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Attorneys at Law – Established 1963

## CONTRACTUAL FORCE MAJEURE CLAUSES AND COMMON LAW DOCTRINES OF IMPOSSIBILITY/IMPRACTICABILITY/FRUSTRATION OF PURPOSE

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Many businesses are asking what impact, if any, the Covid-19 pandemic has on their existing contracts. This Client Alert provides an overview of two potentially relevant legal principles—force majeure and the doctrine of impossibility—which, under exceptional circumstances, may excuse a party from performing its contractual obligations.

### CONTRACTUAL FORCE MAJEURE CLAUSES

A force majeure clause is a provision of a contract that relieves a party from its contractual duties when performance is prevented by a force beyond its control. Whether a force majeure clause excuses performance depends on the language agreed to by the parties in the contract, the nature of the contractual obligation sought to be excused, and the extent to which the event in question has specifically impacted the party claiming relief. Attorney review is often necessary to answer the following key questions:

- **Does the event constitute a qualifying force majeure event under the terms of the contract?** Boilerplate force majeure clauses will often list specific qualifying events such as war, terrorism, floods, labor disputes, earthquakes, natural disasters, acts of government, disaster, and disease. Most force majeure clauses also include catch-all phrases such as “acts of God” or “other similar causes.” Generally, courts are reluctant to give effect to broad catch-all phrases except when the event in question was substantially similar in type to one of the specifically listed events.
- **Which contractual obligations are subject to the force majeure clause?** A force majeure clause may not apply to all duties or obligations. In the absence of language specifically limiting the scope of the force majeure clause, the court will assume that the parties intended the clause to apply to all contractual obligations and duties affected by the event. The parties however, are free to place limits on the application of a force majeure clause. In real estate lease agreements, for example, it is common for the tenant’s obligation to pay rent to be specifically excluded from a force majeure clause.
- **Has the force majeure event made performance of the specific contractual obligation impracticable?** Often overlooked in a force majeure analysis is the presence (or absence) of a causal connection between the force majeure event and the party’s ability (or inability) to perform a specific contractual obligation. A party claiming that a force majeure event excuses performance must demonstrate that despite its skill, diligence and good faith efforts, the event has made performance impossible, impracticable or unreasonably expensive. This demonstration must be specific. General claims of economic hardship are not sufficient.
- **What relief does the force majeure clause provide?** A force majeure clause may excuse a delay in performance for so long as the force majeure event prevents a party from performing or it may void the contractual obligations altogether. Relatedly, a force majeure clause may require the

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non-impacted party to continue to perform its obligations or it may excuse that party's performance for so long as the other party is prevented from performing its obligations.

- **Does the force majeure clause require written notice to the other party?** In the event that a party believes that its contractual obligations are excused as a result of a force majeure event, in many cases the force majeure clause requires written notice to the other party. If litigation ensues, the failure to give required notice may prevent a non-performing party from invoking the force majeure clause in its defense.

## COMMON LAW DOCTRINE OF IMPOSSIBILITY

Even if the contract does not contain an express force majeure clause, in exceptional circumstances performance may be excused pursuant to the common law doctrine of impossibility (which includes “physical impossibility,” “frustration of purpose” and “impracticability”). Functionally, the doctrine of impossibility is very similar to a force majeure clause and, unless the parties agreed otherwise, this doctrine applies to most contracts. The purpose of this doctrine is to balance the public's interest in having contracts enforced according to their terms with the commercial senselessness of requiring performance of a contract when changed circumstances make performance impracticable or frustrate the essential purpose of the contract. This doctrine does not operate to discharge a contractual obligation merely because additional financial burdens make performance less practical than initially contemplated.

In order for an event to excuse performance, the party seeking to be excused must prove all four of the following elements:

- (1) the event made the performance impracticable;
- (2) the nonoccurrence of the event was a basic assumption on which the contract was made;
- (3) the impracticability resulted without the fault of the party seeking to be excused; and
- (4) the party has not assumed a greater obligation than the law imposes.

Traditionally, this doctrine has been applied to three categories of cases<sup>1</sup>:

- **Supervening death or incapacity of a person necessary for performance.** Example: A contracts to employ B to perform music. B dies. B's duty to perform music for A is discharged, and B's estate is not liable to A for breach of contract.
- **Supervening destruction of a specific thing necessary for performance.** Example: A contracts to paint B's house. B's house is destroyed in a fire. A's duty to paint B's house is discharged, and A is not liable to B for breach of contract.
- **Supervening prohibition or prevention by law.** Example: A contracts to provide widgets to B. The government enacts a statute forbidding the sale of widgets. A's duty to provide widgets to B is discharged, and A is not liable to B for breach of contract.

If you have a contract that is affected by the Covid-19 pandemic, our attorneys can help you evaluate whether performance might be excused under a contractual force majeure clause or the common law doctrine of impossibility.

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<sup>1</sup> See Restatement (Second) of Contracts § 261 (1981)