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Force Majeure FAQs in the COVID-19 Environment

April 6, 2020

As a result of the social and economic fallout from the COVID-19 pandemic, businesses are assessing how best to address their commercial relationships, especially where potentially insurmountable barriers to performance loom large. One clause that concerns obstacles to performance has gained increasing recognition in this crisis. "Force majeure" clauses long have existed in contracts. Largely the stuff of law school or bar exams, and often considered contract "boilerplate," these clauses have not often been vigorously negotiated, or contested. Now, force majeure provisions have become a central and current topic of attention in legal and business circles.

What to make of all of the interest in force majeure? We know now that force majeure, meaning "superior strength," is a concept ***that excuses, temporarily or otherwise, a party from performing obligations otherwise due***. But beyond that, how should lawyers and businesses think about force majeure in real world business decision making?

On April 1, we hosted a webinar entitled "***Force Majeure Takes Center Stage***." The goal of the presentation was to provide practical, real world advice for force majeure decision making in an unprecedented and fast-evolving business climate. The topics covered included those within our firm's client advisory, published the previous week, ***"Ten Things You Need To Know About Force Majeure Now."*** That advisory is available here. Participation and interest in the April 1 presentation far exceed what we expected, and we received many thoughtful questions from participants, in advance of, during, and following the event.

Participant questions covered all of the key aspects of force majeure decision making, some more broadly in scope and some with high degrees of specificity. As a follow-up to our article and webinar, and given the continued widespread interest — for understandable reasons — in force majeure concepts within the business community, we thought it would be of interest to consolidate these questions and provide our responses and comments.

We've divided the questions for organizational purposes and ease of reading into the following force majeure-related categories: (1) financial vs. non-financial obligations; (2) other potential remedies during the COVID-19 crisis beyond force majeure; (3) force majeure language and coverage; and (4) invoking a force majeure provision.

Critical Note / Disclaimer: *Everything within these FAQs, both questions and responses, are provided for general informational purposes. Every situation is unique, and the specific wording of a force majeure clause — and other applicable contract terms — is of paramount significance in these areas. In addition, nothing in this publication should be construed as providing legal advice of any manner. As we stated in our webinar, the implications of being "wrong" on a force majeure decision can be significant. For all of these reasons, it is imperative that you consult with your own legal counsel prior to taking or refraining to take any actions relating to force majeure, and that you not rely on these general FAQs in any such decision making or consideration.*

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Financial vs. Non-Financial Obligations

What about the language in the CARES Act that says landlords with certain loans cannot evict tenants for non-payment of rent? With no direct debt relief for the landlord, wouldn't that put the landlord in a position of having to pay the debt with no rent coming in? Is that possibly a force majeure event that prevents a financial obligation from being fulfilled?

Generally, force majeure postpones or excuses non-financial performance obligations. Absent some provision in the debt documents stating that the sole recourse of the lender is to the debtor's incoming rental payments, and that force majeure would include non-payment if that rental stream was not available to the debtor — all of which would be highly unusual in our experience — the general principle above, limiting force majeure to non-financial performance obligations, would likely apply and the landlord debtor would have a weak argument. Given that banking and payment systems are up and running, COVID-19 alone has not, yet, made it unreasonably and unexpectedly difficult or impossible to make payments from a normal force majeure perspective.

Entirely apart from the force majeure concepts, though, the CARES Act may separately provide the landlord itself with loan forbearance or extension rights during the COVID-19 crisis if the relevant loans fall within the coverage of the legislation.

In your webinar example of government stoppage of non-essential construction in New York, where the contractor is able to invoke force majeure to stop providing services, is the owner, who is paying for the project, still liable to continue to pay the contractor fees while the contractor is unable to perform (fees like general conditions)?

Potentially so, unless the payments are tied specifically to performance completion (in whole or part). One of the harsher realities that businesses have discovered is that force majeure provisions are not always reciprocal — they sometimes apply to only one contract party. Similarly, even if reciprocal, it is very likely that a force majeure event, such as the effects of COVID-19, will impact the parties' respective abilities to perform in different ways. So, it is very possible (and we have seen this exact situation with clients) that a party may properly invoke force majeure to excuse performance of non-financial obligations while insisting that the counterparty with payment obligations — based on time, not on performance (*e.g.*, staged payments due on certain dates) — continue to make the required payments even during the postponement of performance by the party invoking the clause.

I know now that force majeure usually will not be available for non-payment of financial obligations. However, are common law impossibility principles available for someone simply unable to make financial payments?

Most likely not. The general principle expressed in the common law doctrine of impossibility / impracticability is that financial hardship alone is not grounds for avoiding performance. The reason why force majeure generally will not excuse financial obligations is because it draws from background notions of impossibility. The doctrine of impossibility / impracticability is enshrined in the Restatement (Second) of Contracts, which includes the following guidance:

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate otherwise[1]*….*

The Restatement also provides a specific example with respect to government actions:

If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made.[2]

As with force majeure, it is important to understand how the relevant jurisdiction applies this doctrine. Some jurisdictions, like New York, apply it narrowly

[1] Restatement (Second) of Contracts, § 261
[2] Restatement (Second) of Contracts, § 264

Does frustration of purpose ever apply to payment obligations?

Frustration of purpose is a common law doctrine that excuses performance when the value of performance has been substantially impaired, *e.g.*, you cannot get what you bargained for. Unlike impossibility / impracticability, performance is possible, but the value of the party's performance has been substantially impaired. The concept is therefore sometimes considered a limited departure from established principles otherwise upholding the sanctity of contract. The doctrine of frustration of purpose is set forth in the Restatement (Second) of Contracts, which states that:

Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.[3]

The Restatement uses the following example to illustrate how frustration could relieve a party of an obligation to pay: A and B enter into a contract under which B must pay A $1,000 in exchange for the use of A's window on April 1 to view a parade that is scheduled for that day. Because of an illness of an important official, the parade is cancelled. B refuses to use the window or pay the $1,000. B's duty to pay $1,000 is discharged. Whether this doctrine will apply to excuse the performance of a financial obligation will depend on how substantially impaired the value of the performance has come. In the parade example, there was no parade and therefore literally no consideration to be exchanged for the $1,000.

The common law doctrines of impossibility / impracticability and frustration of purpose address risks that the parties cannot be said to have assumed under their contracts. Thus, it is important to review your contracts for provisions that may be deemed to have already anticipated and allocated the risk at issue – through, for example, force majeure provisions.

Does a D.C. / Maryland / Virginia stay-at-home order offer a commercial retail or office tenant sufficient reason for not paying rent, as a matter of force majeure, where the tenant no longer has the ability to legally access their premises?

Probably not. As we discussed in our presentation, force majeure generally is easier to invoke by a party providing good or services than a party whose obligation is "merely" to pay money. That is one of the harsh realities that is becoming painfully clear to business owners in the COVID-19 era. One may well have a reasonable and logical basis for the argument that if a business is prevented by government action from pursuing its only means of earning money, how can that business' payment obligations be considered anything but impossible to perform? Fair or unfair, as noted above, given currently functioning banking and payment systems, COVID-19 alone has not alone rendered it impossible to make payments from a normal force majeure perspective. That said, contracts will sometimes address this disparity within its express language, such as in real estate lease contracts that may in fact address rent abatement in the event of unforeseen circumstances.

Do Washington D.C. courts generally interpret force majeure clauses broadly or narrowly, and would they include rental obligations?

D.C. generally does not apply specific rules of construction to force majeure provisions, and we are not aware of any precedent that applies the force majeure provisions in a lease to relieve tenant of its rental obligations. In one case, the U.S. District Court in the District of Columbia that a force majeure provision contained in a Whole Foods lease excused Whole Foods from reopening for business within 60 days of closure – due to a rodent problem beyond Whole Foods' control that caused D.C. to issue two closure orders – but also noted that the provision did not excuse the "payment of monies."[4]

[3] Restatement (Second) of Contracts, § 265

[4] Whole Foods Market Group, Inc. v. Wical Limited Partnership, 288 F. Supp.3d 176 (D. D.C. 2018).

Do Massachusetts courts generally interpret force majeure clauses broadly or narrowly, and would they include rental obligations?

Massachusetts does not apply specific rules of construction to force majeure provisions. Thus, traditional rules of contract construction should be expected to apply to force majeure provisions in Massachusetts leases.[5] That said, Massachusetts recognizes the principle that financial hardship does not ordinarily excuse performance under a contract,[6] and courts may view force majeure through the lens of impossibility.[7] Accordingly, even without specific rules of construction, we would expect a Massachusetts court to construe force majeure provisions, insofar as they relate to payment obligations, narrowly.[8]

Do New York courts generally interpret force majeure clauses broadly or narrowly, and would they include rental obligations?

New York recognizes the "well established rule of contract law that force majeure clauses must be narrowly construed."[9] Under this rule, catchall phrases in addition to specifically enumerated force majeure events "are not to be given the most expansive meaning possible, but are held to apply only to the same general kind or class as those specifically mentioned."[10] Similarly, "when the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure."[11]

Has force majeure been used in real estate construction loan documents, and have you seen any parties attempt to enforce such a force majeure clause?

We have seen force majeure provisions in construction loan documents that provide for the extension of certain construction deadlines / milestones. Whereas you will rarely find a force majeure clause in a conventional loan document — because financial obligations are rarely deemed impossible to perform — construction loans require both financial and non-financial performance from borrowers. Because a force majeure event that prohibits construction may make it impossible for borrowers to reach certain construction deadlines, construction loans will sometimes allow for the extension of these deadlines. But, in most cases, the length of that extension will be capped. There will also be notice requirements in the event that construction is delayed for some defined period of time. It is important to review these loan documents closely to understand to what extent force majeure relief is available and if / when a lender will have to be notified about a project delay.

If a force majeure clause is silent as to a tenant's obligation to pay rent, what is the better interpretation as to whether or not the tenant must pay rent if a force majeure event has actually occurred under the lease provision?

The interpretation that is consistent with the law of impossibility is that financial obligations, like rent payments, will not be excused. Remember, force majeure is an exception to the rule that contractual liability is strict liability. Accordingly, the exception is strictly construed.

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[5] *See Goldman Environmental Consultants v. Kids Replica Ballpark, Inc.,* 81 Mass. App. Ct. 1125, at *1 (2012) ("The interpretation of a contract is for the judge, Sherman v. Employers' Liab. Assur. Corp., 343 Mass. 354, 356, (1961), and a force majeure clause must be interpreted with reference to the previous clauses of the contract."); *Baetjer v. New England Alcohol Co.*, 319 Mass 592, 597 (1946) (rejecting buyer's attempt to rely upon force majeure clause as defense for refusal to take delivery and pay for shipments of molasses and holding that force majeure clause must be construed with reference to the other provisions of the contract).

[6] *See Gurwitz v. Mercantile/Image Press, Inc.,* 2006 WL 1646144 (Mass. Super. May 15, 2016) (refusing to extend defense of impossibility to "business that faces financial difficulty based on decreased demand for its products or services.").

[7] *See Lenn v. Riche,* 331 Mass. 104, 111 (1954) ("This defense is akin to the defense of impossibility of performance under our law, where the burden of proof is upon the defendant.").

[8] *See Imbeschied v. Lerner,* 241 Mass. 199 (1922) (rejecting claim to rescind lease by bar operator in advance of the passage of the 18th Amendment, holding "if the defendant desired to have protected himself from liability to pay rent, a clause for that purpose should have been inserted in the lease.").

[9] *See Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, 910 N.Y.S. 2d 408 (N.Y. Sup. Ct. 2010).

[10] *See Team Mktg. USA Corp. v. Power Pact, LLC,* 41 A.D.3d 939, 942 (2007). *See also Urban Archaeology Ltd. v. 207 East 57th Street LLC*, 951 N.Y.S. 2d 84 (N.Y. Sup. Ct. 2009) ("Generally, only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused.").

[11] *See Constellation Energy Services of New York, Inc. v. New Water Street,* 146 A.D. 3d 557 (NY App. Div., 1st Dept., 2017).

Other Non-Force Majeure Remedies to Consider

Can you identify other potential remedies or clauses to consider or look for if force majeure is not available to me?
First, with respect to the specific provisions of the contract at hand, parties should examine carefully the entire contract and determine the potential application of other clauses such as those related to termination, default and material adverse change. Second, if the contract does not provide an avenue for relief, as noted above, parties may have a limited basis for relief under the common law defenses of impossibility of performance or frustration of purpose. In addition to those common law remedies, parties should determine the applicability of other commercial statutes. For example, the Uniform Commercial Code (UCC) excuses a seller from timely delivery or for non-delivery of goods where its performance has become impracticable because of either: (a) the occurrence of a contingency, the non-occurrence of which was a basic assumption on which the contract was made, or (b) compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid. (See UCC § 2-615(a)). If your contract pertains to international commerce, and does not contain a force majeure clause, civil law jurisdictions generally contain force majeure provisions, but choice of law will be important as different countries apply the concept differently. Excuse for impediment is also addressed by Article 79 in the Convention on Contracts for the International Sale of Goods (CISG).

If a price was negotiated and set forth in a purchase contract prior to COVID-19, and now the previous price is not "market" anymore given circumstances resulting from the virus (such that I could now procure goods or services at a lower price than in the contract), is there any way to get out of the contract?
Probably not via force majeure. Force majeure provisions are not normally available for price adjustment purposes. Instead, these provisions relate to a party's reasonable ability to perform its obligations in the absence of the parties' otherwise agreed upon allocation of risks within the contract. In some purchase agreements, such as those in the corporate acquisition context, material degradation of market conditions might provide a party with a termination right — through a "material adverse effect" or "material adverse change" clause — but even there, courts generally consider the buyer as having assumed the risk of changes in general economic conditions upon execution of the agreement. We have released an article on this topic, which can be accessed here.

How does force majeure relate to the independence of the covenant to pay rent?
Force majeure provisions in leases will often explicitly except the payment of rent or other money due under a lease, so that even an established force majeure event will not excuse the payment of rent. This is a manifestation of the doctrine of independent covenants in which the tenant's covenant to pay rent is unaffected and unabated by any non-performance of other covenants. But, as we have discussed, even without an express exception for the payment of rent, a force majeure clause is unlikely to excuse a financial obligation.

Force Majeure Language and Coverage

Please provide an example of a force majeure clause that would be triggered by the COVID-19 crisis.
While examples abound, below is a broad, reciprocal force majeure provision (this is about as broad and sweeping as they come…):

Neither party will be liable for, or be considered to be in breach of or default under this Agreement for, any delay or failure to perform if and to the extent such delay or failure is the result of or caused by circumstances or conditions beyond such party's reasonable control, including, but not limited to: fire, explosion, earthquake, storm, flood, wind, drought, disease, pandemic or epidemic, or act of God; court order; act, delay or failure to act by civil, military or any other governmental authority; national emergency, strike or work stoppage, lockout, riot, insurrection, or war.

The clause above, of course, is only an example. If the COVID-19 crisis has taught us anything, it is to pay close attention to the clear and concise drafting of force majeure clauses that have specific applicability to the contract and address the relative periods of notice and delay and the hurdles that must be met to invoke force majeure.

If a force majeure clause *does* contain any use of "pandemic" or "epidemic" or "disease" as a specifically enumerated force majeure event, then at what point is the pandemic an impossibility or impracticality such that it would trigger the clause? Does a certain critical mass of the employees, workers, etc. need to actually be sick and quarantined or physically unable to come to work, or does it just need to be pervasive enough such that it is imprudent for people to show up? Presumably it's not just because the pandemic is spreading wildly as that would be anticipatory and this not an enforceable force majeure, correct?

As many are discovering, force majeure clauses may not include pandemics, either through specific omission or because the language of the clause is not broad enough. So…. if your contracts do include pandemics, epidemics or diseases, as you noted, then that is a good thing, assuming you are the party seeking to invoke the clause. There needs to be a causal nexus between the identified event — here, the pandemic — and your inability to perform the obligations. The mere "existence" of COVID-19 without impact on your ability to perform (absent language to the contrary) normally would not suffice. As discussed in our presentation, different states will require different levels of performance hardship for you to trigger the clause. In "strict construction" states, the party seeking to be excused from performance based on force majeure may be required to show that the force majeure circumstances made its performance practically or near impossible — not just "impractical" or "difficult." A helpful distinction to consider is between the statement "the thing cannot be done" and the statement "I cannot do it." The former is "objective" impracticability, while the latter is "subjective" impracticability. The doctrine of impossibility and, by implication, the contract concept of force majeure apply to objective, not subjective, impracticability. Thus, again, these concepts will rarely apply to excuse a party who asserts that it cannot make payment. The doctrine of impossibility and, by implication, the contract concept of force majeure apply to objective, not subjective, impracticability. Thus, again, these concepts will rarely apply to excuse a party who asserts that it cannot make payment.

How does force majeure differ if a City orders all construction shut down, versus a City that allows construction to continue?

An event of force majeure must act on and make nearly impossible the performance at issue, if a government order is an event of force majeure in the applicable contract. Accordingly, a City ban on construction would clearly qualify as an event of force majeure that excuses a party's failure to deliver construction services. If a City allows construction to continue, there is no force majeure event relating to government action and assuming there are no other force majeure events to invoke — *e.g.*, a labor strike or shortage — there is nothing preventing a party from performing. The question becomes more difficult if a City has banned construction but the State has authorized it. The party expected to perform will have a viable argument that, notwithstanding what the State has authorized, proceeding with performance puts it at risk of violating local law and at least placing itself in poor standing with permitting authorities. The party expecting performance may argue that the State order supersedes the City order and therefore, legally, there is nothing preventing performance. To the extent the City keeps its ban in place, it is a tough argument that a party should feel free to continue with performance. Nonetheless, it would be prudent for the party seeking to invoke force majeure when the City has banned construction (but the State has not) at least to inquire with the local building inspector or permitting authority to confirm the City's position that the construction project at issue is indeed prohibited.

Could COVID-19 be considered an "act of God" under a force majeure provision, or are acts of God limited to just natural (physical) disasters?

That is a question of current significant debate, consideration and in many cases disagreement. If the force majeure provision lists "examples" of acts of God which are natural and physical disasters, such as hurricanes, floods, tornadoes, earthquakes, etc. — as such provisions sometimes do, but does not also include plagues, disease, pandemics or epidemics in the list, it may be more difficult to argue, particularly in "strict construction" jurisdictions, that "acts of God" should also cover arguably different circumstances. The argument is stronger if the phrase is not accompanied by specific examples (or of course if the force majeure provision expressly includes pandemics, whether within the "acts of God" examples or otherwise) or if specific non-virus examples are listed and you are not in a strict construction jurisdiction; but even then, disagreement may be expected. Some jurisdictions differentiate between "acts of God" and "human acts" and will exclude manmade events from the scope of the force majeure clause. This, too, would invite significant disagreement over whether a viral outbreak is more "natural" or "manmade" in nature. There also is a significant question being debated as to whether the pandemic is an "act of God," "human act," or whether it is the governmental response that creates the impossibility of performance.

My contracts include force majeure provisions, but they do not list epidemics or disease as a force majeure event. What other types of clauses should I be looking for in my force majeure language that might be helpful to me?

Force majeure clauses often include "acts of God" and "governmental actions." Some clauses include broad "catch-all" phrases such as "or other circumstance beyond the party's control." Whether or not "act of God" or "other circumstances beyond the party's control" language is sufficient to invoke force majeure will be determined by whether the state interprets the clause narrowly, as we discussed. In any event, the wording is key — for example, force majeure clauses might not be invokable because of the ***existence*** of COVID-19, but might become invokable because of the resulting government actions, such as a shutdown, closure of ports of entry, etc. (*i.e.,* the government order is the force majeure event).

What if your force majeure clause includes language that states that performance can be excused under the clause "if it's illegal or impossible" vs just "impossible?"

Generally, we apply the rules of construction in the state whose law governs. A number of states, including New York, adopt a narrow construction of what is a cause of force majeure. Similarly, a number of states will apply force majeure to excuse performance that has been rendered impossible, or possibly illegal, by the cause of the force majeure. Because many contracts, including leases, will require parties to comply with prevailing law, a governmental order that prohibits the performance at issue will make that performance impossible in that sense that it has become illegal, so that the term "impossible" will excuse the party's performance. Even where a contract does not explicitly require parties to comply with prevailing laws, it can be argued that such requirement is implied.

Are there any specific considerations regarding IP licensing, software, etc., in the force majeure context that I should consider?

Force majeure clauses are standard fare in IP and software licensing agreements. When negotiating the force majeure clause, specific attention should be paid to the parties' duties and obligations and the intent and purpose of the agreement. Failure to perform in excess of specified time periods may trigger the licensor's right to terminate the agreement. In addition, licensees should ensure that software or IP escrows or other appropriate mechanisms are established and can be utilized during a force majeure event.

Invoking a Force Majeure Provision

You indicated that force majeure clauses should only be invoked when the force majeure event has actually occurred, and not in "anticipation" of the event happening, even in situations like COVID-19, where things have moved quickly and for a time were only, and clearly, getting worse. Can you comment on what I should do if I receive a force majeure notice from one of my contract counterparties that seems, to me, anticipatory and premature?

Decisions about force majeure are, almost by definition, made in highly unusual, unexpected and stressful circumstances. Certainly that's the case now. These decisions will often have material ramifications and cannot be taken lightly. A premature — and therefore ineffective — trigger of a force majeure provision, or a showing that the decision was done anticipatorily or for economic reasons, may be recast in calmer times as a simple yet egregious breach of contract. So, if you believe the notice was sent prior to a force majeure event being in effect, your position would simply be one of disagreement. A response to the notice would likely be in order, and would depend on what the notice was seeking (a postponement of obligations, a termination of the contract?) and the language of the contract, but would likely need to make clear your position that force majeure has not occurred and that you fully expected your counterparty to perform under the contract. Concepts of waiver and anticipatory breach may also be relevant here. Note, however, that in this quickly changing environment, as discussed during the webinar, the COVID-19 consequences that are not a force majeure event this week, may be fully within the wording of the clause next week. Therefore, as a practical matter, you may just end up with a second, this time timely, force majeure notice…

Does having a force majeure clause, of itself, entitle a party to terminate a contract automatically?

Depends, of course, on the language at issue. Some contracts allow for a **termination** of the contract upon trigger of a force majeure provision. Other contracts simply allow the triggering party to **postpone performance** during the force majeure event. But very little operates automatically. It is the language of the contract that controls. Generally, for a party to invoke force majeure under its contract, the party must give notice and comply with any other contractual conditions with respect to termination.

How do force majeure events, and triggering force majeure clauses, relate to insurance coverage, such as business interruption insurance?

As we noted in our webinar, exactly when a force majeure clause is invoked and "announced" can be relevant both for determining whether the force majeure event actually has occurred to the level excusing performance (as described above), but also may have other important ramifications. Circumstances may have evolved to support a party invoking force majeure to postpone contract performance (or to terminate a contract) but those same circumstances may not yet trigger insurance coverage under applicable insurance policies. As a general proposition, on the insurance front, many insured businesses are likely to discover that their basic policies to not cover lost income resulting from COVID-19. Though some policies might cover one or more aspects of a particular insured's losses. This subject is the topic of an article by two of our colleagues and can be accessed here. Note, bills are pending in MA, OH, and NJ that may require insurers to cover COVID-19 related losses under business interruption coverage – more to follow.

How should one navigate force majeure when no governmental mandates or shutdowns are currently imposed?

As discussed in our presentation, language and timing are each critical. Force majeure clauses might not be invokable because of the **existence** of COVID-19, but might become invokable because of the resulting government actions, such as a shutdown, closure of ports of entry, etc. (*i.e.,* the government order is the force majeure event). As noted above, the clauses should not be invoked anticipatorily - - something we recognize can create a difficult and high-stakes "waiting game."

What are people expected to be granted by means of relief?

Typically, force majeure will excuse performance so long as the force majeure event is operative. Accordingly, in most cases, the relief afforded by force majeure is in the nature of a suspension of the duty to perform or, in an appropriate case, cancellation or termination of performance. But each contract should be reviewed to understand the remedial implications of force majeure: sometimes it will vest in the invoking party a right to terminate the contract; sometimes it will vest in the other party a termination right if the force event persists beyond a stated period of time. Please remember, this is a function of drafting including any shifting of the risk, including the risk of loss. The parties and courts are likely to enforce the bargain including risk shifting, as long as it is not punitive or illegal.

For More Information

Have additional questions regarding force majeure or additional COVID-19-related guidance? Please contact **Daniel Avery**, **John Cushing**, **Derek Domian**, **Martin Edel**, or your **Goulston & Storrs** attorney contact.

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