

Drafting and Enforcing *Force Majeure* Clauses in the Wake of COVID-19: Details Matter

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The COVID-19 virus, now on the shores of the United States, continues to impact U.S. businesses at an increasing velocity. With workers contracting the virus across the globe and unable to perform their jobs, business owners are met with critical decisions as to shutting down factories and reevaluating their supply chain. Faced with difficult business, health and safety questions related to the spread of the virus, business owners are often required to engage in a careful analysis of whether COVID-19 might trigger the *force majeure* clause in existing business contracts.

Force majeure clauses are contract provisions that excuse a party's inability to perform its obligations under the contract if an unforeseeable event prevents such performance. The clause originated under French law, with the literal translation of the phrase "force majeure" being "superior force". The Chinese government has made clear that it considers COVID-19 to be a *force majeure* event. The quasi-governmental China Council for the Promotion of International Trade (CCPIT) has reportedly issued thousands of "force majeure certificates" to Chinese companies stating that these companies' non-performance is excused due to effects from the COVID-19 outbreak. Two major purchasers of liquefied natural gas (LNG) in China made headlines this week by cancelling orders for LNG and shielding this non-performance with claims of *force majeure*. Cases concerning the validity of these claims of *force majeure* protection by Chinese companies has not yet reached United States courts. In the United States, the analysis of whether a *force majeure* clause may be employed to excuse performance is based on the facts of a specific case and the language of the applicable *force majeure* clause in question.

When U.S. courts analyze a *force majeure* clause to determine if it applies to a certain instance of non-performance, there are four key factors:

1. the precise language in the *force majeure* clause[1];
2. evidence that the *force majeure* event was unforeseeable[2];
3. proof of causation between the *force majeure* event and the resultant non-performance[3]; and
4. evidence that the effects of the *force majeure* event are so severe that contract obligations cannot be performed[4] [5].

The first key factors are the precise language in the *force majeure* clause and the unforeseeable of the events defined in the clause. *Force majeure* clauses will often include a long list of possible events that are considered unforeseeable by the contracting parties. For example, "acts of God" (such as fires, earthquakes and floods), war, revolutions, and epidemics or pandemics — like COVID-19 — may be listed as events that would excuse performance in the *force majeure* clause. If an event is already foreseeable by both of the parties, then the occurrence of the foreseeable event will not trigger the *force majeure* clause.[6] Whether a specific *force majeure* event is explicitly included in the contract language may be a determining factor in whether a court concludes that the event that prevented performance falls within the *force majeure* protection.[7] For example, in the case of COVID-19, if the *force majeure* clause lists "act of God" as a *force majeure* event, but not "contagion," or "pandemic," a court may or may not agree that COVID-19 is a covered event; an "Act of God" alone may be too broad to excuse a party from performance.

To enforce a *force majeure* clause a company must also prove that the *force majeure* event defined in the contract has caused an inability to perform the contract obligation. For example, imagine there is a U.S. company that is producing a product and requires a component from a Chinese factory to complete its product. The Chinese factory is currently shut down due to COVID-19. Consequently, the U.S. company is forced to temporarily close operations and cannot honor its supply contracts for the product. In such a case, the non-performing U.S. company could make an argument that the effects of COVID-19 have completely paralyzed the party from performing its obligations under the contract. In addition to proving causation, the non-performing party must also prove that the effect of the *force majeure* event is so severe that performance is essentially impossible (for example, the company cannot “cover” from an alternative supplier^[8]).

The *force majeure* clause of a contract, if drafted precisely, can serve as a life preserver to a company faced with unforeseen circumstances beyond its control. If drafted incorrectly, *force majeure* language in a contract is only the mirage of a protection and will not save a company from unforeseeable pitfalls.

The White and Williams International Group advises U.S. companies in drafting and enforcing *force majeure* clauses. For further information please contact Gwenn Barney (barneyg@whiteandwilliams.com; 215.864.7063) or Gary Biehn, Chair of the International Practice Group (biehng@whiteandwilliams.com; 215.864.7007).

[1] For an example of the premise that “if a party desires to broaden the protections available under the impossibility doctrine, the excusing contingencies should be described with particularity and not in general language,” see *Constellation Energy Servs. of N.Y., Inc. v New Water St. Corp.*, 146 A.D.3d 557, 46 N.Y.S.3d 25 (2017). See also for examples, *Moncrief v. Williston Basin Interstate Pipeline Co.*, 880 F. Supp. 1495 (D. Wyo. 1995), *TEC Olmos, LLC v. ConocoPhillips Co.*, 2018 Tex. App. LEXIS 3909 (May 31, 2018), and *LLC v. Chatsworth At Wellington Green, LLC*, 2019 U.S. Dist. LEXIS 19264 (S.D. Fla. 2019).

[2] See for example *In re Cablevision Consumer Litig.*, 864 F. Supp. 2d 258, 264 (E.D.N.Y. 2012).

[3] See e.g. *Toyomenka Pac. Petroleum, Inc. v. Hess Oil Virgin Islands Corp.*, 771 F. Supp. 63, 67 (S.D.N.Y. 1991) for an example of this principle and the court finding of an exceptions for indirect causation. See also *ARHC NVWELFLO1, LLC v. Chatsworth at Wellington Green, LLC*, 2019 U.S. Dist. LEXIS 19264 (S.D. Fla. 2019).

[4] The standard for performance depends on the language of a force majeure clause.

[5] See for example *Publicker Indus. v. Union Carbide Corp.*, 1975 U.S. Dist. LEXIS 14305, 17 UCC Rep. Serv. 989 (E.D. Pa. 1975); *Oosten v. Hay Haulers Dairy Employees & Helpers Union*, 45 Cal. 2d 784, 291 P.2d 17 (1955), cert. denied, 351 U.S. 937, 76 S. Ct. 833, 100 L. Ed. 1464, 38 L.R.R.M. (BNA) 2134.

[6] See for example *Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236 (Tex. App.—Corpus Christi 1994, writ denied).

[7] See Footnote 3 above for cases exemplifying this proposition.

[8] See for example, *Gulf Oil Corp. v. F.E.R.C.*, 706 F.2d 444, 452 (3d Cir. 1983).

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