

“But we have a contract!”
COVID-19 & The Force Majeure Clause

by Robert J. Powell & Amelia H. Beard

Is the recent Coronavirus (COVID-19) pandemic interrupting your business? Are you unable to perform certain contractual obligations or have you received notice from another individual or entity explaining they cannot meet their obligations to you? The first step in handling these situations is to take a look at the contract that outlines your performance obligations and rights, as well as possible remedies whenever a party to the contract defaults.

Many contracts contain a “force majeure” (pronounced forss ma-ZHOOR, a Latin phrase meaning “superior force”) clause — a provision that may suspend or altogether excuse performance by one or both parties to the contract due to an “act of God” or other unforeseen, extraordinary event. Analysis of how a force majeure clause may affect contractual rights and obligations requires careful review of the contract as well as an understanding of the facts and circumstances. Courts generally apply force majeure clauses narrowly — only events specifically identified in the contract will suspend or excuse performance in the typical case. Some clauses include a “catch all” phrase suspending or excusing performance such as for “any other similar event of emergency or exigency beyond the reasonable control of either party”. That said, a triggering event enumerated in the clause is more likely to result in a court enforcing the force majeure clause. But even so, we can expect a multitude of arguments as to whether a pandemic and its resulting government mandates fall within one of the enumerated events. Most force majeure clauses contain a notice requirement and possibly other technical requirements.

Absent a force majeure clause, a party may be excused from performance by successfully invoking a related doctrine. Frustration of purpose, impracticability or impossibility of performance all provide a means to excuse a party from performance either temporarily or permanently. But a party seeking to suspend or to be completely excused from performance pursuant to one of these defense doctrines is cautioned that courts set a high bar using an objective approach. Here are some example cases that provide a small glimpse into the difficulty proving up such a defense:

- Great Lakes Transmission Ltd. P’ship v. Essar Steel Minn., LLC, 871 F.Supp.2d 843, 852-53 (D. Minn. 2012) (discussing whether the 2008 financial crisis constitutes a force majeure, and one concluding that it did only under force majeure clause which “specifically included ‘change to economic conditions’ as an enumerated event that could excuse a default”).
- St. Joe Paper Co. v. State Dept. of Environmental Regulation, 371 So. 2d 178, 180 (Fla. 1st DCA 1979) (suggesting that a force majeure clause excusing delays for “any cause ... not within the reasonable control of the company” was enforceable);
- Camacho Enterprises, Inc. v. Better Constr., Inc., 343 So. 2d 1296, 1297 (Fla. 3d DCA 1977) (interpreting force majeure clause to excuse delay where development company president’s heart attack was construed as circumstance “beyond the control” of the company).

- Florida Power Corp. v. City of Tallahassee, 18 So. 2d 671 (Fla. 1944) (finding that a hurricane preventing power company's delivery of electricity to city was an "act of God" justifying power company's failure to perform contractual duty to deliver electricity).
- Ferguson v. Ferguson, 54 So.3d 553 (Fla. 3d DCA 2010) (declining to apply doctrine of impossibility to excuse ex-husband's compliance with marital settlement agreement following execution of which there was substantial decrease in value of marital home allocated to ex-husband under MSA, reasoning that "[e]conomic downturns and other market shifts do not truly constitute unanticipated circumstances in a market-based economy.)

Attorneys at Clark Partington are well versed in these issues and navigating a way ahead for many personal and business clients. The situations in which interpreting and enforcing a force majeure clause vary widely impacting virtually every industry including financial services, real estate, hospitality and tourism, healthcare, manufacturing, and more.

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