

FORCE MAJEURE and COVID-19

The continued presence of COVID-19 is generating uncertainty as to whether necessary supplies and labor will be available for business needs and whether contracting parties are able to complete ongoing projects. This raises the question of whether a party may rely upon a force majeure clause in a contract if such shortages prevent them from meeting deadlines.

Force majeure clauses address circumstances beyond the parties' control which make contractual performance too difficult or impossible. They may allow the invoking party to suspend performance, delay, or be released from certain duties.

Many of these clauses list various unforeseeable triggering events, such as war, terrorist attacks, floods, fire, etc. Depending on the language of such a contractual provision, the inability to meet contractual requirements may be excused by COVID-19. Several form contracts, such as ConsensusDocs 200 and Federal Acquisition Regulation 52.249-14, include "epidemics" in their force majeure listings. By contrast, the standard language in the AIA construction contract's general conditions does not include epidemics. Force majeure clauses may also include acts of the government as triggering events. Given the WHO's labeling of COVID-19 as a pandemic (a global-scale epidemic) and recent limitations imposed by state and local governments limiting gatherings of specified numbers of people, these clauses may be ripe for invocation. Some clauses may even include a "catch-all," whereby a party is excused for unspecified major events outside of its control, to which COVID-19 may apply.

If you think that your contract may provide an excuse of performance based on a force majeure clause, important steps to take include:

- Analyze the clause – Is an epidemic or pandemic included? Government action? Is there a catch-all provision?
 - Review the contract for additional provisions which may allow for extra time or recovery of costs.
- Gather supporting documentation
 - The US declared a national emergency March 13, 2020 and many states followed suit.
 - The WHO declared a "public health emergency of international concern" January 31, 2020 and a "pandemic" as of March 11, 2020.
 - If supplies from China are involved in your operations, China's Council for the Promotion of International Trade can issue "force majeure" certificates.
 - Information and correspondence regarding supply shortages and laborers/employees impacted by the virus would be relevant.
- Provide written notice to the other party in accordance with the contract (and potentially find mutually beneficial solutions)
 - Respond timely if you are the party being provided notice.
- Consider alternative means of performance and mitigation strategies

Should there be disagreement regarding whether a force majeure provision applies, most courts construe such clauses in accordance with their plain language. *See Holder Constr. Grp. v. Ga. Tech Facilities, Inc.*, 640 S.E.2d 296, 298 (Ga. Ct. App. 2006) ("Accordingly, under the contract, Holder bore the risk of the late delivery of the steel because it was not due to any of the reasons set out in the 'Force Majeure' clause."). *Compare St. Joe Paper Co. v. State Dep't of Env'tl. Regulation*, 371 So. 2d 178 (Fla. Dist. Ct. App. 1979) (enforcing

unambiguous force majeure clause including catch-all provision), *with Cartan Tours, Inc. v. ESA Servs., Inc.*, 833 So. 2d 873, 875 (Fla. Dist. Ct. App. 2003) (finding ambiguity in a force majeure provision, requiring further contractual interpretation by the court).

Force majeure is an affirmative defense, which the party invoking would likely the burden of proving. *See, e.g., Pro-Logistics Forwarding (Pty) Ltd. v. Robison Tire Co.*, No. 2:13CV83-KS-MTP, 2013 WL 6507347, at *4 (S.D. Miss. Dec. 12, 2013) (noting in the context of Mississippi's UCC force majeure statute that the invoking party bears the burden of proof at trial); *see also Falanga v. Kirschner & Venker, P.C.*, 680 S.E.2d 419, 423 (Ga. Ct. App. 2009) (party relying on affirmative defense bore the burden of proving it); *African Methodist Episcopal Church, Inc. v. Smith*, 217 So. 3d 816, 823 (Ala. 2016) (same); *SA-PG Sun City Ctr., LLC v. Kennedy*, 79 So. 3d 916, 920 (Fla. Dist. Ct. App. 2012) (same).

Merely being unable to perform a contract as a result of financial hardships is not sufficient. *See, e.g., Elavon, Inc. v. Wachovia Bank, Nat. Ass'n*, 841 F. Supp. 2d 1298, 1306 (N.D. Ga. 2011) (“The economic downturn of 2008 was not an ‘act of God.’ Further, financial inability does not excuse contract performance as impossible.”); *Marshall Const., Ltd. v. Coastal Sheet Metal & Roofing, Inc.*, 569 So. 2d 845, 848 (Fla. Dist. Ct. App. 1990) (“It is a well-settled contract principle that unexpected difficulty, expense, or hardship does not excuse a party from performance of its obligations under a contract.”). Thus, it is important to consider whether COVID-19 truly prevents timely performance, or whether it is being used as an excuse to avoid compliance.

A force majeure defense may be available in some jurisdictions without a contractual provision, but that argument will receive resistance. *See Alpine Constr. Co. v. Water Works Bd. of City of Birmingham*, 377 So. 2d 954, 956 (Ala. 1979) (“Where one by his contract undertakes an obligation which is absolute, he is bound to perform within the terms of the contract or answer in damages, despite an act of God, unexpected difficulty, or hardship, because these contingencies could have been provided against by his contract.”) (emphasis added). Other states may permit impossibility or frustration defenses in certain cases. *See Mailloux v. Briella Townhomes, LLC*, 3 So. 3d 394, 396 (Fla. Dist. Ct. App. 2009) (“In Florida, acts of God, impossibility of performance, and frustration of purpose are well-recognized defenses to nonperformance of a contract.”); *Watkins Dev., LLC v. Jackson Redevelopment Auth.*, 283 So. 3d 170, 179 (Miss. 2019) (noting Mississippi's recognition of an impossibility defense in certain instances).

For future reference, parties should carefully consider whether to include epidemics or pandemics in contracts. Arguably, COVID-19 could impact whether epidemics or pandemics are seen as “unforeseeable” in future settings.

Our firm is committed to helping our clients thoughtfully navigate the issues COVID-19 presents for their businesses. We will continue to monitor developments in this and other areas. Please feel free to contact us with any questions or concerns.

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