although many contracts include helpful headings, not all force majeure provisions actually include the words “force majeure.” Heed the advice above and read the contract as force majeure provisions are sometimes buried in other contractual provisions or under headings such as “regulations and delays.”
3. **Examine the contractual definition of force majeure.** The scope of a force majeure event will be defined by the language in the relevant contract and will vary from contract to contract. Often, such a definition will include a laundry list of items that are not anticipated and would prevent a party from performing certain obligations under the contract. These are commonly referred to as “acts of God,” and include weather-related events (e.g., fires, earthquakes and floods), wars, labor disputes and, yes, sometimes even pandemics. To the extent the contract specifically identifies pandemics as a force majeure event, the COVID-19 outbreak would likely fall within the scope of the definition. Even if pandemics are not specifically identified, the COVID-19 outbreak might still qualify. For example, the definition of force majeure might also include governmental orders (perhaps an order closing a tenant’s business or
4. **Research the relevant state’s case law.** Just because a contract is signed in Ohio by contracting parties based in Ohio does not necessarily mean that Ohio law will govern. Many contracts have a choice of law provision that expressly identifies which state’s law governs the contract. In the context of force majeure, this could have a significant impact on your analysis, as some states have very little relevant force majeure case law, and case law surrounding this legal principle (and the related doctrine of impossibility of performance) varies from state to state. For example, does the relevant state require complete prevention of performance in order to trigger force majeure?
5. **Evaluate causation.** A party claiming force majeure generally must show that the force majeure event proximately caused the contracting party to be unable to perform. In addition, courts generally require the party invoking the clause to use reasonable efforts to avoid the effects of force majeure. A factual analysis will be necessary to determine whether the COVID-19 pandemic was the proximate cause of the failure to perform and whether the invoking party used reasonable efforts to avoid the effects.
6. **Comply with any notice provisions.** Parties impacted by force majeure events frequently have contractual obligations to notify other contracting parties of the occurrence of the force majeure event and/or the inability of such party to perform. Parties that believe they may be impacted by the COVID-19 outbreak should strictly comply with such notice provisions and understand the impact of

sending proper and timely notice of a force majeure event. For example, such notices frequently give rise to termination rights for the other contracting party, especially if the force majeure event continues (or is expected to continue) for an extended period of time. Further, in the context of the COVID-19 pandemic, the trigger for providing notice may not be entirely clear. For example, even when epidemics or pandemics are specifically included in the definition of a force majeure event, there often is little guidance as to when the pandemic or epidemic actually began. Is it when the World Health Organization or Center for Disease Control declared the situation a pandemic? Is it when state and local governmental authorities issued quarantine orders?

7. **Identify the available remedies for a force majeure event.** The remedies for a force majeure event under a contract may include an extension of time to perform certain obligations or permit the invoking party to terminate without liability. The specific remedy should be identified in the contract and should be considered as part of any parties’ strategic decision-making.

Conclusion

As the business implications from the COVID-19 containment strategies at the national, state and local level are fully realized, contract parties must be proactive in evaluating the impact on their business. As always, early and effective documentation and communication with your legal counsel prior to taking any action is recommended. If your current contract forms do not contain force majeure provisions, care should be taken to now include them with specific references to events currently impacting commercial transactions, such as the COVID-19 pandemic and related governmental actions and orders.