

Force Majeure and COVID-19

الدكتور

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ملخص البحث :

عند دخول الأطراف في عقد للبحث أو الإنتاج أو البيع أو أية أنواع أخرى من المشاريع، فإن المخاطر أمر متأصل ومقبول في مثل هذه العلاقات التجارية، ولكن ضمن هذه العلاقات الاتفاقية يعد الاحتراز ضد احتمالية حدوث الكوارث المستقبلية بالقوة القاهرة أمراً ضرورياً، ويجب التفاوض على المخاطر المتعلقة به بالتفصيل، خلال الأزمة الحالية التي يعيشها العالم - جائحة كوفيد-١٩ - هذا الوباء العالمي الذي لم يكن بالإمكان تصوره أو التنبؤ به، يركز هذا البحث على دراسة موضوع القوة القاهرة وأهمية تضمينه في العقود للمعاملات التجارية أو المدنية في المستقبل لما له من تأثير على سير الأعمال والتجارة، وما يمكن أن يوفره من حماية لأطراف العقود وضبط للعلاقة بينهم . فالقوة القاهرة كفكرة قانونية تحمي الأطراف من الكوارث سواء كانت طبيعية أو من صنع الإنسان، والتي تكون خارجة عن سيطرة أطراف العقود، ومع الأزمة الحالية لجائحة كوفيد-١٩، من الأهمية بمكان فهم المخاطر والاستجابة المطلوبة أثناء الكوارث وبعد حدوثها عند إبرام اتفاقات معينة، أو الدخول في شراكات أو علاقات تعاقدية، تجارية كانت أو مدنية، فيجب مناقشة إمكانية التخفيف من آثار الأضرار التي تتكبدها الأطراف والتي لم تكن متوقعة.

الكلمات المفتاحية: القوة القاهرة - كوفيد-١٩ - الجوائح - العقود

Force Majeure and COVID-19

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Abstract:

For parties entering into a contract for research, production, building, selling, and other types of enterprise, risk-taking is inherent and acceptable in this formal commercial relationship. Within the agreement, the force majeure defense is critical for any future catastrophes, and major associated risks should be discussed in depth. During this current and unimaginable crisis concerning a global contagious disease, it is especially important to pay attention to contracts that have already been executed and include future business agreements in terms of the nuances involved as a result of the crisis. The pandemic has caused ongoing upheaval, and its overwhelming effect on global commercial transactions has influenced this paper's focus on the force majeure clause in contracts.

On the surface, force majeure appears to be a straightforward legal concept protecting parties from events, such as natural and man-made catastrophes, beyond the control of contracted partnerships. However, in the current crisis, it is critical to understand the risks and required responses during and after such calamities. When making a deal, parties should discuss the mitigation of damages incurred by an unforeseen disaster.

Keywords: Act Of God- Frustration- Covid-19- Pandemic- Mitigation- Contract.

Introduction

The corona virus pandemic has been regarded as a novel and global disaster when considering the usual natural catastrophic events categorized under the legal doctrine of force majeure. The last global virus was the 1918 Spanish flu, and except for more contained epidemics since then, businesses and general commerce have been mostly concerned with natural disasters (e.g., hurricanes, earthquakes, volcanic eruptions, floods, and fires). As countries close borders, businesses around the world have been confronted with shutdowns in manufacturing and retail. This has also created outbreaks of the disease among workers and customers. Departments and facilities conducting human services, data collection, and investment protocols are being forced to furlough administrative and other managerial staff or prescribe online work from home. Moreover, the virus has disrupted the usual flow of business, adversely affecting downstream subcontractors and other support services.

Therefore, there are risks for contractual parties when an agreement or contract consists of a proposed project and the promise by the performing party to carry it out. In such an agreement, the performing party risks complications as well as unanticipated catastrophic events and may still be required to compensate the other party for any breaches of contract, which, in turn, leads to losses for the proposing party. However, every rule has an exception. If extraordinary events occur during the contract period, the performing party can be exempt from the completion of the project. Such unusual events have been delineated in the force majeure agreement. With this exception to ongoing or completing the work, the promising party is relieved of the burden of performance caused by the interrupting event by delaying the project or even ceasing before the deadlines specified in the contract.

The force majeure concept: The contract's risk assessment for disasters

One of the critical legal concepts in a contract is force majeure, which relieves a party or parties from their obligations when a certain qualified event, defined as catastrophic and beyond the control of the performing party, occurs. Many types of events can be categorized as such: labor strikes, diseases, pandemics, natural disasters, government acts, acts of war, revolution, insurrection, acts of terrorism, civil unrest, fire, floods, famines or plagues, earthquakes, volcanic eruptions, blockades or embargoes by government actions (e.g., laws, regulations, or decrees), and others that cannot be controlled by either of the contracted parties. Additionally, the performing party may remain unaccountable for the nonperformance of its obligations even when such an event is not specifically named in the qualifying list of force majeure events (Swanson, 2013).

An event is deemed as force majeure based on the following assessment questions: What are the events to be deemed force majeure? Do the events of force majeure have to be unforeseen? What is the potential cost of breaching the contract due to a force majeure event? Is it reasonable to excuse or suspend performance until force majeure events are ameliorated?

Resolving these issues depends on the parties' agreement and the will of each participant to bear some of the risks. Indeed, risk allocation is at the heart of the force majeure doctrine.

Although not always studied in depth during the formation of a contract, every force majeure agreement should be scrutinized for its particular terms and exact context. Nonetheless, several common characteristics are required for an event to be considered force majeure. By way of critical assessment, the following criteria should be met: (a) The event must be beyond the reasonable control of affected parties; (b) The performing party should have been impaired, prevented, or impeded from performing their contractual obligations; (c) The affected parties should have taken all necessary steps to mitigate the consequences of the relevant event (Hunter, 1991).

Force majeure and future events

The focus of the force majeure concept is the allocation of risk to parties who must determine the ability of their partnership to endure in the event of an inability to perform under chaotic conditions. It is critical to the contract that the parties come to a consensus about the definition of each provision under a force majeure event to determine accountability for the obligations of the performing party to the receiving party (Grieshop Corrada, 2007). If the performing party cannot complete their contracted work due to events beyond their control, the contract may be extended, invalidated, or re-negotiated. By definition, the event should qualify as one of the disasters listed in the agreement for it to affect any resulting discussion.

It is strategic that contracts contain the likelihood of a particular event occurring that may disrupt the performance of the contract's trajectory, such as a foreign government's instability or a volcano showing signs of eruption. Parties need to calculate the risk involved, and, therefore, may want to adopt their own definitions of what constitutes a potential event in the force majeure agreement or clause. The ability to evaluate the risk becomes the main function of contract law, and, thus, invigorates parties, companies, and individuals to plan their future with a moderate degree of certainty. Such a timely agreement will maximize the freedom of all participants as they act in concert to achieve the goals of the contract.

Parties may want to exclude an event from the list and agree to allocate the risk to the nonperformance party. Such an event or incident must be specified as precluded from the list of force majeure events in the definition. The loophole in this approach is that the parties may fail to predict the force majeure events, and it may be cumbersome to include all possible circumstances. Lawyers and legal counsel have tried to mitigate this loophole by adding a catch-all phrase that refers to any event that cannot be reasonably controlled by the parties.

On the other hand, the promisor is also at liberty to limit the amount of risk assumed at the stage of forming the contract when there is little control during force majeure events, such as acts of God, strikes, lockouts, riots, or civil commotion (Litvinoff, 1985). Therefore, in the aftermath of a disaster, a party may be reliant on a force majeure defense

to secure them from litigation by the other party when the obligations pursuant to the contract are abruptly ended by such events.

Parties will need support from legal staff to develop precise wording in the force majeure agreement. In general, four common elements are to be considered: a) The event must be out of the performing party's control; b) The event was not reasonably foreseeable by the parties and could not be avoided; c) The subsequent material effect on the contract work impeded the ability of one or both parties to continue the obligations of the contract requirements; d) The party, or parties, took all necessary steps to provide notice to the other party in a timely manner as spelled out in the agreement (Flambouras, 2001). Note that some courts may apply rigorous standards in asking the performing party to prove that the force majeure event was unforeseeable and impeded the performance in whole or in part.

Mitigation of the event's impact

Parties need to be apprised by legal staff that when a catastrophic experience occurs, the performing party must, if possible, try to mitigate the impact of the event on the contract work (Stark, 2003). If this does not happen, the party may be found liable if mitigation sustains the contract together with actions, such as an extension of time, an increase in costs, or changing a subcontractor's implementation of the promised work. If alternative options allow the work to continue, the promisor should consider the type of burdens and costs involved. The force majeure defense becomes admissible when the continuation of project terms becomes impossible.

In contrast, in situations in which a party relies on a force majeure defense, they can be held liable for not pursuing mitigation in good faith for the harm derived from the nonperformance of its obligations. Furthermore, the performing party may not have carried through with the mitigation efforts that were available to them. For example, a ruling can be made even if the unexpected event qualifies for a force majeure episode (Handy, 2019). Finally, proper notice to the other party must have been sent within a designated time.

Proper notice

When a catastrophic event occurs during the contract period and has upended the project in whole or in part, it behooves the performing party to notify the receiving party regarding the work stoppage or changes to the project; in this case, the event should qualify as a force majeure event in the agreement. Part of this notification should include specific descriptions of how the event is impacting the contracted project and the subsequent delays or inability to commence or continue work. Therefore, the contract should describe the required contents of the notification, including but not limited to timelines and details of issues that may constrain continued progress.

Laws often mandate strict compliance with the wording of the notification selected by the parties. The notice should be in written format and sent to the other party within a specific time by email or certified mail, whatever communication is detailed in the agreement (Flambouras, 2001). The performing party notifies the receiving party of termination by force majeure, highlighting the specific occurrence. Even when a force majeure agreement fails to include a notice, the noticing party may be required to alert the other party of the force majeure event once performance is delayed or rendered impossible. In this case, the party providing a legitimate notice for a force majeure defense will not be held liable for a breach of contract. Yet, even when the event is determined a force majeure and the performing party provides proper notification, as well as actions that would mitigate the required obligations, the contractual parties can still sue each other over disagreements on any of the clause elements, such as whether the event can be considered force majeure. Furthermore, it may be concluded by the courts that the mitigation efforts are not adequate. The level of required mitigation relies ultimately upon the language of the provision as well as the facts and applicable law. The impacted party's defense under the contract is normally conditional upon providing notice to the counterparty enhanced with the related evidence. The contract may also require the notice to include whether the work may be suspended, delayed, or the contract terminated altogether (Way, 1997). Most commercial contracts have a time-bar provision that mandates the party to provide notice to the receiving party as soon as they are aware of a

force majeure event. Failure to do so may result in losing the right to claim this defense.

Applicable law: Common or civil law in the United States and the UK

In Saudi Arabia, most global commercial contracts, whether governmental, private business, universities, or individuals, are with the United States and the UK. Even contracts involving other European parties tend to choose British law as the applicable law in cases where disputes arise. Regarding force majeure cases, both common law and civil law jurisdictions are different in treating force majeure provisions. Both the United States and the UK use common law and accept the force majeure defense expressly written in the contract, whereas in civil law (practiced in most of Europe and South America), a force majeure is implied in a contract. The differences between the two categories (common and civil laws) are that a force majeure limitation in common law is at the discretion of the parties to broaden or narrow its boundaries by agreement (Bell, 1986). In civil law, force majeure is implied, and parties cannot circumvent the applicable law.

Often, parties may encounter situations when changes in the relevant laws have taken place, which may consequently lead to the enactment of a new law, making the performance of contractual obligations impossible for parties. As a result, contracts may stipulate that parties will pay increased costs to reimburse the affected party; other results may give parties the right to end the contract.

Corona virus (COVID-19) and force majeure

Currently, the 2020 corona virus pandemic has strongly affected not only individuals but national and global commerce. In such a crisis, the estimation of the pandemic's duration may be ongoing for the near future. The impact has nearly bankrupted countries, and as a result, there may be fewer mitigating strategies due to the closure of businesses, both large and small, and the domino effect of wiping out the workforce and most levels of the economy. Furthermore, rehiring employees for manufacturing is complicated by the need for caution in preventing more virus outbreaks due to the number of workers that must be protected while at their place of employment. Sanitizing the workplace is a daily

necessity, and testing each employee for coronavirus symptoms is also a new routine.

Employees must follow a cautionary trajectory of personal hygiene, wearing masks and gloves to safeguard other employees as well as themselves and to halt the virus spread at work and home. Businesses assume a critical role in broadening the ways that a company can maintain at least partial operation by allowing employees to work at home. Telecommuting is increasingly common in businesses that can move their work online, and the use of online meeting and conferencing programs are becoming standard business practice for many commercial enterprises.

Nevertheless, commerce continues to be stymied. Cargo cannot be unloaded due to the reduction of workers, and retail has been shut down, as are most businesses. While a few countries have begun reopening their economies, the process has been slow and delayed as the pandemic is closely monitored to detect new outbreaks. The financial toll seems unimaginable, with the global economy showing little sign of returning to business as usual. Economic recessions or negative business conditions may not, however, adequately meet the requirements of force majeure events. Even though the performing party may prove that declining business and the resulting work stoppages were caused by COVID-19, such a public health crisis may not be considered a force majeure event. In the end, contractual obligations must be revisited to determine the appropriate category for this world-changing pandemic and resulting economic decline. Many parties around the world are poised to invoke force majeure with the widespread hindrance to businesses, manufacturing, and transportation due to COVID-19 (Jennejohn et al., 2020). Invoking the force majeure defense may result in a slew of litigation cases, which may not be in the best interests of contractual parties. Instead, parties might be better off searching for a workable solution based on mutual understanding.

Although courts and arbitrators assess force majeure cases based on individual merits, relying on contract terms and the contract's subject matter, they also review the intentions of the parties as well as the steps taken to mitigate the impact of the crisis. Governments across the world have ordered a full lockdown of many types of businesses, such as barbers in Saudi Arabia, or limited these businesses to partial opening

only. These businesses may have ordered products and made payments in full before the pandemic. Will such owners be able to claim these costs as part of the loss under the force majeure agreement? (Goldberg, 1988). It will be interesting to determine how judges interpret COVID-19 in relation to a force majeure defense when the impact of the virus declines and settles down. Additionally, the position of insurance companies will certainly be affected regarding covering the business losses incurred due to these unforeseen circumstances and whether COVID-19 will be covered under these policies.

It is expected that an influx of notices invoking a force majeure defense may overwhelm the courts, and parties should be advised to safeguard their interest for the way ahead. Courts will be flooded with complaints, but it will be in everyone's interest to consider pre-litigation meetings for parties to work out settlements from the confusion caused by the pandemic. Ultimately, it will be an opportune time to make more practical and reasonable decisions.

The most likely scenario with COVID-19 would be the inability to perform some or all contractual obligations due to the self-enforced isolation of countries, social distancing in workplaces, or workers telecommuting from their homes. The loss of a contract's profitability may not be an adequate warrant for a force majeure defense unless there is a specific clause in the contract that deals with such cases. Neither an economic downturn nor other adverse business conditions may be enough, and although it is apparent that the economic downturn was a consequence of COVID-19, it still may not be sufficient for a claim of force majeure.

Another approach to consider when applying a force majeure defense is to determine the commercial losses from such events. If accidents disrupt the contract's benefits or profitability, force majeure may be difficult to prove unless the language in the agreement deals with economic loss. Thus, the force majeure argument may need to indicate the profitability impact of an event. For example, if a restaurant stayed partially open during the crisis, its income will be far less than in normal times, making only enough money to pay workers and supplies. Its profit margin may be nonexistent.

A one-off event, such as a natural disaster, that is included under the force majeure agreement may happen once and be restricted to a certain

territorial location. Such contained events may affect projects temporarily and can be reassessed by the parties to prevent the termination of the contract. However, the COVID-19 outbreak has become a worldwide phenomenon that has overwhelmed medical facilities and staff and caused an economic plunge comparable only to the Great Depression of the 1930s. Identified by the World Health Organization as a global pandemic, the disease spreads rapidly and is highly contagious from one individual, community, or country to another. As communities, countries, cities, and regions have shut down all forms of commerce, laying off thousands of workers, and requiring individuals and families to stay sheltered at home while seeking to suppress the spreading virus, the economy has taken a direct and dire hit. In this enormous and complex environment, failing businesses are looking for ways to access the precepts of force majeure in their contracts and to subsequently declare a temporary or permanent stoppage to their projects. Some parties have taken the approach of issuing rolling or protective notices as required in force majeure agreements as they consider the developing impact of the virus outbreak on their implementation of contractual obligations.

Doctrine of impossibility: One UK approach to force majeure

Although the impossibility doctrine of performance is available in English common law, it is rarely permitted (Mansfield, 2013). As far as possible, contractual obligations are decisively enforced under English common law, no matter how drastic the changes in circumstances. The legal rationale behind this resolute position is that the parties assume the risk of unforeseen occurrences that may interfere with project completion or failure to deliver. Such incidences are considered a breach of contract under English common law; therefore, an event must render the performance of a contract impossible. Certainly, such cases of impossibility allow the extraordinary defense of admissible evidence. On the other hand, in tort law, a plaintiff is found liable for compensation for any harm they caused only when the victim can provide proof that the defendant was somehow at fault. If the performing party wants to limit its promises, contractual obligations, and duties, the party is free to do so when deciding not to bear the risk of nonperformance (Lewis, 1988).

An impossibility doctrine exempts the performing party from providing contractual duties if the impossibility happens after the execution of the contract and was not the fault of the promisor through negligence, willfulness, or omission. However, modern courts realize the difficulty of meeting the requirements for the impossibility defense of nonperformance, delays, or changes. Such requirements include that the performing party discloses evidence proving they were not at fault when seeking to end or change the contract due to the work being impossible to continue. At the same time, the nonperforming party also undertakes the necessary steps to mitigate the damage in the contract (Dellinger, 2017). The “impossibility doctrine” has been recently renamed the “impracticality doctrine” due to possible mitigation complications, cost increases, further delays, and the like, making it impractical to proceed with the original arrangement (Lewis, 1988).

Doctrine of frustration: Another UK approach to force majeure

Another dimension of English contract law is labeled the “doctrine of frustration,” which can be used reliably as an explicit force majeure clause within a contract. The doctrine of frustration is not available if the contract has an expressed provision of force majeure. With the ongoing global coronavirus outbreak, lawmakers may enact laws and contingency plans for containment measures limiting physical interaction, as governments are currently doing. Parties may need an alternative plan in their contracts in case of local restrictions or home quarantine. A party’s right to reimbursement may ultimately depend on the scope of work and its specific language in their agreements. The frustration of contract results when contractual obligations cannot be met due to unforeseen events and both parties realize that continuing with the contract, as written, is impossible (Schwartz, 2010).

Yet, the doctrine of force majeure is also interpreted and applied differently based on the relevant jurisdictions. The doctrine, also called “frustration of purpose,” is closely related to the “impossibility doctrine.” The fine line between the two doctrines is distinguished by the fact that impossibility deals with duties outlined in the contract, while the frustration of purpose is in conjunction with the reason a party consents to draw up a contract in the first place (DiMatteo, 2015). For example, if

an entrepreneur signs a premises rental contract to open a restaurant that serves only Arabian ostrich and the country later bans the commercial hunting of ostrich, or the premises is demolished in a storm, the landlord and entrepreneur are exempt from performing the contract by impossibility. Nevertheless, if the Arabian ostrich becomes extinct, the entrepreneur may be relieved from continuing to pay the landlord because the reason for entering the contract no longer exists; the purpose is ended by frustration. The parties in the preceding scenario may continue the leasing contract, but one of them no longer has a prime reason.

Invoking a frustration defense requires that the entire subject matter or purpose of the contract is declared damaged. The frustration doctrine renders the contract null and void, and the consequential obligations of the parties cease to exist. It can be said that the frustration of a contract is an external test of a contractual relationship and the result of an unexpected occurrence after a contract has taken effect. In contrast, force majeure is a contemplated contractual provision where parties focus on the possible or expected events that may occur to hinder their contract implementation. COVID-19 has disrupted trade across borders, affecting the ability of parties to accomplish their contractual work due to the ban on travel and movement, halting production, rising costs due to the lack of essential materials, a reduction in staff who may be sent into quarantine, scarcity of funds, and disruption of supply chains. A business may invoke force majeure to eliminate or limit their liability resulting from an inability to deliver their contractual obligations (Bell et al., 2008), other companies have canceled contracts and services due to travel bans, and many have gone out of business permanently.

This doctrine, in contrast to the impossibility doctrine, allows the performing party to be excused or relieved from liability for failure to bring about the promises in a contract (Durr, 2016). The doctrine of frustration may excuse nonperformance from the obligations in the contract because of the circumstances that have rendered that obligation frustrated from a force majeure point of view. The performing party uses the force majeure concept to anticipate the allocation of future risk and try to settle it peacefully rather than impose it forcefully by the law. It is a common concept that is always included in commercial contracts.

Consequences of a force majeure defense

Accidents, or any number of events disrupting a contract's benefits, must be sufficient and significant to qualify for a force majeure defense, including the explicit language that deals with profitability. Force majeure and hardship under general contract principles include an exemption for nonperformance in international arbitration (Brunner, 2009). A commercial recession or a long-lasting business turn down may not be adequate to meet the requirements of force majeure events. Even when one of the parties proves that declining business profits may be caused by COVID-19, it still may not be considered as a force majeure event.

Definitional categories

Under the definition of force majeure, events fall under two categories: a) political forces that produce a risky environment for companies; b) non-political or natural forces that involve physical risks affecting businesses or projects. Remedies for both types of force majeure often range from a time extension for project completion to an increase in costs associated with a political crisis. An extension of time and relief from termination often happens when the force majeure event is of natural causes.

Legal principles: Common and civil laws

Although the legal principle of force majeure is linked to common law, the idea is imported from a French law in which the promisor is relieved from the liability of nonperformance in specific circumstances (Smith, 1936). Despite the semblance to the doctrine of frustration under common law, it is somewhat narrower in its mitigating effect. In many English contracts, the words are in French to emphasize the reflected meaning in French law.

Force majeure in French civil law may be interpreted as a defense against liability for damages by not meeting the contractual obligations as a result of force majeure or *cas fortuit* (a chance occurrence or an unavoidable accident). This is a common clause in contracts that essentially frees both parties from liability or obligation due to a natural disaster or other such circumstance beyond the parties' control (e.g., war, strikes, riots, crime, or an event described by the legal term act of God, e.g., hurricane, flooding, earthquake, volcanic eruption, etc.) (Rauh,

1996). The doctrine of force majeure that originated in France has been accepted in several legal systems as the world has become more aware of natural threats. Moreover, cyberattacks and other acts of digital terrorism are becoming increasingly common, and such occurrences may prevent one or both parties from fulfilling their obligations of a contract. In practice, most force majeure agreements do not excuse a party's nonperformance entirely but only suspend it for the duration of the force majeure. Proof of breach does not require evidence that the promisor is at fault for failing to perform what they promised. In claiming damages for breach of contract, the defendant's reasons for not fulfilling their obligations will not be requested, nor will the defense of best effort to fulfill obligations be accepted. For the promisor to invoke the force majeure defense, they must provide proof that the performance has become impossible and not more onerous. In this respect, the force majeure legal concept is similar to the English law of frustration (Perillo, 1997), although one difference is that the French law cannot be invoked by the performing party based on technical issues if they could have utilized online platforms and communication. Thus, English law may relieve the promisor, whereas French law may not. The force majeure that does not relieve the promisor in such circumstances is narrower than the English law of frustration. Physical or legal impossibilities are the only reasons taken into account by French law.

To invoke force majeure, the accident or event that impedes performance must be unforeseeable and uncontrollable (Ullman, 1988). If the parties foresee an event that might cause the impossibility of performance, it must be inserted into the contract, otherwise, the obligations of the contract are not to be assumed. The expectation is that where the parties do not encompass a provision in their contract regarding foreseeable risk, then the parties must bear the loss. Again, the event that impedes performance must be uncontrollable, unavoidable, and insurmountable. When there is an alternative method to continue contract work, or a skills upgrade can overcome the hurdle blocking the performance, it becomes necessary to follow new strategies for the completion of the contract (James & Fusaro, 2006). The party cannot be relieved by invoking the doctrine if mitigation has not been attempted. Delivering contractual obligations in common law comes from the liability of parties not performing their obligations, which is a rigid rule. It is assumed that the

party providing services or delivering products as part of a contract ensures that the duties are undertaken with reasonable effort and care. Failure to bring about the results promised in the contract will constitute a breach of contract resulting in a demand for damages.

Possible complications when using force majeure

By making a declaration for force majeure, a party suspends its contractual obligations and performance, and as a result, the promisor claims no liability for damages. Such a legal principle may even allow a party to walk out of the relevant contract. Using a force majeure defense in most legal contracts can exempt a promisor from performing contractual obligations. Additionally, there are specifications under the force majeure doctrine that are deemed permissible, but they may vary from one legal system to another:

1. The promisor does not assume responsibility for the obstacle that could impede the performance of the contract;
2. The promisor did not reasonably anticipate an impediment when concluding the contract;
3. The event causing the impediment was beyond the control of the promisor;
4. Halting the performance was caused by the impediment;
5. The impediment causing the nonperformance could not be reasonably avoided or overcome (Moore & Giaccio, 1986).

During the force majeure episode, the affected parties should meet and mutually attempt to overcome the circumstances causing the nonperformance. When the event has ceased, work on the contract must resume in full. With the COVID-19 pandemic, most businesses are facing unprecedented circumstances never before encountered in their corporate history. Under such circumstances, they may need to postpone their contractual obligations by halting or freezing the work as well as acting to limit a contract party's liability. Categorizing an event as force majeure is judged on a case-by-case basis, relying on the relevant contract and other pertinent facts as well as the applicable law.

Force majeure events are not always foreseeable, and they may be uncontrollable for contractual parties. A rampant global pandemic, such as COVID-19, may qualify as a force majeure event even if the contract's force majeure clause precludes references to a pandemic or

epidemic, which are catch-all terms related to disaster from an act of God. National emergencies, governmental regulations, or acts beyond the control of the parties may underscore that COVID-19 and its inevitable commercial impact are more likely to be force majeure events.

For parties involved in commercial contracts during the pandemic, there is an underlying caution for preparation as scenarios change and conditions dictate. This crisis may evolve from slowing down to unveiling a second wave of continuing harm and havoc to people and businesses. Claiming respite from a force majeure event may be problematic, and parties should only make such a claim with caution; any wrongful claims may result in serious consequences amounting to a breach or repudiation of the contract. The counterparty, therefore, may subsequently claim for damages or termination of the contract.

In the meantime, it behooves the contractual parties to re-examine their contracts and consult legal staff to determine if the force majeure defense applies to this pandemic. The notice should be exceptionally detailed, articulating comprehensive information to the receiving party. Here are a few guidelines for reviewing contracts and termination:

- Check for a force majeure agreement, including the precise events and conditions that qualify for force majeure;
- Review the definition of force majeure to determine if any of the possible qualifying events, such as COVID-19, are listed;
- Focus on the general language to discover if the wording is sufficient to qualify COVID-19 and its consequences as a force majeure event;
- Study relevant terms in the contract, such as the governing law;
- Assess whether an implication of litigation exists under the contract that may manifest the impracticable or impossible situation of carrying out contractual obligations precisely because of the direct or indirect effects of COVID-19;
- Brainstorm various ways to mitigate or reduce the impact of COVID-19;
- Exercise diligence in complying with notification timelines and requirements (e.g., specific methods of notice via email or registered mail);

- Take into account the potential commercial impact downstream on the counterparty when they receive notice for a force majeure event that suspends performance of the contract;
- Determine whether insurance companies cover business interruptions or provide force majeure insurance policies that cover unexpected losses in full or with partial reimbursement.

The receiving party should examine the notice of termination, noting whether it falls within the definitions and qualifications of a force majeure event as written in the contract. Furthermore, the receiving party should give the following questions thorough consideration:

1. Have the deadlines for notice submissions been observed?
2. If the contracting party determines that force majeure is implied in the contract, are all applicable requirements followed?
3. Has the contracting party indicated whether the contract goals will be delayed, suspended, modified, or mitigated, and have they suggested alternatives for continuing the contract with changes?
4. Considering the downstream impact on subcontractors if the contract is delayed or terminated, what action, if any, is suggested regarding submitted payments?
5. Does the notice refer to additional copies that have been sent to other parties or subcontractors if this was mandatory?
6. Is supporting documentation or related information attached to the notice?

Contracting parties who are involved in back-to-back contracts or a network of interrelated contracts may need to take immediate steps to contact the relevant stakeholders that will be affected by a force majeure defense, considering various laws that may be relevant as well as their interpretations of force majeure. It is critical to understand the implications of such laws and how they may impact the status of the contract. If the parties fail to develop a force majeure agreement or include it in their contract, there may be a legal basis in common law that excuses parties from nonperformance or delay by unanticipated circumstances. In some jurisdictions, the law may provide that parties can be relieved of performance, delay some aspects of their obligations if unreasonable and unexpected circumstances make the performance impracticable, or frustrate the performance, hence, depriving a party of the benefit of the contract.

A contracted party impacted by a force majeure event will typically be exempt from performing their obligations under the contract for the duration of the crisis and may be entitled to compensation. However, an extension of time may provoke the other party to terminate the contract due to the lack of feasibility in realizing the expected commercial outcome.

Conclusion

Looking at the potential risks involved when parties enter a mutually coherent contract for the benefit of both participants, it is normal practice to use a contract template by cutting and pasting from a previous model to expedite the process. Thus, the force majeure agreement may not be explicitly studied by the parties and legal counsel to determine the exact role and inclusion of prerequisites to cover a variety of circumstances that can hinder or even breach the contract after its execution. Parties need to understand the ramifications of the applicable law that must be followed if a breach by event occurs. Common law and civil law have different interpretations of how a party uses a force majeure defense when circumstances have impeded the work on a contract and enhanced the possibility of a breach concerning liability for delays, work stoppages, cost overruns, and possible lawsuits.

This paper serves as a timely reminder that force majeure events have occurred around the world since 2020. The COVID-19 pandemic has affected every country, harmed businesses, upset global commercial progress, and caused confusion at every stage of the contractual process. Contractual parties, businesses, and enterprises have been affected as have countries' economic stability due to national and state lockdowns and limiting shopping to essentials for families sheltered at home.

Finally, for parties who come together for a variety of purposes, whether for commercial gain or innovative research, the contractual relationship will benefit in the long run if liability and risk assessment are part of their conversation. Along these lines, ideas for mitigating unanticipated events by extending timelines or refashioning goals and trajectories will prove beneficial to both parties.

Recommendations

Parties are urged to ponder the risks that are inherent in every agreement, specifically conceptualizing how the work will go forward to implement agreements in the face of a force majeure event.

Termination for force majeure should be created with deliberation and be forward-thinking as both the proposing and performing parties anticipate losses, lawsuits, and other complexities.

In a world transformed by the pandemic, parties undertaking new commercial transactions must generate several strategies to alleviate negative outcomes.

Lawmakers may have to intervene to immolate the impact of the pandemic by giving parties choices, when possible, to deliver their contractual commitments by enacting extensions on timelines or giving tax reductions to help businesses overcome extraordinary circumstances.

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Topic Index

INTRODUCTION.....	521
THE FORCE MAJEURE CONCEPT: THE CONTRACT'S RISK ASSESSMENT FOR DISASTERS	522
FORCE MAJEURE AND FUTURE EVENTS.....	523
MITIGATION OF THE EVENT'S IMPACT	524
PROPER NOTICE.....	525
APPLICABLE LAW: COMMON OR CIVIL LAW IN THE UNITED STATES AND THE UK	526
CORONA VIRUS (COVID-19) AND FORCE MAJEURE.....	526
DOCTRINE OF IMPOSSIBILITY: ONE UK APPROACH TO FORCE MAJEURE.....	529
DOCTRINE OF FRUSTRATION: ANOTHER UK APPROACH TO FORCE MAJEURE...	530
CONSEQUENCES OF A FORCE MAJEURE DEFENSE	532
DEFINITIONAL CATEGORIES	532
LEGAL PRINCIPLES: COMMON AND CIVIL LAWS	532
POSSIBLE COMPLICATIONS WHEN USING FORCE MAJEURE	534
CONCLUSION	538
RECOMMENDATIONS.....	539
REFERENCES.....	540
TOPIC INDEX.....	543