

Ten Things You Need to Know About Force Majeure Now

March 23, 2020

In the social and economic fallout from the Coronavirus, businesses are assessing how best to address their commercial relationships, especially where potentially insurmountable barriers to performance loom large. One clause that concerns performance impossibility has gained increasing recognition in this crisis. “Force majeure” contract 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. 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 all know now that force majeure, meaning “superior strength,” is a concept ***that excuses, temporarily or otherwise, a party from performing otherwise applicable obligations***. But beyond that, how should lawyers and businesses think about force majeure in real-world business decision making? While some of the force majeure considerations can be complex, there are, in our view, ***ten things you need to know about force majeure now***. Some of these are legal in nature, some are more commercially-oriented, but all of them are practical considerations to help guide rational and practical decision making.

The Ten Things You Need to Know About Force Majeure Now are:

1. ***Force Majeure is a Contractual, Not Common Law, Concept***. Force majeure is a ***contractual*** concept; something contract parties can agree to and that courts generally will enforce. However, if you don’t have a force majeure provision in your contract, there is generally no “common law” force majeure “right” outside of the contract to rely on - - though there may be other available contractual rights and defenses, of course, depending upon the specific circumstances.[\[1\]](#) But bottom line: don’t go asserting force majeure without having contract language in hand.
2. ***Force Majeure is Governed by State, not Federal, Law and varies by State***. Force majeure is determined and applied primarily under state laws — and different states construe and interpret force majeure differently; sometimes dramatically so. Thus, the determination of which state law governs is often a critical one. [\[2\]](#) Similar factual circumstances, with identical force majeure language, may give rise to very different results in different states.
3. ***The Specific Circumstances Identified in The Force Majeure Clause Are, of Course, Paramount***. As many lawyers are discovering, force majeure clauses may not include

pandemics, either by specific omission or because the language of the clause is not broad enough. Force majeure clauses often include “acts of God” and “governmental actions.” Some clauses include broad “catch-all” phrases such as “or other circumstances 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 discussed below. In any event, the wording is key — for example, force majeure clauses might not be invokable because of the **existence** of the Coronavirus 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)

4. **Force Majeure Provisions May Be Construed Narrowly.** Some states will construe contractual force majeure provisions narrowly. The courts of a particular state may, for example, require that the event in question **be specifically identified within the contract’s list of force majeure events, or be of a “similar type” if a catch-all force majeure phrase is invoked.** Depending on the applicable state law, the party seeking to be excused from performance based on force majeure may be required to show **that the force majeure circumstances made performance practically or near impossible — not just “impractical” or “difficult.”** Notably, New York courts construe force majeure provisions narrowly.
5. **Force Majeure Provisions Should Not Be Invoked “Anticipatorily.”** Parties should avoid invoking force majeure provisions “anticipating” that developing circumstances will create a force majeure event, **even if that proactive approach is rational and later proven to have been correct.** As the Coronavirus spreads, and with the known comparative experiences within other countries hit earlier by COVID-19, businesses may conclude that force majeure circumstances **will certainly be happening soon, even if not here today.** It is natural — and in most other cases prudent — to make business decisions based not only on today’s facts, but on what experience and context show are likely to be the facts tomorrow. But, there must be causation for force majeure and courts may look unfavorably on an invocation of a force majeure provision in anticipation of circumstances that have not yet happened.
6. **Force Majeure Provisions Should Not Be Invoked on Economic Grounds.** A party seeking to gain the protection of a force majeure clause should refrain from invoking a force majeure provision because performance has become economically less viable. Instead, a trigger should tie to the difficulty (or impossibility) of **performance, wholly apart from economic considerations.** These two concepts (ability to perform and economic considerations) can be difficult to separate in situations like the Coronavirus, where a government shutdown might become the applicable force majeure event, but the economic impacts of the virus are first and foremost in peoples’ minds. **In a force majeure analysis, put the economic considerations to the side.** Invoking a force majeure clause should be made because the “act of God” or “other circumstances beyond the party’s control” prevents performance or has caused the failure of performance, irrespective of economic factors.

7. **Force Majeure Provisions Favor the Party Providing Goods or Services.** Force majeure generally is easier to invoke by a party providing good or services than a party whose obligation is “merely” to pay money (though contracts will sometimes address this disparity within its express language, such as in real estate lease contracts that may address rent abatement in the event of unforeseen circumstances). This is consistent with the principles above: putting economics aside, given that banking and payment systems are up and running, ***the Coronavirus alone has not – yet - made it unreasonably and unexpectedly difficult or impossible to make payments from a normal force majeure perspective.***
8. **Force Majeure Provisions May Not Result in a Termination of the Contract.** 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. And, still other contracts may provide that if a party invokes force majeure, it may still be obligated to account to, and pay, the other party funds received that were not expended in delivering the goods or services. As a result, it is not uncommon for one contract party to be excused from performance, while another party’s obligations continue unaltered, particularly if the second party’s obligations are “merely” financial. Again, it is the contract’s words that govern the post-invocation duties of the parties among themselves.
9. **Timing To Trigger A Force Majeure Provision Can be Critical.** Exactly when a force majeure trigger 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. For example, 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.*** Think carefully about how the decision made under one contract may be relevant in other areas.
10. **Decisions Regarding Force Majeure Will be Revisited with 20/20 Hindsight.** Decisions about force majeure are, almost by definition, made in highly unusual, unexpected and stressful circumstances. These decisions will often have material ramifications and cannot be taken lightly. In many cases, the decisions will be revisited — likely by objecting contract parties — in the fullness of time and with the benefit of 20/20 hindsight. 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.*** Businesses should stay “on message” in their communications (internal and external) about the rational, timing, and effects of a force majeure decision.

The particular facts on the ground, in an evolving Coronavirus-affected business landscape, as well as the applicable state laws and contract language at issue, will impact every force majeure decision. At the same time, keeping in mind the ***ten things you need to know about force***

majeure now should help guide and inform not only those decisions but also in drafting future contracts.

Dan Avery is a director in Goulston & Storrs' business and M&A practice, resident in the firm's DC and Boston offices. Gene Barton and John Cushing are each Boston-based directors in the firm's business and M&A practice. Martin Edel is a litigation group director in the firm's New York office.

[1] These may include excuses from performance-based upon impossibility or frustration of purposes, under the Uniform Commercial Code, the Restatement (Second) of Contracts, or otherwise.

[2] Legal disclaimer here: As a primarily state law concept, which state law applies in any given circumstance can have a critical effect on how force majeure will work (or not) for any given party. Our list of ten things to know about force majeure now is based on general observations and principles, and the applicability and relevance of any of the items on the list will depend on the laws of the relevant state(s).