

COVID-19: Understanding Contract Rights and Obligations

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The spread of COVID 19 is obviously impacting businesses across all sectors. Amid travel bans and restrictions, unprecedented business closures, and event cancellations, businesses are looking to maintain their own survival through this crisis. As businesses develop or implement strategies and plans for addressing immediate short term needs and post recovery processes, they are no doubt engaged in contract review to fully understand their rights and obligations. This article is intended to provide some guidance as businesses strategize responses to on-going developments.

Force Majeure

In this current environment, businesses will likely turn to the often overlooked force majeure clause in their contracts. What does this mean? Generally, "Force Majeure" means an unforeseeable circumstance outside of a party's control that prevents them from fulfilling a contract. Although often mentioned in the same contractual provision, force majeure differs from an "Act of God". An "Act of God" is an unpredictable natural event, such as a storm, earthquake, or flood that prevents or interferes with contract performance. Force majeure, on the other hand, is a human-initiated action that cannot be predicted or controlled by a party to a contract.

A force majeure clause is often included in contracts to relieve parties from their contractual obligations when faced with natural and unavoidable catastrophes that interrupt the expected course of events and restrict participants from fulfilling obligations. It is often viewed as a defense to non-performance. What types of events constitute force majeure depends on the specific language included in the clause itself. The enforceability of such a clause generally will be governed by its express terms. Such clauses will be subject to traditional principles of contract interpretation. Courts will look to the terms of the contract as the best evidence of the parties' intent, and the plain meaning of the words used will control. Courts will also consider the contract as a whole, and will generally not consider any one provision in isolation. When a contract is unambiguous and clear, courts will interpret the contract in accordance with its plain meaning. If, however, a contract is reasonably susceptible to more than one interpretation, courts will find it to be ambiguous. Additionally, if provisions within a contract conflict, courts will interpret the contract so as to reconcile the conflicting provisions.

A party relying on a force majeure clause to excuse performance bears the burden of proving that the event was beyond its control and without its fault or negligence, even if the event is viewed as extreme and unforeseeable. That party also bears the burden of proving that the failure to perform was proximately caused by the event and, in spite of skill, diligence and good faith on the promisor's part, performance remains impossible or unreasonably expensive.

However, nonperformance dictated by economic hardship may not be enough to fall within a force majeure provision. A mere increase in expense may not excuse performance under a force majeure clause unless a contract expressly provides for this contingency or there exists an extreme and unreasonable difficulty, expense or injury.

If seeking to invoke a force majeure clause, a party must be sure to comply with any other contract provision requiring notice or any other applicable condition precedent. Companies should also review any provisions requiring opportunities to cure. Further, companies should examine their rights and obligations once a force majeure event has subsided. Additionally, a party invoking a force majeure clause will usually have a duty to undertake reasonable efforts to mitigate the event and its consequences.

Courts will give effect to broadly written force majeure clauses, provided they are based on events outside of a party's control. *Stein v. Paradigm Mirasol, LLC*, 586 F.3d 849 (11th Cir. 2009) ("It appears to us that force majeure clauses broader than the scope of impossibility are enforceable under Florida law."). A force majeure clause may be void or unenforceable if it turns on events within a party's reasonable control or renders obligations in the contract illusory. For example, a force majeure clause that turned on obtaining a building permit was not enforceable as this contingency was within the party's control and rendered their obligation to complete construction within two years illusory. *Princeton Homes, Inc. v. Virone*, 612 F.3d 1324, 1331-32 (11th Cir. 2010).

Other issues impacting the enforceability of such clauses include whether the clause is ambiguous, whether the party invoking the clause has complied with contractual requirements such as notice, and whether that party reasonably sought to mitigate the impact of the event. For example, a force majeure clause for "material events", including "terrorism" "affecting the ability of the Olympic Games to be held" was ambiguous since the clause was found to have two plausible meanings—the clause could reasonably mean preventing the games altogether or simply "affecting" them. *Cartan Tours, Inc. v. ESA Servs., Inc.*, 833 So. 2d 873 (Fla. 4th DCA 2003). In another case, a force majeure clause did not provide relief where it applied to unforeseeable events preventing the party from fulfilling its obligations to supply coal from a "primary source," since the party was still obligated to attempt to provide coal from other potential sources. *Gulf Power Co. v. Coalsales II, LLC*, 522 F. App'x 699 (11th Cir. 2013). Companies should be reviewing their force majeure clauses carefully, and evaluating the scope of enforcement, and its impact.

Neither party to a contract is responsible to the other for damages resulting from a loss occasioned by a force majeure event or act of God, unless the risk of such loss is expressly assumed in the language of the contract.

Early Termination/Termination for Convenience

In the absence of an enforceable force majeure clause, companies can look to other contract terms that may provide some protections against unexpected cancellations or an inability to perform. Early termination or termination for convenience clauses may come into play. Companies should be careful to examine the contractual requirements for invoking such

clauses, including notice provisions and conditions precedent. Florida courts will strictly apply notice provisions and other express termination language in the contract.

Impracticability or Frustration of Purpose

Florida courts also recognize several legal principles excusing contract performance, including impossibility of performance and frustration of purpose or impracticability. Impossibility of performance arises where the purposes for which the contract was made have, on one side, become impossible to perform. On the other hand, this doctrine will not apply where the relevant business risk was foreseeable when the contract was made, and could have been the subject of an express provision in the agreement.

Similarly, frustration of purpose occurs where the value of performance regarding the subject of an agreement has been frustrated or destroyed. This can occur because of failure of consideration or impossibility of performance by the other party. The doctrine is broader than strict impossibility, and may also include impracticability when it can be demonstrated that, through no fault of the nonperforming party, nonperformance is due to an unforeseen, unreasonable expense. Businesses should evaluate the potential cost impact of COVID-19 on their agreements, and consider adjustments that can be made if performance costs have changed substantially from what was contemplated when the agreement was made.

Additional Considerations

Before making any decision invoke a force majeure or termination clause, or other legal doctrine excusing performance, companies should evaluate potential liability for the other party's fees or costs incurred in the event it is determined that the termination or non-performance was wrongful or without legal basis. Contracts should be reviewed to identify any attorney fee provisions that may shift the risk of fees to a party who wrongfully terminates, as well as any cost shifting provisions that could shift to the terminating party costs that the other party incurs as a result of a wrongful termination.

Additionally, while parties will want to maintain open communication regarding the impact of COVID-19 on their agreements, they should be careful to avoid providing notices that could be deemed anticipatory breach of the contract. Anticipatory breach occurs when one party repudiates its obligations under the contract, making the unperformed contractual rights and duties non-binding on the other party. Businesses should document and communicate their efforts and intent to perform under their agreements, despite the unusual circumstances.

As always, our team at RumbergerKirk is here to assist you as we all work through this crisis together.