COVID-19 AND FORCE MAJEURE

FERRIS & BRITTON

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Since the beginning of quarantining, social distancing, and the global shutdown of many businesses altogether due to the COVID-19 pandemic, clients have been asking about whether or not their contractual obligations may be postponed or excused. Essentially, what they are asking is what their contractual rights and obligations are vis-à-vis force majeure given the COVID-19 pandemic.

A force majeure event refers to the occurrence of an event which is outside the control of the parties and which prevents and/or frustrates a party from performing its obligations under a contract. Black's Law Dictionary defines "force majeure" as "an event or effect that can be neither anticipated nor controlled. It is a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event that the parties could not have anticipated or controlled."

Force majeure events are fact intensive inquiries determined on a case-by-case basis as defined by the force majeure provision in the contract. Contracts frequently define specific events and occurrences which if they occur would qualify as a force majeure, and relieve the parties from performing their respective obligations under the contract for the period of time the force majeure event continues. Force majeure events are generally defined to include, but are not limited to, an act of God, war, terrorism, weather related events such as floods, fires, earthquakes, hurricanes or tornados, governmental acts preventing performance under the contract, strikes and labor disputes, or any other unanticipated events and conditions beyond the parties' control which prevent the parties from performing their obligations under the contract.

In order for a party to claim delayed or excused performance of a contract due to a force majeure event, the party will have to demonstrate that the event was beyond the control of the party as defined in the contract, the party has attempted to mitigate the event and its consequences, and that there are no alternate means for performing under the contract.

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Although the application of force majeure clauses will be determined on a case-by-case basis, with the global shutdown of businesses due to COVID-19 it is very conceivable that many businesses will be invoking the force majeure clauses in their business contracts and seek to delay and/or excuse their performance of their obligations under the contracts in question. This in turn, will likely lead to extensive litigation where the courts will have to interpret the application of COVID-19 as related to the specific force majeure provisions in question. There is little question that the courts are going to be inundated with force majeure cases and that the case law will begin to develop and evolve because of COVID-19 and its fallout.

However, if an event does not qualify as a force majeure event under the contract or the contract does not contain a force majeure provision, the parties are not without potential recourse. The parties may still attempt to invoke the defenses of impossibility, impracticability and/or frustration of purpose to determine their contractual obligations during this pandemic. California recognizes the defenses of impossibility and impracticability where "A condition in a contract, the fulfillment of which is impossible or unlawful . . . or repugnant to the nature of the interest created by the contract, is void." (Cal. Civil Code § 1441) California Civil Code § 1511, provides in part: "The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate:

> 1. When such performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not be an excuse; however, the parties may expressly require in a contract that the party relying on the provisions of this paragraph give written notice to the other party or parties, within a reasonable time after the occurrence of the event excusing performance, of an intention to claim an extension of time or of an intention to bring suit or of any other similar or related intent, provided the requirement of such notice is reasonable and just; or
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> 2. When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary[] . . . ."

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On the other hand, the doctrine of frustration of purpose is available as a defense where contractual performance is still possible, but it has become valueless or pointless resulting in the main purpose or object of the contract becoming frustrated.

In conclusion, the application of force majeure provisions may be available during the COVID-19 pandemic. However, those provisions are very fact-intensive and are governed by the express provisions of the contract. If the contract does not contain a force majeure provision, the parties may still invoke the defenses of impossibility, impracticability or frustration of purpose as related to the COVID-19 crisis.