



Does The COVID-19 Coronavirus Trigger The *Force Majeure* Clause in Your Commercial Contracts or Otherwise Excuse Performance By Either Party?

03.13.2020

As the COVID-19 Coronavirus (“COVID-19”) outbreak spreads, more and more public gatherings and events have been cancelled or postponed, including major sporting events like the NCAA Final Four tournament, and the NBA, MLS, and MLB seasons. In addition, some businesses are directing their employees to work from home or temporarily shutting down all together in order to combat the spread of COVID-19.

For many businesses, the COVID-19 pandemic has already cast doubt on the efficacy of certain commercial contracts, including those in the hospitality, construction, transportation, and manufacturing industries. And with the growing and evolving response to the risks associated with COVID-19, it will likely continue to cast long shadows over many more commercial contracts affected by the outbreak in myriad industries.

Whether and to what extent COVID-19 will affect your commercial contract, or how that impact and any associated losses will be allocated between the parties to the contract, will largely depend on the specific language in the contract and the particular facts and circumstances of the commercial engagement and how COVID-19 may affect it.

In order to anticipate and allocate the risk associated with unforeseen events like the COVID-19 outbreak, many contracts include excusal provisions under the doctrines of *Force Majeure* or impossibility, or parties may invoke other defenses such as frustration of purpose. While sometimes colloquially referred to as an “Act of God” provision, a *force majeure* clause is not necessarily limited to unforeseen natural

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disasters like an earthquake or flood. The purpose of a *force majeure* clause is to limit the parties' exposure to losses to those that could reasonably be anticipated and not as a result of extraordinary circumstances beyond either party's control. The application of a *force majeure* provision will generally depend upon the language used in the contract and "whether under the particular circumstances there was such an insuperable interference occurring without the parties' intervention as could not have been prevented by prudence, diligence, and care."

For example, in 1946, in a dispute over a contract involving the shipment of goods, the California Supreme Court ruled that the United States' entry into World War II after the bombing of Pearl Harbor fell within the ambit of the applicable *force majeure* provision where the provision explicitly mentioned the outbreak of war. On the other hand, where a *force majeure* clause provides that drilling may be suspended while the price for *oil* is below a certain threshold, the fact that the price for *gas* is below that threshold is irrelevant.

Force Majeure And Illness Outbreak

There is no clear controlling California legal authority that addresses the effect of *force majeure* involving the outbreak of a pandemic such as COVID-19. However, at least one federal District Court in the Midwest analyzed a *force majeure* provision within the context of the Avian Flu outbreak of 2015. In Rembrandt Enterprises, Inc. v. Dahmes Stainless, Inc., 2017 WL 3929308 (N.D. Iowa, Sept. 7, 2017), Rembrandt Enterprises, an egg producer, had recently entered into a contract with cereal producer Kellogg which would substantially increase Rembrandt's output of eggs. As a result, Rembrandt contracted with Dahmes Stainless, Inc. in connection with the construction of a \$100 million facility; in particular, Dahmes would be installing an industrial egg dryer at the new facility for \$9 million. A \$2.5 million down payment was made and several progress payments were scheduled through the contract term.

Avian Flu then broke out and Rembrandt had to eliminate over one million birds, which substantially cut into Rembrandt's production capacity. Rembrandt later informed Dahmes that it had terminated the contract under the *force majeure* provision. A lawsuit was filed and

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Dahmes ultimately filed a motion for summary judgment.

The applicable *force majeure* provision described the *force majeure* event as follows:

“Neither party shall be liable to the other for failure or delay in performance of the Work caused by war, riots, insurrections, proclamations, floods, fires, explosions, acts of any governmental body, terrorism, or other similar events beyond the reasonable control and without the fault of such party.”

The District Court in the Rembrandt case ruled that such a *force majeure* clause was broad enough to potentially encompass the Avian Flu outbreak and Rembrandt defeated summary judgment.

COVID-19 and the Application of *Force Majeure* and the Doctrines of Impossibility and Frustration of Purpose

Force Majeure. Since it is unlikely that the *force majeure* provision in your commercial contract specifically lists a novel viral pandemic, it is likely that a question similar to that in the Rembrandt case of whether the catch-all provision in your contract is sufficiently broad to encompass COVID-19 will also be important. But while the Rembrandt case is an instructive case study, it is not necessarily predictive of how a different court would construe a *force majeure* provision in a different contract for a different purpose in the particular circumstances surrounding the impact of COVID-19 on that contract. Whether COVID-19 qualifies as an unforeseeable event of sufficient force to invoke a particular *force majeure* provision will be a highly fact-specific inquiry.

In addition to the question of foreseeability, courts will likely also look at whether and to what extent COVID-19 prevented or inhibited performance of the particular contract by one or both parties. Factors a court might consider may include whether one or both parties could or was willing to perform, whether there was partial performance or if performance was attempted, whether there was a government order or regulation that prohibited or effectively prohibited performance, whether the non-performing party is acting in good faith, and whether the non-performing party has complied with any formal prerequisite necessary to raise the defense under the terms of the contract.

Impossibility. If your contract does not have a *force majeure* provision, a non-performing party may still be excused from performance if they can invoke the doctrine of impossibility. To excuse performance under the doctrine of impossibility, the non-performing party would have to prove that the COVID-19 outbreak rendered performance *impossible* and that the viral pandemic was unforeseeable such that the parties could not have been negotiated around its occurrence in the contract.

While the impossibility doctrine is distinct from a *force majeure* provision written into a contract, an unforeseen pandemic such as COVID-19 that renders performance impossible is also more likely to trigger a catch-call provision in a written *force majeure* clause as well. And although some courts have not required

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evidence of strict impossibility to invoke the impossibility doctrine, courts are generally more willing to invoke written *force majeure* clauses than they are to apply the impossibility doctrine where the unforeseen event renders performance impractical or impossible *within reason* rather than strictly impossible.

Frustration of Purpose. Parties to a commercial contract affected by the COVID-19 pandemic should also consider whether the interference caused by COVID-19 so changed the circumstances such that the “change in circumstances makes one party’s performance virtually worthless to the other, frustrating his purpose in making the contract.” Restatement (Second) of Contracts § 265 (1981). To invoke the frustration of purpose defense, the non-performing party would generally have to prove that its principal purpose in making the contract was mutually understood and that, through no fault of the non-performing party, that basic principle purpose was completely frustrated as a result of the supervening COVID-19 pandemic.

Significantly, unlike the impossibility doctrine, the party need not prove that the COVID-19 pandemic rendered its performance impossible, but “the frustration must be substantial. It is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss. The frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract.” Id.

In the Rembrandt case, the non-performing party moved for summary judgment on its claim that the Avian Flu outbreak completely frustrated the purpose of its purchase contract as a matter of law and therefore excused its performance. Noting that the case and factual issues surrounding the Avian Flu and its impact on the purpose of the contract was not “clear cut” and would require “detailed factual findings,” the court denied the motion for summary judgment. Rembrandt, 2017 WL 3929308, at *9. After a bench trial on the merits and the particular facts of the case, the court ultimately “rejected Rembrandt’s defense of frustration of purpose for its failure to perform its obligations under the Agreement.” Rembrandt Enterprises, Inc. v. Dahmes Stainless, Inc., 752 F. App’x 375, 376 (8th Cir. 2019).

Conclusion And Next Steps

As discussed above, whether the COVID-19 pandemic excuses performance of a particular commercial contract pursuant to a *force majeure* clause or under the doctrines of impossibility or frustration of purpose are highly fact-specific inquiries that will vary based on the particularized circumstances of the parties, the specific language of the *force majeure* clause in the contract, and the unique facts giving rise to the formation of the contract and the effect of the COVID-19 pandemic on the parties’ respective performance of the contract. In addition, there may be certain notice requirements in a contract prior to the invocation of the *force majeure* provision. With that in mind, time could be of the essence if you have an issue involving a contract affected by the COVID-19 pandemic.

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Whether COVID-19 has adversely affected your ability to perform under a commercial contract or if you are in a dispute with a non-performing party that is seeking to invoke COVID-19 to excuse its performance, if you are confronted with an issue involving the COVID-19 pandemic and its potential effect on a commercial contract, please contact the authors of this article to review the contract and your legal options in your particular circumstances.

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