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Memorandum

As COVID-19 Spreads, Companies Should Consider Possible Assertions of *Force Majeure*, Impossibility, or Frustration of Purpose

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Is *Force Majeure* Triggered?

Force majeure clauses may excuse non-performance with a contract when extraordinary events or "acts of God" prevent a party from fulfilling its contractual obligations. As coronavirus disease 2019 ("COVID-19") spreads across the globe, parties may seek to argue that a *force majeure* provision is triggered or have concerns that a counterparty may invoke a *force majeure* provision. While the relationship between COVID-19 and a specific *force majeure* provision is dependent on the particular language of the provision and the applicable jurisdiction's laws, the discussion below outlines general considerations.

A *force majeure* clause is a contractual provision that concerns events beyond the control of the parties, which prevent performance under a contract and may excuse non-performance. A party seeking to rely on a *force majeur*e provision to excuse non-performance generally must establish: (1) a *force majeure* event as defined by the contract; (2) the failure to perform was due to circumstances outside its control; and (3) the *force majeure* event was unforeseeable. Adverse economic conditions usually do not constitute a *force majeure* event. Even when a *force majeure* event occurs, a party is often under an obligation to mitigate the risk of non-performance.

Force majeure clauses are usually interpreted narrowly and the specific language of the *force majeure* clause will dictate if the provision covers an event. Courts typically review the text of the *force majeure* provision to determine whether a specific event falls within the definition and therefore may excuse performance. Unless the contract was executed very recently, it is unlikely that COVID-19 is specifically listed in the *force majeure* provision. However, other terms such as "epidemics," "pandemics," and "plagues" may be listed and provide a potential basis to argue that COVID-19 triggers the *force majeure*.

COVID-19 may also be covered by "act of God" language in a *force majeure* clause. While the definition of an "act of God" will differ depending upon the jurisdiction, courts often define the term as: (1) a force strictly of nature; (2) that is abnormal or unusual in occurrence; and (3) of such severity that human prudence or precaution could not have avoided the damage. According to Black's Law Dictionary, an "act of God" is generally defined as "[a]n overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado." The 2019 version of Black's Law Dictionary specifically notes that recently the "definition has been statutorily broadened to include all natural phenomena that are exceptional, inevitable, and irresistible, the effects of which could not be prevented or avoided by the exercise of due care or foresight."

Additionally, even if the provision does not contain express epidemic or "act of God" language, COVID-19 may be covered by a general catch-all phrase like "anything beyond the reasonable control of the parties" or "for any other reason." Some courts apply the rule of *ejusdem generis*, however, which broadly states a general term juxtaposed with a series of specific terms should not be given its broadest possible meaning, but rather should extend only to matters of the same general class or nature as the terms specifically enumerated. For example, in one New York case, the court held the general catch-all phrase "for any reason" could not be interpreted to include a cancelation where the specifically enumerated events included "Acts of God, labor troubles, riots, and restraints on public authority" because these events related "to a party's ability to conduct day-to-day commercial operations" as opposed to a particular commercial occurrence. Since states use different interpretive methods in determining the scope of a catch-all phrase and even use the same methods differently it is important to consider the language surrounding the phrase and the applicable law.

Even if a court finds a *force majeure* event occurred, there may be additional obligations. Contracts often require a party invoking a *force majeure* provision to provide notice to its counterparty. Some courts also require that the nonperforming party demonstrate that it attempted to fulfill its contractual obligations despite the alleged *force majeure* event. For example, the Third Circuit held the failure of an oil company to deliver specified daily quantities of gas could not be excused because the company failed to show it "exercised due diligence to overcome the effects of the specific *force majeure* events."

When Might Impossibility, Frustration and Impracticability Apply?

If a contract does not have a *force majeure* provision, or the *force majeure* provision does not cover the event in question, excusal of performance may be possible in limited circumstances under common law doctrines such as impossibility, frustration or impracticability. The applicability of each of these doctrines is fact and circumstances dependent (and can vary by jurisdiction), but the below review provides general guidance regarding how courts examine the issues.

Under the doctrine of impossibility, a party's duty to perform under a contract is discharged when, without any fault of that party and due to an unanticipated event, it becomes impossible to perform. Under New York law, for example, impossibility must be produced by an unanticipated event and performance must be "objectively" impossible. Economic hardship, even to the extent of bankruptcy or insolvency, usually does not excuse performance.

Frustration of purpose requires the underlying purpose of the contract to be frustrated by supervening events. Similar to impossibility, the principle does not apply where the parties could have foreseen the events or the party seeking to apply the doctrine caused the event in question. Under New York law, the principle also does not apply where there is only a showing that the transaction has become less profitable for the affected party.

Finally, some courts have accepted the doctrine of impracticability under which a court may excuse a party from performing under a contract if that party will suffer extreme, unreasonable, and unforeseeable hardship. The Restatement (Second) of Contracts states commercial impracticability arises when, "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."

As noted at the outset, application of each of these principles is highly dependent on the specific language of the relevant contract, the applicable facts and the law of the affected jurisdiction.

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