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Force Majeure Claims Amid New Supply Chain Disruptions

By **Neil Schur** (June 21, 2022)

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During the pandemic, the reach of force majeure clauses and related common law doctrines has been tested nationwide, and the results have been decidedly mixed.

In one recent decision, Huth v. American Institute for Foreign Study Inc.,[1] the U.S. District Court for the District of Connecticut found in March that 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 more recent supply chain disruptions — which include containers mired in ports, labor shortages, shipping delays, and increased freight costs, for starters — will likely prove even more difficult to assert. Unsurprisingly, although these are early days, our research found no published decisions to date that even address such a claim, much less find for the claimant.

The better bet may be to argue that the pandemic caused the supply chain disruption and try to claim force majeure based on the pandemic. The cases addressing force majeure relief clauses after the disruptions of 2020 and 2021 provide something of a road map as to when courts may or may not excuse performance, though the results will likely depend on the language of your clause, your proofs of causation, and the law of your jurisdiction.

Review Current Contracts for a Force Majeure Clause

Current contracts may include a force majeure clause that may prevent a party from being penalized for something that is not its fault. The primary purpose of such a clause is to relieve a party from its contractual duties when its performance has been prevented by a force beyond its control or when the purpose of the contract has been frustrated.

The party claiming force majeure bears the burden of proof — it is considered an affirmative defense — and must establish that it gave notice in accordance with the contract's requirements. In the 2020 CMA CGM SA v. Leader International Express Corp. decision,[2] the U.S. District Court for the Eastern District of Virginia refused to waive a seven-day notice requirement in a force majeure clause.

And in the 2007 U.S. v. Sunoco Inc.[3] decision, the U.S. District Court for the District of New Jersey noted that the failure to provide adequate notice of force majeure renders the defense unavailable.

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.

But the pandemic has led many businesses and lawyers to focus their attention on their force majeure clauses — either to rely on them in current disputes, amend them in anticipation of future disputes, or both.

Most force majeure clauses drafted before March 2020 do not identify either a pandemic or a public health crisis as a triggering event. Claiming that the pandemic triggered a force majeure clause today will obviously be more difficult than in 2020 and 2021, given that government shutdowns are long since over and most pandemic-triggered restrictions have been lifted.

President Joe Biden's Chief Medical Adviser Dr. Anthony Fauci declared in late April that the U.S. is "no longer in the full-blown pandemic phase." However, it is also true that in May 2022, the U.S. Department of Health and Human Services extended the COVID-19 public health emergency past mid-July, following an increase in coronavirus cases.

These facts may impact a party's ability to claim that the pandemic triggered its force majeure clause.

Many force majeure clauses include a catchall provision for events outside the reasonable control of a party that make performance impossible. A party may be able to argue that such a catchall — or perhaps the commonly used phrase acts of God — covers the pandemic, though courts generally construe these clauses narrowly.

As the U.S. Court of Appeals for the Second Circuit explained in the March JN Contemporary Art LLC v. Phillips Auctioneers LLC decision:

New York law requires courts to construe force majeure clauses narrowly, so that "only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused." … A narrow construction also applies when the force majeure clause contains a "catchall," such as "or other similar causes beyond the control of such party,' cabining the meaning to 'things of the same kind or nature as the particular matters mentioned.'[4]

In other words, to invoke the catchall provision in that jurisdiction, you would need to show that the pandemic is "the same kind or nature" as the specific triggering items listed in your force majeure provision. That may not be an insurmountable task, however: the JN Contemporary Art court itself concluded that the party claiming force majeure had satisfied it.[5]

Force Majeure Claims Based on the Pandemic

As noted above, litigants have argued that the pandemic triggered their force majeure clauses and either excused performance or permitted delayed performance. Many courts found or assumed that the pandemic was an act outside the party's control but nonetheless found the party 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.

This seemingly innocuous causation requirement frequently disposes of force majeure cases altogether. In the 2021 1600 Walnut Corp. v. Cole Haan Co. Store decision,[6] the U.S. District Court for the Eastern District of Pennsylvania found that the pandemic was an event included within the catchall provision of a lease's force majeure clause, but the language of the parties' force majeure provision did not excuse the tenant from its obligation to pay rent.

Similarly, in the 2021 Fitness International LC v. DDRM Hill Top Plaza LP decision,[7] the court found that the tenant

has not shown that its failure to pay rent was proximately caused by the restrictive laws, as required under the Force Majeure provision. ... Tenant concedes that it had the ability to pay the rent during the entirety of the closure periods.

And in STORE SPE LA Fitness v. Fitness International, LLC,[8] the U.S. District Court for the Central District of California reasoned that the defendants

have not shown that they were prevented from paying rent by the government closures or that the closures caused them to stop paying rent. Instead, Defendants only submit evidence that the fitness studios could not operate as fitness studios during that time. However, that does not amount to the pandemic causing an inability to pay rent.

Other courts have reached different conclusions, particularly when the pandemic-related government shutdowns were in place. In the March 1 Morgan Street Partners LLC v. Chicago Climbing Gym Company LLC decision,[9] the U.S. District Court for the Northern District of Illinois found:

[A]s a matter of law that the force majeure clause applies to the facts of this case and delayed Defendants' rent payments to Plaintiff, at least for the period of time the government orders forced them to shut down or operate at reduced capacity.

And a bankruptcy court in Chicago found that a government shutdown order triggered the force majeure provision but only prohibited 75% of a restaurant's revenue generation because "the remaining 25 percent of the restaurant's square footage, consisting of the restaurant's kitchen, could have been used for carry-out, curbside pick-up, and delivery purposes," in In re: Hitz Restaurant Group.[10]

In sum, causation is a very important element of a force majeure case.

Possible Force Majeure Claims Based on Supply Chain Disruptions

Given that pandemic-related restrictions have waned and sweeping government shutdowns stopped months ago, you may be wondering whether a party could instead argue that a supply chain disruption itself — rather than the pandemic — triggered a force majeure provision.

Our research of published opinions suggests that courts have not yet addressed the question, much less found in favor of the claimant. 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, a party may be able to argue force majeure.

Second, in the unlikely event that the force majeure clause expressly identifies supply chain disruptions as a triggering event and defines what constitutes a supply chain disruption, the claimant will also likely have a strong position.

Other than those scenarios, courts may be hesitant to allow force majeure clauses or a catchall within such a clause to excuse nonperformance or untimely performance based on supply chain disruptions. Courts 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, including containers stuck in ports, labor shortages, the war in Ukraine the energy crisis, and/or inflation.

Instead, a party may want to consider arguing that the pandemic caused the supply chain disruption, which, in turn, rendered it unable to perform. This argument will likely succeed or fail based on the language of your particular force majeure provision and proofs of causation, as discussed above.

It also may be affected by Fauci's declaration that the U.S. is "no longer in the full-blown pandemic phase" or the extension of the public health emergency.

You will need to analyze the specific language of the relevant force majeure clause and make the best argument for your particular case. The language of a contract matters, and force majeure clauses vary materially.

Argue Impossibility, Impracticability and Frustration of Purpose

If the relevant contract does not contain a force majeure clause or was not in writing, a party facing a supply chain disruption may be able to argue instead that it should nonetheless be excused from performance by the common law doctrines of impossibility, impracticability or frustration of purpose, though it will likely need to establish that the pandemic or supply chain disruption was not foreseeable. If the relevant contract contains a force majeure clause, that clause will likely supersede these common law doctrines.

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, making performance materially different from the original agreement. But the frustration of purpose must have been extensive; the mere fact that performance is more expensive is generally insufficient.

In the 2021 CAI Rail Inc. v. Badger Mining Corp. decision, the U.S. District Court for the Southern District of New York explained that:

"In New York, a party is not excused from a contract simply because it becomes more economically difficult to perform" and "Quite a bit more is required than demonstrating a desire to avoid the consequences of a deal gone sour."[11]

Communicate and Renegotiate

Independent of possible legal arguments, if supply chain disruptions render a party unable to perform, that party may wish to consider contacting the other party to the contract and trying to come up with a mutually agreeable solution.

The parties may be able to revise deadlines or come to an understanding that could help avoid litigation. Having a frank dialogue before the problem disrupts their business — or disrupts it further — may be helpful and appreciated. The parties may be able to amend the contract and avoid litigation, which could be costly and time-consuming for both sides.

Assuming the customer relationship is a good one, each party should try hard to work with their counterparty as a partner. This is particularly true here, given that these are relatively novel issues with limited and sometimes inconsistent precedent, and no one can predict with certainty how a court will rule. The party facing the disruption can point out that other suppliers are likely facing the same issues, and it is not a situation where the counterparty can simply buy from the party's competitor.

Revise Force Majeure Provision in all Contracts Going Forward

Parties should consider modifying the force majeure clauses in all contracts going forward. Think carefully about either adding a broad force majeure clause to your contracts — or those of your client — or broadening the language of the current force majeure provision to identify pandemics, the COVID-19 pandemic, public health crises, unavailability of raw materials, government shutdowns and possibly even supply chain disruptions as triggering events.

In the event of another pandemic, this revision will likely materially strengthen your force majeure argument. As discussed above, in Huth,[12] 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."

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[1] Huth v. American Institute for Foreign Study, Inc., 2022 WL 834419, at *4 (D. Conn. Mar. 21, 2022).

[2] CMA CGM S.A. v. Leader Int'l Express Corp., 474 F. Supp. 3d 807, 818 (E.D. Va. 2020).

[3] United States v. Sunoco, Inc. (R & M), 2007 WL 1652266, at *4 (D.N.J. June 7, 2007).

[4] JN Contemporary Art LLC v. Phillips Auctioneers, LLC, 29 F.4th 118, 124 (2d Cir. 2022).

[5] 29 F.4th at 124.

[6] 1600 Walnut Corp. v. Cole Haan Co. Store, 530 F. Supp. 3d 555, 558-59 (E.D. Pa. 2021).

[7] Fitness International, LLC v. DDRM Hill Top Plaza L.P., 2021 WL 5456666, at *4 (C.D. Cal. Oct. 20, 2021).

[8] STORE SPE LA Fitness v. Fitness International, LLC, 2021 WL 3285036, at *8 (C.D. Cal. June 30, 2021).

[9] Morgan Street Partners, LLC v. Chicago Climbing Gym Company, LLC, No. 20-cv-4468, 2022 WL 602893, at *5 (N.D. Ill. Mar. 1, 2022).

[10] In re Hitz Restaurant Group, 616 B.R. 374, 379-80 (N.D. Ill. Bankr. 2020).

[11] CAI Rail, Inc. v. Badger Mining Corporation, 2021 WL 705880, at *8 (S.D.N.Y. Feb. 22, 2021).

[12] 2022 WL 834419, at *4 (D. Conn. Mar. 21, 2022).