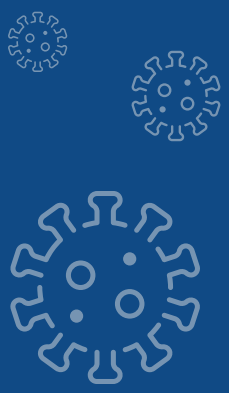
KEY CLAUSES

Force Majeure Clauses for a Post-COVID-19 World



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Law Insider

Introduction

This book aims to bring contract drafters up to date with how to use Force Majeure Clauses to protect contract clients in the post-covid global environment. We are going to explain force majeure concepts and important updates that drafters should be making to their contracts now.

The COVID-19 pandemic will likely produce considerable litigation.

Are the nonperformance losses blamed on the COVID-19 pandemic excusable? The unique complications of this pandemic will raise many questions.

When did the pandemic start?

What happens if a party refused to perform for safety considerations, even after governments rescinded lockdowns?

When will it end?

If there are multiple covid waves, how do you protect your contract clients?

How can you protect your clients contractually, if they are doing business in or with a country experiencing civil unrest?

We will try to answer these questions and explain how you can best protect yourself and your contract clients.

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FORCE MAJEURE EXPLAINED

The French term "force majeure" translates literally to "superior strength." Black's Law Dictionary defines the concept as an "event or effect that can neither be anticipated nor controlled" that "prevents someone from doing something that [they] had agreed or officially planned to do." Black's Law Dictionary (Thomson Reuters 11th ed. 2019).

The phrase force majeure is often confused with the phrase "act of God."

An act of God, or "vis major," is an extraordinary, uncontrollable natural disaster or "superhuman" event that impedes performance. See Lord, 30 Williston on Contracts § 77:31 (Lawyers Coop. Publ'g 4th ed. 1993) (hereinafter Williston on Contracts); Pesando, 1 Am. Jur 2d Act of God § 1 (Lawyers Coop Publ'g 2d ed. 2016) (hereinafter Am.Jur.2d).

Force Majeure Clauses in contracts typically excuse performance under circumstances that fall under "acts of God." They also often go further by including a comprehensive list, sometimes called a "parade of horribles." This list includes natural and unnatural events that excuse performance in whole, in part, or only temporarily, depending on the language and the circumstances. See URI Cogeneration Partners, L.P. v. Bd. of Governors, 915 F.Supp. 1267, 1287 (D.R.I. 1996).

Parties to a contract should negotiate and include specific scenarios, including foreseeable and controllable events, as well as events that may not be foreseeable but could occur. See, e.g., Perlman v. Pioneer Ltd. P'ship, 918 F.2d 1244 (5th Cr. 1990).

FORCE MAJEURE CLAUSES IN CONTRACTS

Next, let's consider two major force majeure issues. First, why do we need Force Majeure Clauses at all? And second, what happens when a contract does not have a Force Majeure Clause?

a. Why Force Majeure Clauses are necessary

Contracts protect parties through risk allocation (who bears the risk?).

When construing Force Majeure Clauses, the question, ultimately, is this: what situations did the parties intend to constitute an excuse for performance?

Start with the "list of horribles" to determine whether the COVID-19 pandemic constitutes a force majeure event sufficient to excuse performance. The terms "pandemic" and "epidemic" appear in many Force Majeure Clauses. For instance, after canceling the remainder of its season, the NBA looked to the term "epidemic" in the Force Majeure Clause of its collective bargaining agreement to start proposing player salary reductions. Pickman, 'Report: NBA, NBPA Discussing Possibility of Withholding Player Salaries,' Sports Illustrated (Mar. 31, 2020)

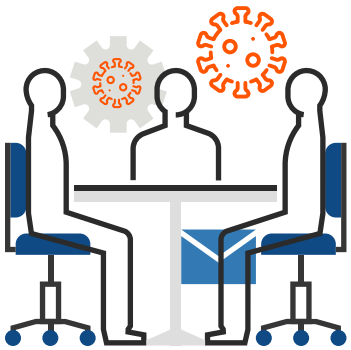
FORCE MAJEURE CLAUSES IN CONTRACTS

b. Contracts Without Force Majeure Clauses

When a Force Majeure Clause doesn't cover a situation, common law may still provide a way to compensate for a contract that must be breached.

The three most useful common law doctrines relevant to contract liability are frustration of purpose, impossibility, and illegality. Commonwealth Edison Co. v. Allied-Gen. Nuclear Servs., 731 F. Supp. 850 (N.D. Ill. 1990).

The Uniform Commercial Code (UCC) excuses a seller from performing under a contract when "performance as agreed has been made impracticable by the occurrence of a contingency, the non-occurrence of which was a basic assumption on which the contract was made, or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid." NY UCC § 2-615(a). The Restatement (Second) of Contracts defines impossibility as "not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved." Second Restatement of Contacts § 254.



The "frustration of purpose" doctrine can excuse a party from performing a contract if:

- the subject matter of the contract or the means of performance have been destroyed, making it impossible for the party to perform; or
- the central purpose of the contract has been frustrated by an event that the parties could not have reasonably anticipated when they entered the contract.

Frustration of purpose can be difficult to prove, however, and courts typically will not allow parties to overcome contract language by asserting frustration of purpose.

FORCE MAJEURE CLAUSES IN CONTRACTS

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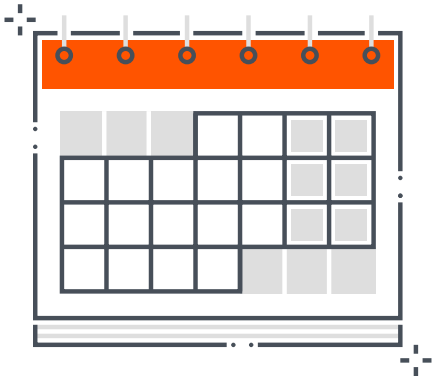
For this doctrine to apply,

"the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense."



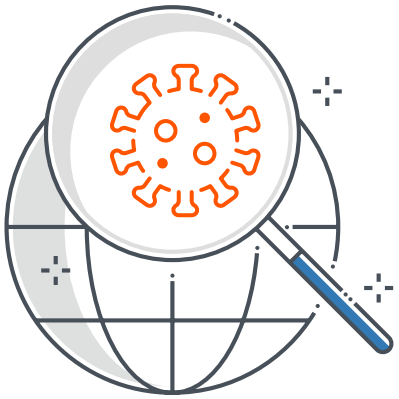
Crown IT Servs. v. Olsen, 11 A.D.3d 263, 265 (1st Dep't. 2004). Pure economic hardship, such as an increase in the cost of performance, is not enough to assert a frustration of purpose defense. A + E Television Networks, LLC v. Wish Factory Inc., 2016 WL 8136110, at *13 (S.D.N.Y. Mar. 11, 2016).

The date that the parties entered the contract is crucial role in determining whether a potential or actual coronavirus pandemic constitutes a frustration of purpose. In other words, the key question is this: at what point did a coronavirus pandemic become reasonably foreseeable?

The doctrine of impossibility discharges contractual obligations when an unforeseen event makes it impossible to satisfy the terms of the agreement. The event must have been truly unforeseeable. If a party should have foreseen the event but simply failed to consider it, this defense is unavailable.

FORCE MAJEURE CLAUSES IN CONTRACTS

Difficulty is not the same as impossibility. For example, while the Ebola virus was ravaging West Africa in 2014, Morocco invoked a force majeure provision to unilaterally withdraw from hosting the African Cup of Nations soccer tournament. The African Confederation of Football (CAF) rejected the move. They concluded that while performance was "difficult," it was possible, as ultimately proven by the replacement host. The CAF fined Morocco and banned the nation from participating in the next two tournaments. See Arbitration CAS 2015/A/3920, FRMF v. CAF, Award of Nov. 17, 2015.; See Vol. 49, 2020-07, Pg. 0022 (July, 2020); See Contract Performance during COVID-19 Force Majeure, Acts of God, and the Impossibility of Performance (Colorado Lawyer, 2020).



Illegality is a fundamental precept of contract law. Essentially, if a contract compels you to break the law and you refuse to do so, a court won't enforce the contract. Martinez v. Johnson, 61 Nev. 125, 119 P.2d 880, 882 (Nev. 1941) Accordingly, the doctrine of illegality discharges your contractual obligations, if satisfying the contract would require you to commit a crime. Unlike impossibility, this defense relies far less on the factual circumstances surrounding contract formation (although those facts are still relevant to a certain extent). Instead, this defense focuses on whether the terms of the contract would violate an applicable statute.

A Force Majeure Clause is the best way to protect your clients. Similar common law doctrines are vague, subject to interpretation, and require factual analysis. A Force Majeure Clause will supersede these defenses.

See Commonwealth Edison Co. v. Allied-General Nuclear Servs., 731 F.Supp. 850, 855-56 (N.D.Ill. 1990). Specifying the exact circumstances that excuse performance allows parties to make confident decisions during times of uncertainty. Vol. 49, 2020-07, Pg. 0022 (July, 2020), Contract Performance during COVID-19 Force Majeure, Acts of God, and the Impossibility of Performance (Colorado Lawyer, 2020).

DRAFTING FORCE MAJEURE CLAUSES

When interpreting Force Majeure Clauses, what circumstances did the parties intend to excuse performance?

For guidance, courts often rely on the doctrine of ejusdem generis, which holds that when "general words follow an enumeration of two or more things, they apply only to…things of the same general kind or class specifically."

Seal la and Garner, Reading Law: The Interpretation of Legal Texts at 199 (West 2012). Courts interpret these provisions narrowly and are reluctant to give the provision(s) expansive meaning. See, e.g., Kel Kim Corp. v. Cent. Markets, Inc., 519 N.E.2d 295, 296-97 (N.Y.App. 1987); Vol. 49, 2020-07, Pg. 0022 (July, 2020), Contract Performance during COVID-19 Force Majeure, Acts of God, and the Impossibility of Performance (Colorado Lawyer, 2020).

Courts will look to several factors when ruling on force majeure cases:		
Foreseeability:	**Control:**	**Contractual language:**
Force majeure implies that the problem is not foreseeable or controllable at time of contract, and the contract assumed that the problem would not occur. Most force majeure claim rejections are based on foreseeability.	Did the party or parties have control over the issue? Could the breaching party have controlled the situation, and could the party asserting force majeure mitigate the effects of the force majeure event?	Does the contract provide for suspension of performance or termination of the contract altogether as a result of a force majeure event?

Draft a comprehensive "parade of horribles." Parties can contractually agree to excuse performance under any defined circumstance, including specifically defined, foreseeable events. Now, more than ever, a practitioner's imagination should be expansive. Most force majeure provisions include standard events such as major natural disasters, wars, and strikes. Counsel should use this opportunity to include more creative scenarios tailored to clients' needs. COVID-19 and other public health emergencies should be included. Contract drafters need to look around at what is happening in the world and contemplate adding any force majeure event that could occur.

It is always better to prepare for the worst than be surprised later.

DRAFTING FORCE MAJEURE CLAUSES

If a Force Majeure Clause does not list an epidemic or pandemic as a triggering event, it is possible that the coronavirus could be covered as an act of governmental authority in some areas. Many governments, including the United States government, instituted lockdowns to prevent the spread of the coronavirus. Listing specific events, however, is a safer approach. Using vague phrases, like "act of God," can create uncertainty and breed litigation.

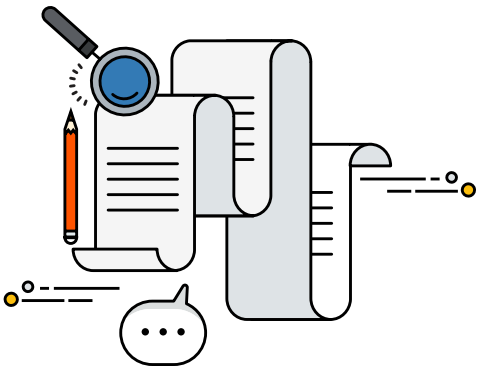
Consider catchall language. The use of catchall language requires the balance of certainty and risk. You must be careful, however, to lower the chance of ambiguity and dispute, if you include a catchall phrase.

Also, beware that courts could rely on ejusdem generis or the doctrine of expressio unius est exclusio alterius—the expression of one thing is the exclusion of another—to limit relief to the enumerated horribles and exclude similar events.

See Reale v. Bd. of Real Estate Appraisers, 880 P.2d 1205, 1207 (Colo. 1994). A party can tailor the catchall provision to the desired level of specificity. For example, in the Fifth Circuit, where the phrase "including but not limited to" preceded the parade of horribles, the court expansively interpreted the catchall phrase to supersede the doctrine of ejusdem generis. See, e.g., £ Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 989 (5th Cir. 1976).

When drafting a Force Majeure Clause, determine if and when any specific notices must be delivered to the other party and what time limits may apply to providing notice of a force majeure event.

CURRENT CASE LAW



Under New York law, a key issue in determining whether a party can successfully invoke a Force Majeure Clause is whether the clause lists the specific event claimed to be preventing performance. Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl, 720 F. Supp. 312, 318 (S.D.N.Y. 1989) (citing Kel Kim Corp. v. Central Markets, Inc., 70 N.Y.2d at 902-03). As noted previously, some Force Majeure Clauses list epidemics or pandemics as force majeure events. If a contract at issue lists epidemics or pandemics as a force majeure event, the claiming party could argue that the coronavirus qualifies because the World Health Organization officially declared it a pandemic.

In New York,

the force majeure event must be unforeseen, and the party seeking to invoke the Force Majeure Clause must attempt to perform its contractual duties despite the event. See Rochester Gas & Elec. Corp. v. Delta Star, Inc., 2009 WL at *7; Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl, 720 F. Supp. at 318; see also Goldstein v. Orensanz Events LLC, 146 A.D.3d 492, 493 (1st Dep't 2017). However, some jurisdictions, including Texas, do not require that the force majeure event be unforeseeable. See Perlman v. Pioneer Ltd. P'ship, 918 F.2d 1244, 1248 (5th Cir. 1990)

In Florida,

a party seeking to invoke a Force Majeure Clause must show that the force majeure event was unforeseeable and that the force majeure event occurred outside the party's control. This means that the claiming party must show that the event could not have been prevented or overcome. Additionally there cannot be any fault or negligence on the part of the claiming party. Bloom v. Home Devco/Tivoli Isles, LLC, 2009 WL 36594, at *4 (S.D. Fla. Jan. 6, 2009) (quoting Florida Power Corp. v. City of Tallahassee, 18 So.2d 671, 675 (Fla. 1944)); see also Fru-Con Const. Corp. v. U.S., 44 Fed. Cl. 298, 314 (1999).

CURRENT CASE LAW

In California,

even in the case of a force majeure provision in a contract, mere increase in expense does not excuse the performance, unless extreme and unreasonable difficulty, expense, injury, or loss is involved. Butler v. Nepple, 54 Cal. 2d 589, 598, 354 P.2d 239 (1960)

Under Texas law

unless expressly included in a contract, parties seeking to invoke a Force Majeure Clause to excuse non-performance are not required to exercise reasonable diligence to overcome the force majeure event. See Sun Operating Ltd. P'ship v. Holt, 984 S.W.2d at 283-84. If the parties contracted for the force majeure event, however, determining whether a party exercised reasonable diligence is fact-intensive and must be assessed on a case-by-case basis. El Paso Field Servs., L.P. v. Mastec N. Am., Inc., 389 S.W.3d 802, 808 (Tex. 2012). "Reasonable diligence" is defined under Texas law as "such diligence that an ordinarily prudent and diligent person would exercise under similar circumstances." Id. at 808-09.

Illinois law

places an implied duty on the claiming party to attempt to resolve the event causing delay or inability to perform before invoking a Force Majeure Clause. This duty is "related to the duty of good faith [and] is read into all express contracts unless waived." Commonwealth Edison Co. v. Allied-Gen. Nuclear Servs., 731 F. Supp. 850, 859 (N.D. Ill. 1990);

Due to the extent of the coronavirus outbreak and the government-imposed lockdowns in China, a quasi-governmental agency called the China Council for the Promotion of International Trade (CCPIT), backed by Beijing's Commerce Ministry, has been providing businesses in China with force majeure "certificates." CCPIT is issuing the force majeure certificates if businesses can provide documents proving that they cannot meet their contractual obligations because of the coronavirus. Council might consider situations in which a business located in an area of China experiencing a government-imposed lockdown has a Force Majeure Clause in a contract governed by Chinese law. In this case, the invocation of a Force Majeure Clause may be successful. The article "China Trade agency to offer firms Force Majeure certificates" offers some interesting examples of these force majeure certificates.

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Conclusion

Force Majeure Clauses and the common law defenses of impossibility and frustration of purpose may provide companies needed relief in the difficult economic environment created by the COVID-19 pandemic. Contractual parties must look to the specific language of the contract, including the applicable common law, to determine their likelihood of successfully claiming force majeure.

Now is the time to review these clauses and doctrines to determine how they might affect current contracts and to plan accordingly. If you are drafting a contract, be sure to include a Force Majeure Clause and detail any possible events that may cause your client to not be able to perform under the contract as written.

ABOUT

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Gretchen Cothron is a legal and forensic science consultant, originally from Florida. She practices around the United States, assisting law firms with their cases. Gretchen has degrees from the American Academy of Performing Arts, St. Petersburg College, the University of Tampa, and the University of Miami School of Law.

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