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Contractual Obligations in the Face of Events Beyond a Party's Control: *Force Majeure* and Other Relevant Doctrines

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Key points:

Claims of *force majeure* based on the pandemic have had mixed results in court.

For nonperformance triggered by supply chain disruptions, the common law doctrines of impossibility, impracticability, or frustration of purpose may be relevant, but these doctrines are also difficult to invoke.

If supply chain disruptions render you unable to perform, communication and negotiation with the other party may be your best option.

Given the disruptions of the past two years to the supply chain for consumer goods, raw materials, and component parts, you may be worrying that circumstances beyond your control could expose you or your business to liability if you could not or cannot perform. What can you do? Either situation, a blanket denial or an information request, can leave the policyholder wondering how, if at all, to continue to pursue the claim. The following tips can help policyholders bring a claim to resolution as quickly as possible and with the greatest chance of success.

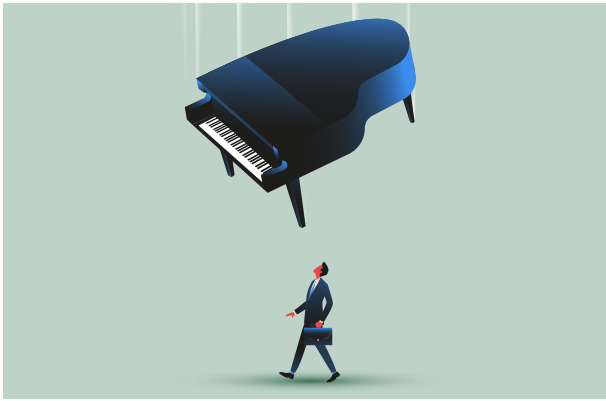
Review Your Contracts For a *Force Majeure* Clause

Your contracts (or contracts you are negotiating with another party) may include a provision known as a *force majeure* clause that may prevent a party from being penalized for something that is not its fault.

Before the pandemic, parties usually claimed *force majeure* when they were unable to perform due to "acts of God," natural disasters, riots, war, terrorist acts, civil commotion, governmental acts or omissions, changes in laws or regulations, national strikes, fire, explosion, or generalized lack of availability of raw materials or energy.

The pandemic has led many businesses to focus anew on their *force majeure* clauses.

The reach of *force majeure* clauses and related common law doctrines



has been tested nationwide during the pandemic, and the results have been decidedly mixed. In one 2022 decision, *Huth v. American Institute for Foreign Study, Inc.* (D. Conn. Mar. 21, 2022), the court found the defendant's performance was excused pursuant to "clear and unambiguous" contractual language that "contemplated not only a *force majeure* event, but an actual pandemic itself." But *force majeure* clauses are rarely that

clear, and the resultant path to relief is rarely that smooth.

Force Majeure Claims Based on the Pandemic

Claiming the pandemic triggered a *force majeure* clause today will obviously be more difficult now than it may have been over the last few years, given that government shutdowns are over and restrictions have been lifted.

On February 7, President Joe Biden said in his State of the Union address: "While the virus is not gone…we have broken COVID's grip on us. And soon we'll end the public health emergency." In a significant change, the U.S. is not renewing the COVID-19 national and public health emergencies when they expire on May 11. Of course, the pandemic and its impact are still very much ongoing in other countries around the world (where raw materials or component parts may be originating). For example, cases still appear to be at high levels in some Chinese cities following China's sudden reversal of its zero-COVID policy.

Given the current perception that the pandemic in the U.S. is essentially over, at least as an economic force, a *force majeure* claim based on the pandemic will be a far tougher sell, unless the relevant facts occurred at an earlier stage of the pandemic.

The party claiming *force majeure* bears the burden of proof and must establish that it gave the required notice.

Claims of *force majeure* based on the pandemic have had mixed results. Most *force majeure* clauses drafted before March 2020 do not identify a pandemic as a triggering event. The absence of such language, however, does not necessarily preclude coverage, as many *force majeure* clauses include a "catch-all" provision for events outside the reasonable control of a party that make performance impossible. You may be able to argue that such a catch-all (or perhaps the commonly used phrase "acts of God") covers the pandemic, though courts generally construe these catch-all clauses narrowly.

Many courts have found that the pandemic was an act outside the party's control but that the claimant failed to prove causation. For a *force majeure* provision to excuse nonperformance, the nonperformance must be both directly and proximately caused by the allegedly triggering condition. For example, a restaurant may be able to show it could not operate (or operate fully) due to government shutdowns but may fail to prove it could not pay rent. The party claiming *force majeure* must also establish that the triggering event was not foreseeable, even if the *force majeure* provision contains no such requirement.

Possible *Force Majeure* Claims Based on Supply Chain Disruptions

You may be wondering whether a party could instead argue successfully that a supply chain disruption itself — rather than the pandemic — triggered a *force majeure* provision. The answer in most cases will likely be no.

At least two possible exceptions come to mind. First, if the supply chain disruption results in a generalized lack of availability of raw materials, and the clause at issue includes that as a triggering event, you may be able to argue *force majeure*. Second, in the unlikely event that your *force majeure* clause expressly identifies supply chain disruptions as a triggering event and defines what constitutes a supply

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chain disruption, you may also have a strong position.

Other than those scenarios, courts may be hesitant to allow *force majeure* clauses or a catch-all within such a clause to excuse nonperformance or untimely performance based on supply chain disruptions. They may reason that the concept of a "supply chain disruption" is amorphous and a slippery slope to excusing many failures to perform. They may also conclude that such disruptions could have been caused — in whole or part — by factors other than the pandemic or are foreseeable. Unsurprisingly, our research has revealed only one published decision to date that even addresses a *force majeure* claim based on supply chain disruptions, much less finds for the claimant.

In that decision, the court based its rejection of an impracticability defense on the contract's *force majeure* clause, which contained particularly unhelpful language for the defendant. In *BAE Industries, Inc. v. Agrati*, No. 22-12134, 2022 WL 4372923, at *5 (E.D. Mich. Sept. 21, 2022), the court found that the *force majeure* clause expressly contemplated that "changes in cost or components will not constitute a *force majeure* event," even if the breach is due to "wars and other natural disasters," unless the other party notifies the plaintiff within 10 days after the *force majeure* event occurs. *Id.* Because "nothing on the record reflected the date when the event occurred or whether [the supplier] contacted Plaintiffs within 10 days of a qualifying event," the court rejected the impracticability defense. *Id.* The BAE decision reinforces the importance of drafting a *force majeure* clause carefully and thoughtfully and holding firm in negotiations, on whichever side you find yourself.

The better bet may be to argue that *the pandemic* caused the supply chain disruption, which, in turn, rendered you unable to perform. This argument will likely succeed or fail based on the language of your particular *force majeure* provision, causation proof, and the law of your jurisdiction.

Argue Impossibility, Impracticability, and/or Frustration of Purpose

If the relevant contract does not contain a *force majeure* clause, a party may be able to argue that in light of the supply chain disruption, it should nonetheless be excused from performance by the common law doctrines of impossibility, impracticability, or frustration of purpose. A party invoking these doctrines will likely need to establish that the pandemic or supply chain disruption was not foreseeable to recover under these doctrines. If the relevant contract contains a *force majeure* clause, it will likely supersede these common law doctrines, *but see BAE* (addressing the impracticability defense notwithstanding a *force majeure* clause).

These doctrines vary from jurisdiction to jurisdiction, but the basic concepts are similar. Impossibility generally allows one party to be released from a contract if unforeseen circumstances prevent performance. Impracticability, in turn, excuses performance when a contract has become impracticably difficult or expensive to perform, and frustration of purpose occurs when an unforeseen event undermines one party's main purpose for entering into a contract. They are all difficult to invoke and are frequently rejected.

You may wish to consider modifying the force majeure clauses in all of your contracts (or those proposed by a counterparty) going forward. Don't ignore these provisions in your negotiations, as they may prove to be important.

Communicate and Renegotiate

Independent of possible legal arguments, if supply chain disruptions render you unable to perform, you may wish to consider contacting the other party to the contract and trying to come up with a mutually agreeable solution. Litigating may be risky and expensive, as these are relatively novel issues, the doctrines discussed above are all narrowly construed and difficult to invoke, and no one can predict with certainty how a court will rule. These same considerations apply with equal force if your counterparty finds itself unable to perform. Having a frank dialogue before the problem disrupts your business or your counterparty's business (or disrupts it further) may be appreciated. The party seeking to be excused from performance can also point out that other suppliers are likely facing the same disruption, so the counterparty cannot simply buy from a competitor.

Revise *Force Majeure* Provisions in All Contracts Going Forward

You may wish to consider modifying the *force majeure* clauses in all of your contracts (or those proposed by a counterparty) going forward. Don't ignore these provisions in your negotiations, as they may prove to be important. If you think you or your client may be rendered unable to perform, think about either adding a broad — or broader — *force majeure* clause to your contracts (or those of your client) that identifies pandemics, the COVID-19 pandemic, public health crises, unavailability of raw materials, government shutdowns, and possibly even supply chain disruptions, as triggering events. Conversely, if your counterparty or your client's counterparty is the one at risk of nonperformance, try to negotiate a narrower *force majeure* clause or limit the scope of relief. For example, some restaurant leases excuse performance but not the payment of rent. Other *force majeure* clauses allow a party to terminate the agreement when the counterparty is unable to perform. These are contractual provisions and can be negotiated to meet your particular facts and circumstances. If both parties know of a specific potential risk, you may wish to address it (and allocate the risk) in a separate provision, eliminating the foreseeability requirement that comes along with a *force majeure* claim.

Consult a Lawyer

If your business is affected by a supply chain disruption or other potentially *force majeure* event, consult an attorney. Determining contractual rights and obligations will benefit from legal guidance.

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