Global Commercial Disputes

White paper

Force Majeure

One year later
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"Generally, force majeure provisions excuse parties from performing under a contract when unforeseen events – such as a global pandemic – render performance impossible or impractical."

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Introduction

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Now more than one year in, the COVID-19 pandemic continues to challenge global health, commerce, government, private organizations and our societal norms in nearly every respect. The dramatic and unprecedented measures employed to slow the spread of COVID-19 (*e.g.* travel restrictions, business closures, remote schooling, stay-at-home orders, quarantines) continue to force businesses and organizations into positions in which they are often unable to meet their contractual obligations.

It will be months, and likely years before the legal and economic costs of the pandemic become fully apparent. There is however, a legal issue that became immediately apparent at the pandemic's outset: the application of contractual force majeure provisions. Generally, force majeure provisions excuse parties from performing under a contract when unforeseen events – such as a global pandemic – render performance impossible or impractical. But the scope and application of force majeure provisions depend on a variety of factors. Contracts differ greatly in how they define force majeure and what types of events will trigger a force majeure provision. Courts in various jurisdictions also differ greatly in how they construe force majeure provisions. And there are a variety of remedies and consequences that may arise from force majeure disputes. Simply put, the law of force majeure is far from uniform, and businesses must consider a number of factors when faced with force majeure issues.

This paper is an overview and analysis of force majeure issues in US state jurisdictions. It also includes a comparative analysis of force majeure themes in nine international jurisdictions.

The paper provides:

(1) a general overview of the force majeure doctrine and the various types of force majeure language that parties often include in their contracts;

(2) a survey of how various US jurisdictions have applied force majeure provisions;

(3) a survey of how various US jurisdictions have applied force majeure provisions in the context of COVID-19 and other health crises;

(4) an analysis of common law defenses available to parties when a force majeure clause does not exist, with a survey of the US jurisdictions that have applied those defenses;

(5) an analysis of remedies commonly applied in force majeure disputes, with a survey of the US jurisdictions that have applied those defenses;

(6) potential avenues of affirmative relief for businesses adversely impacted by the COVID-19 pandemic;

(7) an international comparative analysis of force majeure themes identified from US jurisdictions with the position in nine international jurisdictions; and

(8) general advice and recommendation for businesses to consider as they continue to navigate the force majeure issues that the global pandemic presents.

This is product of a collaborative effort by many.

1. General principles of Force Majeure

Force majeure clauses are contractual provisions that govern parties' conduct when certain unexpected events occur. Parties typically invoke these clauses as a defense to excuse their nonperformance of contractual obligations.

"Force majeure" events are usually unforeseeable or unavoidable events beyond the parties' control. These types of events are often – but not always – listed with some specificity in contractual force majeure clauses. Many contracts call out specific occurrences that constitute force m*ajeure* events, and those typically include events such as earthquakes, fires, hurricanes and yes, even pandemics.

While many force majeure provisions identify these "triggering events" with specificity, others contain more general, "catch-all" provisions with less specific language. In theory, these catch-all provisions are designed to ensure that other, unspecified triggering events are covered, and to avoid limiting the force m*ajeure* provision to events specifically enumerated in the contract. These catch-all provisions often describe triggering events as "Acts of God," "acts of government," "matters beyond the parties' control" and other broad, catch-all phrases.

"While many force majeure provisions identify these "triggering events" with specificity, others contain more general, "catch-all" provisions with less specific language."

2. Language matters
Look to the contract first

When faced with force majeure issues, parties should look first to the contract itself. In doing so, the very first step is to confirm that the contract actually contains a force majeure clause.

While this seems obvious, it is an important step because it may define the scope of defenses available to the party seeking excuse from performance. If a force majeure clause exists, the language of that clause may supersede common law defenses that parties would otherwise have, such as impossibility, impracticability, or frustration of purpose. *See, e.g., Commonwealth Edison Co. v. Allied-General Nuclear Services,* 731 F. Supp. 850, 855 (N.D. Ill. 1990) ("If … the parties include a force majeure clause in the contract, the clause supersedes the [impossibility] doctrine … [L]ike most contract doctrines, the doctrine of impossibility is an 'off-the-rack' provision that governs only if the parties have not drafted a specific assignment of the risk otherwise assigned by the provision."

If the contract contains a force majeure provision, the next step is to determine what the provision actually says. This too may seem obvious, but force majeure provisions come in many different forms, and courts interpret them in many different ways.

For example, some courts require that parties identify force majeure events specifically, and will reject application of the doctrine if the contract does not expressly identify the triggering event in question. That is the approach a Michigan court took in *Kyocera Corp. v. Hemlock Semiconductor, LLC*, holding that force majeure clauses "will generally only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically identified." 313 Mich. App. 437, 447 (Mich. Ct. App. 2015).

A Pennsylvania District Court reached a similar conclusion in *Wartsila Diesel v. Sierra Rutile*, 1996 U.S. Dist. LEXIS 18634, at *28-29 (E.D. Pa. Dec. 11, 1996) (holding it unreasonable for a force majeure clause to cover unforeseeable events not listed within the provision). The *Wartsila* court went even further in rejecting force majeure, adding that the defense is only available where the alleged triggering event actually caused the nonperformance.

In *Wartsila*, the parties contracted to build a power plant in Sierra Leone. 1996 U.S. Dist. LEXIS 18634, at *1-2. The parties renegotiated deadlines several times, but the defendant failed to make a milestone payment for the plant construction. *Id.* at *3-4. The defendant invoked force majeure on the ground that a rebellion had broken out in Sierra Leone. The plaintiff countered that the milestone payment was already past due when the rebellion broke out, and the rebellion did not directly cause the defendant's inability to pay. *Id.* at *19-20. Noting that the court "must construe the contract as a whole, giving effect to all of its provisions," the court refused to excuse defendant's payment obligation because "the parties could not reasonably have meant to excuse past, uncured breaches of contract by unexpected future events." *Id.* at *26, 29. In addition, the court found that the circumstances leading to the force majeure event were not entirely beyond the defendant's control. *Id.* at *29-30. *See also In re Old Carco LLC,* 452 B.R. 100, 120 (Bankr. S.D.N.Y. 2011) (holding that a party's nonperformance was caused by events other than the claimed force majeure).

Few courts, however, have ruled definitively that force majeure clauses must specifically enumerate triggering events. Instead, most courts have fashioned several different (and evolving) approaches in evaluating force majeure issues. This is particularly true with respect to contracts that contain broad "catch-all" force majeure language. Despite the broad phrasing of these catch-all provisions, courts have found various ways to construe them narrowly and have developed a number of restrictions that limit these seemingly expansive provisions.

"Many jurisdictions hold that catch-all force majeure clauses do not cover general economic downturns because that is a foreseeable risk of doing business."

One such restriction is the concept of foreseeability. Numerous courts have refused to apply force majeure if the triggering event was reasonably foreseeable, within the party's control, or preventable. Those courts will typically refuse to apply force majeure if the event was reasonably foreseeable or within the party's control, and "could have been prevented by the exercise of prudence, diligence, and care." *See. e.g., Great Lakes Gas Transmission Limited Partnership v. Essar Steel Minn.,* LLC, 871 F. Supp. 2d 843 (D. Minn. 2012) (a party's inability to obtain financing was or should have been foreseeable and did not excuse performance).

For example, many jurisdictions hold that catch-all force majeure clauses do not cover general economic downturns because that is a foreseeable risk of doing business. *See, e.g., Langham Hill Petroleum, Inc. v. Southern Fuels Co.,* 813 F.2d 1327 (4th Cir. 1987) (sudden drop in oil prices did not excuse performance); *Elayon, Inc. v. Wachovia Bank, N.A.,* 841 F.Supp.2d 1298 (N.D. GA 2011) ("The economic downturn in 2008 and the subsequent events that followed do not constitute a force majeure…"); *Publicker Industries, Inc. v. Union Carbide Corp.,* 1975 U.S. Dist. LEXIS 14305, at *5 (E.D. Pa. 1975) ("Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen [sic] contingency which alters the essential nature of the performance. Neither is a rise in the market itself a justification, for that is exactly the type of business risk which business contracts cover."); *Mcalloy Corp. v. Metallurg, Inc.,* 128 N.Y.S. 2d 14, 14 (2001) (force majeure defense unavailable where nonperformance was due to financial hardship).

Another force majeure limitation courts have employed is the doctrine of *"ejusdem generis"* ("of the same kind"). Under that doctrine, any triggering event not specifically mentioned in the force majeure provision must be similar to the events that are mentioned. If the event is dissimilar, the court will not apply *force majeure. See, e.g., Stoud v. Forest Gate Dev. Corp.,* 2004 Del. Ch. LEXIS 66 *16-17 (Del. Ch. Ct. May 4, 2004) (A "catch-all phrase… must be construed within the context established by the preceding listed causes.").

Courts have also become reluctant to recognize the historic definition of force majeure as an "Act of God." While many parties still use that broad phrase in their force majeure clauses, courts again will look to the overall language of the provision in determining whether an event triggers force majeure. *See, e.g., Specialty Foods of Ind., Inc. v. City of S. Bend*, 997 N.E.2d 23, 27 (Ind. App. 2013) ("In other words, when the parties have defined the nature of force majeure in their agreement, that nature dictates the application, effect, and scope of force majeure with regard to that agreement and those parties, and reviewing courts are not at liberty to rewrite the contract or interpret it in a manner which the parties never intended …. The party seeking to excuse its performance under a force majeure clause bears the burden of proof of establishing that defense." *See also Bayou Place Ltd. P'ship v. Alleppo's Grill, Inc.,* 2020 U.S. Dist. LEXIS 43960 (D. Md. March 13, 2020) (same).

Simply put, if the parties include a force majeure provision in their contract, the language they choose to define force majeure events is of paramount importance. While parties generally need not identify every triggering event with specificity, they should endeavor to be as specific as possible. And while courts will still recognize certain "catch-all" provisions, parties should not rely solely on such provisions when drafting their force majeure language. The general concepts of "Acts of God" or other broad, undefined "unforeseen circumstances" are unlikely to suffice.

3. Jurisdiction matters
Consider the venue

Recognizing that the application of a force majeure provision depends first and foremost on the language of the provision itself, a party grappling with force majeure issues must next consider the jurisdiction that will be deciding those issues.

As noted, courts are far from uniform in their construction of force majeure provisions. Some courts require that force majeure provisions expressly enumerate triggering events. Most courts do not impose that requirement, but do require that triggering events be unforeseeable. Some courts require that triggering events must be unpreventable or beyond the parties' control. Some courts require causation. Many courts will recognize "catch-all" language, but only if the triggering event is similar to other events enumerated within the clause. And again, several courts have refused to apply force majeure where the triggering event stems from an economic downturn, general financial hardship, or natural market forces.

In other words, the venue and the law that govern the contract both matter greatly in determining whether force majeure applies. The chart below provides a survey of the approach various jurisdictions have taken in construing force majeure provisions.

Jurisdictions that have required express mention of triggering events in the force majeure clause	FL MI NV PA WY
Jurisdictions that have found force majeure may apply to events not listed in the force majeure clause, but such events must still fall within the contract's force majeure "catch-all" provision	AK AR AZ CT DE ID IA KS KY LA MA MN MO MT NE NH NJ NM NY ND OH OK OR PA RI TX UT WA
Jurisdictions that have found triggering events must be beyond a party's control	AK CA CO DE IN MA MI MN NE ND PA WA WI WY
Jurisdictions that have rejected force majeure in the context of financial hardship or economic downturns	AZ GA NY PA PR
Jurisdictions that have required triggering events be unforeseeable	AL AK AZ AR CO DE GA HI IN IA LA ME MD MA MI MN MO NC NH ND NY PR SC TN TX VT WV WY
Jurisdictions that have found force majeure is available only if it causes nonperformance	FL IL MA NY PA VT

4. *Force Majeure* in the COVID-19 and health crisis contexts

What guidance exists?

The COVID-19 pandemic propelled the force majeure doctrine into the spotlight within both the business and legal communities. Indeed, a growing body of law is already emerging from efforts to invoke force majeure provisions due to COVID-19 issues.

For example, the Southern District of New York recently construed a force majeure provision in the COVID-19 context. In *JN Contemporary Art LLC v. Phillips Auctioneers LLC*, 20cv4370, 2020 WL 7405262 (S.D.N.Y., Dec. 16, 2020), the plaintiff and defendant entered agreements to auction two paintings. *Id.* at *1. One of the paintings sold at an auction the same day the parties executed the agreement. *Id.* After the COVID-19 outbreak, the defendant terminated the agreement to auction the second painting and refused to pay the plaintiff the minimum price guaranteed from the auction. *Id.* The plaintiff sued, seeking to compel the second auction and payment under the agreement. *Id.* The defendant moved to dismiss. *Id.*

In its motion, the defendant cited a force majeure provision that allowed it to terminate the agreement if the auction was postponed for circumstances beyond the parties' reasonable control. *Id.* at *1-2. The auction was scheduled for May 2020, but postponed due to the COVID-19 pandemic and government restrictions on business operations. *Id.* The District Court dismissed the case, finding that the circumstances fell squarely within the terms of the force majeure clause. *Id.* at *7.

Notably, the plaintiff in *JN Contemporary* raised the principle of *ejusdem generis* to argue that the pandemic was not similar enough to the circumstances contemplated in the force majeure clause. *Id.* at *9. The court rejected that argument and explained that a pandemic is a circumstance beyond the parties' control and is fairly described as a "natural disaster," which the parties specifically mentioned in their force majeure provision. *Id.*

The Southern District of Florida also addressed force majeure in the COVID-19 context in a dispute regarding non-payment of rent under a commercial lease. In *Palm Springs Mile Associates, Ltd. v. Kirkland's Stores, Inc.*, 20-21724, 2020 WL 54111353 (S.D.Fla., Sept. 9, 2020), a landlord sued its tenant for failing to pay rent beginning in April 2020, and the tenant moved to dismiss on the ground that COVID-19, quarantine orders, and other government restrictions relieved it of its rent payment obligations. *Id.* at *1. While the court did not rule one way or another whether COVID-19 constitutes a force majeure event generally, it stated that force majeure provisions are not general "opt-out" provisions, are "narrowly construed," and "will only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically identified." *Id.* at *2. The court further noted that the defendant failed to link its nonperformance to the government's COVID-based restrictions, and emphasized that force majeure requires a causal link between the nonperformance and the triggering event. *Id.* Finally, the court noted that force majeure is an affirmative defense, which generally will not support a motion to dismiss unless the plaintiff's pleading clearly discloses the existence of the defense. *Id.* While the court did not foreclose the possibility that COVID-19 and related restrictions could constitute a force majeure event, it held that the force majeure clause did not support dismissal at the pleading stage of the litigation. *Id.*

The Eastern District of Louisiana took a different view in another commercial rent dispute in *Richards Clearview, LLC v. Bed Bath & Beyond, Inc.,* 20-1709, 2020 WL 5229494 (E.D. La., Sept. 2, 2020). There, the landlord sought to evict a tenant for unpaid rent in April and May of 2020. *Id.* at *1. In response, the tenant argued that it was excused from rent payment due to COVID-19 government restrictions, and cited a force majeure clause that excused nonperformance caused by "strikes, failures of power, riots, insurrection, war, earthquake, hurricane or tornado ... or other reasons of a like nature which are beyond the reasonable control of the party." *Id.* at *3. Importantly, the tenant also noted that it eventually cured its default by tendering the unpaid rent amounts, albeit late. The court ultimately rejected the landlord's efforts to evict the tenant for a variety of reasons, including the absence of harm to the landlord. Like the Florida court in *Palm Springs Mile*, the court did not definitively find COVID-19 to constitute a triggering event under the force majeure clause. It did however, state that the tenant's delays in payment were "excusable by the global circumstances." *Id.* at *8.

An Illinois Bankruptcy court also addressed force majeure in the COVID-19 context in *In Re Hitz Restaurant Group,* 616 B.R. 374 (Bankr. N.D. Ill. 2020). *In Re Hitz* involved a bankruptcy creditor's effort to force a debtor to pay past due and future rent under a commercial lease. *Id.* at 376. The debtor, a restaurant group, invoked the lease's force majeure clause, which provided that "Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in this Lease, in the event, but only so long as the performance of any of its obligations are prevented or delayed, retarded or hindered by ... laws, governmental action or inaction, orders of government.... Lack of money shall not be grounds for Force Majeure." *Id.* at 376-377. The debtor then cited an executive order from the Governor of Illinois that suspended restaurant operations. *Id.* at 377.

The Bankruptcy court ultimately reached a mixed result. Citing the force majeure provision's reference to "government action" and "orders of government," the court found that the force majeure provision "unambiguously" applied to rental payments that became due after the Illinois Governor issued his order suspending restaurant service. *Id.* The court rejected the creditor's arguments that the debtor could have satisfied its payment obligations by obtaining a small business loan, and rejected the notion that the nonpayment was attributable solely to a "lack of money," which the force majeure clause would not cover. *Id.* at 378. The court did find, however, that the Governor's order allowed, and even encouraged, restaurants to provide carry-out, curbside pick-up and delivery services while COVID-19 restrictions remained in effect. *Id.* at 379. The court ultimately determined that the debtor was liable for at least 25% of the rent owed, despite acknowledging that the force majeure clause applied. *Id.* at 379-380.

The COVID-19 pandemic is not the first time courts have addressed force majeure disputes in the context of health crises. In *Rexing Quality Eggs v. Rembrandt Enterprises, Inc.,* 360 F.Supp.3d 817, 841. (S.D. In. 2018), an Indiana District Court ruled that a decline in purchaser demand for cage-free eggs was *not* a force majeure event, but rather a foreseeable consequence of doing business. In doing so, however, the *Rexing Quality* court pointed to other instances in which the same defendant invoked force majeure based on the eradication of egg supply due to the 2015 avian flu outbreak. *Id.* at 840. The court stated that "[u]nlike the avian flu example, which may plausibly constitute an unforeseeable event precipitating a dramatic change in market conditions, a change in purchaser demand – even a substantial change – is a foreseeable part of doing business." *Id.* at 841. In other words, the court distinguished an unforeseeable health crisis from commercial market forces. *See also Gregg School Tp., Morgan County v. Hinshaw,* 132 N.E. 586, 587 (Ind. App. 1921) (school board not required to compensate teacher because influenza outbreak rendered teacher's contract impossible to perform).

Iowa courts have also faced force majeure issues in the health crisis context. In *Rembrandt Enterprises, Inc. v. Dahmes Stainless, Inc.,* C-15-4248, 2017 WL 3929308 (N.D. Iowa, Sept. 7, 2017), the Northern District of Iowa analyzed *force majeure* in another case involving decreased egg production caused by the avian flu. The plaintiff, Rembrandt, sued for declaratory relief excusing it from a contract to purchase an industrial egg dryer. *Id.* at *1-2. Rembrandt argued that the force majeure provision in the parties' purchase contract excused its performance due to the avian flu outbreak and a decline in the need for eggs. Much like *Rexing Quality*, the court found that the force majeure clause did not apply because market forces, not the avian flu, caused Rembrandt's breach. The court cited a number of "bad business decisions" Rembrandt made before the avian flu outbreak, and ultimately concluded that it was a variety of factors – not the avian flu itself – that prevented performance. *Id.* at *12-14. *See also SNB Farms, Inc. v. Swift and Company*, C01-2077, C01-2078, C01-2080, 2003 WL 22232881 (N.D. Iowa, Feb. 7, 2003) (applying Nebraska law, court refused to apply force majeure to an outbreak of Porcine Reproductive and Respiratory Syndrome because the party seeking to invoke the doctrine did not notify the other party that it was invoking force majeure).

Force majeure jurisprudence in the COVID-19 context will undoubtedly continue to develop. The cases above suggest that courts will be reluctant to view the COVID-19 pandemic as a blanket excuse from commercial performance. The cases that evaluate force majeure in the health crisis context (both within and outside of COVID-19) all require a direct connection between the crisis in question and the nonperformance.

Below is a chart identifying jurisdictions that have addressed force majeure in the COVID-19 context, and jurisdictions that have addressed force majeure in the context of health crises generally.

Jurisdictions that have addressed force majeure in the COVID-19 context	CA DE FL HI IL LA MA ME NJ NV NY OH PA TX
Jurisdictions that have addressed force majeure in the context of other health crises	IA (applying MN and NE law) IN (applying IA law)

"The cases that evaluate force majeure in the health crisis context (both within and outside of COVID-19) all require a direct connection between the crisis in question and the nonperformance."

5. What if no Force Majeure provision exists?
Common law remedies

While most commercial contracts contain force majeure clauses, some do not. How do contracting parties address unforeseen events without specific guidance from the contract? They look to various common law doctrines that may excuse nonperformance. Those doctrines include impossibility of performance, impracticability, frustration of purpose, or some hybrid of those related doctrines. Parties may also be able to avail themselves of remedies available in the Restatement (Second) of Contracts. And, for contracts involving the sale of goods, parties may rely on § 2-615 of the Uniform Commercial Code.

The ability to invoke these defenses depends, of course, on whether a party's particular jurisdiction recognizes them. Unlike force majeure clauses, the parties need not specifically incorporate these doctrines into their contracts, because they are common law concepts implied into contracts by law. Parties must, however, ensure that their jurisdiction will accept these common law doctrines, and jurisdictions vary in their approaches to each of these concepts. We discuss below various common law remedies that may be available to parties when a force majeure clause does not exist.

1. Impossibility of performance

The doctrine of impossibility of performance excuses nonperformance if a party can show that a truly unexpected, unforeseeable supervening event changed one or more conditions essential for contractual performance. Put differently, "[i]mpossibility of performance occurs where, after the contract is entered into, an unforeseen event arises rendering impossible the performance of one of the contracting parties." *Skilton v. Perry Local School Dist. Bd. Of Educ.,* 2001-L-140, 2002 WL 31744700, at *26 (Ohio App. Dec. 6, 2002). Additionally, the party seeking to avoid performance on these grounds must show "that the non-occurrence of the event [in question] was a basic assumption underlying the agreement" and that the event itself rendered performance impossible. *Settles v. Invesco Real Estate Partnership,* CA89-03-047, 1989 WL 145968, at *3 (Ohio App. Dec. 4, 1989).

Unforeseeability has long been a key element of the impossibility doctrine. Recently, however, courts have shifted focus from that unforeseeability element to the separate element that the non-occurrence of the event was a basic assumption of the parties at the time of contract. *Opera Co. v. Wolf Trap Found.,* 817 F.2d 1094, 1102-1103 (4th Cir. 1987) (discussing why foreseeability is an inappropriate standard). Some courts continue to focus on unforeseeability, while others have moved to the "basic assumption" standard. *See, Rock Constr., Inc. v. Onyebuchi,* No. 222503, 2001 WL 637260, at *1 (Mich. App., May 25, 2001) (quoting *Bissell v. L.W. Edison Co.,* 9 Mich. App. 276, 287 (1967) (impossibility is a defense "in the event that unanticipated circumstances beyond the contemplation of the contracting minds and beyond their immediate control make strict performance impossible."); *but see Eastern Air Lines, Inc. v. McDonnell Douglas Corp.,* 532 F.2d 957, 991 (5th Cir. 1976) (adopting "basic assumption" approach to the doctrine and holding that impossibility-impracticability arises as a defense to breach of contract when "the circumstance causing the breach has made performance so vitally different from what was anticipated that the contract cannot reasonably be thought to govern.").

"But even as those events became foreseeable, they still may have undermined the basic assumptions under which parties originally contracted."

While the difference in these approaches may seem negligible, it may lead to drastically different results in the context of the global pandemic, where stay-at-home and business closure orders became not only foreseeable, but practically universal and unavoidable as COVID-19 spread across the globe. But even as those events became foreseeable, they still may have undermined the basic assumptions under which parties originally contracted. Thus, parties should evaluate whether their particular jurisdiction favors the "unforeseeability" standard or has shifted to the "basic assumption" standard.

2. Commercial impracticability

Commercial impracticability is similar to impossibility. Indeed, many jurisdictions have adopted both of these concepts and in some instances use them interchangeably. Those jurisdictions will often excuse performance where a particular supervening unforeseeable event makes performance *either* impossible *or* impracticable. The doctrine of impracticability, however, is somewhat less restrictive than the doctrine of impossibility: it may excuse performance where performing contractual obligations is still technically possible, but impracticable "because of extreme and unreasonable difficulty, expense, injury, or loss involved." *Roberts v. Farmers Ins. Exch.,* 275 Mich. App. 58, 73-74 (2007) (quoting *Bissell,* 9 Mich. App. 273 at 285); *see, Freidco of Wilmington, Del., Ltd. v. Farmers Bank of State of Del.,* 529 F. Supp. 822, 824 (D. Del. 1981) (For contract obligation to be discharged because of supervening impracticability, party claiming discharge must establish occurrence of an event, the nonoccurrence of which was a basic assumption of the contract and such party must show that continued performance is not commercially practicable. The courts have abandoned the restrictive doctrine of "impossibility of performance" for the more flexible "impracticability").

Impracticability may prove an important common law defense in the COVID-19 context because performance of many contractual obligations would be technically possible but commercially impractical in the face of pandemic-related restrictions. For example, most states and many local authorities restricted restaurant dining, but permitted restaurants to continue delivery and take-out services. Continuing limited operations under those restrictions may be commercially practical for some businesses, but impractical for others. In the COVID-19 context, impracticability will likely involve a case-specific inquiry focused on the abilities and resources of the party that seeks to raise the defense.

"In the global pandemic context, this defense could easily apply to live concerts, sporting events, and other large gatherings scheduled before the COVID-19 outbreak."

3. Frustration of purpose

Frustration of purpose is a defense that arises where an intervening event destroys the principal purpose of the contract. In such cases, courts that recognize the defense will generally excuse performance. Most jurisdictions require parties to satisfy several factors to establish a frustration of purpose defense. For example, one Delaware court held that "three factors are necessary to invoke frustration of purpose: (1) the purpose that is frustrated must be the principal purpose of the contract; (2) the frustration of that purpose must not be the fault of the party seeking to be excused from performance; and (3) the occurrence of the event must not have been foreseen at the time of the contract's formation." *In re Atl. Gulf Communities Corp.,* 369 B.R. 156, 167 (Bankr. D. Del. 2007).

In the global pandemic context, this defense could easily apply to live concerts, sporting events, and other large gatherings scheduled before the COVID-19 outbreak. For example, event venues may face breach of contract claims from sponsors and vendors. Those contracts, however, naturally contemplate that the concert, sporting event, or other gathering actually takes place. In such cases, frustration of purpose would likely serve as an effective defense.

4. U.C.C. § 2-615

Section 2-615 of the Uniform Commercial Code offers another potential defense under certain circumstances. Section 2-615 provides a statutory basis for sellers to assert commercial impracticability as a defense in the context of contracts for the sale of goods. The provision will excuse a delay in performance – or a partial or whole nonperformance – if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid." Under this section, the seller has a notice requirement and "must notify the buyer seasonably that there will be delay or non-delivery." Most states have either adopted U.C.C. § 2-615 verbatim or developed their own modified version of the provision. The lone exception is Louisiana, which has its own Civil Code and has not adopted the U.C.C.

Parties to contracts for the sale of goods should consider Section 2-615 if their contract lacks a force majeure clause. If, for example, government regulations deemed a seller of goods a "non-essential business" and shut it down, it would be unable to produce goods it contracted to provide pre-pandemic. That scenario would likely support a Section 2-615 defense. Importantly, however, any party seeking to raise this defense must be mindful to promptly notify the buyer of the delay or nonperformance.

5. Restatement (Second) of contracts

The Restatement (Second) of Contracts is another source of defenses for parties who lack force majeure protection. Sections 261, 264 and 265 of the Restatement offer further support for the doctrines of impossibility, impracticability, and frustration of purpose. Section 261 of the Restatement provides that a failure to perform contract obligations is excused "[w]here, 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 . . . unless the language or the circumstances indicate the contrary."

Restatement Section 265 states: "[w]here, 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."

Finally, Restatement § 264 specifically states that if performance "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." Restatement (Second) Contracts §264. Notably "[t]he regulation or order must directly affect a party's performance in such a way that it is impracticable for him both to comply with the regulation or order and to perform." Restatement (Second) Contracts §264, Comment b. That provision carries particular importance in the COVID-19 context, where state and local governments promulgated a host of regulations, restrictions, and orders that rendered parties unable to comply with those governmental directives while still performing their contractual obligations.

6. Summary: Defenses where no Force Majeure provision exists

Below is a chart that identifies jurisdictions that have recognized these various common law defenses.

Jurisdictions recognizing impossibility	AL AK AR CA CO CT DE FL ID IL IN IA KS KY LA ME MD MA MI MS MO MT NE NV NH NM NY NC ND OH OK OR PA PR RI SC SD TN TX UT VT VA WA WV WY
Jurisdictions recognizing commercial impracticability	AK AZ AR CA CO CT DE FL HI ID IL IA KS KY MD MA MI MN MS MO MT NE NV NM NY NC ND OH OK OR PA PR RI SC SD TN TX UT VT VA WA WV WI WY
Jurisdictions recognizing frustration of purpose	AK AZ AR CA CO CT DE FL HI ID IL IA KS MD MA MI MN MO NE NH NY NC ND OH OR PA PR RI SC SD TN TX UT VT VA WA WV WY
Jurisdictions that have adopted U.C.C. 2-615 or equivalent	AK AR CA CT DE FL HI ID IL IA KS KY ME MD MA MI MN MO MT NE NV NH NM NY NC ND OK OR PA PR RI SD TX UT VT WA WV WY
Jurisdictions that have adopted Restatement (Second) of Contracts (261, 264 or 265)	AK AZ AR CA CO CT DE FL HI ID IL IA KS KY ME MD MA MI MN MS MO MT NE NM NY NC ND OH OR PA RI SC SD TX UT VT VA WA WV WY

6. Remedies

Relief available when Force Majeure exists

After determining that a force majeure or common law excuse for performance exists, parties must next determine the remedies available to them. Once again, available remedies will differ depending on the language of the parties' contract and the law of the applicable jurisdiction. Courts have awarded various forms of relief in force majeure situations. Common remedies include contract termination, partial excuse from performance, and temporary suspension of performance. In some cases, force majeure clauses include liquidated damages provisions. And in some instances, courts have awarded traditional contract damages in the force majeure context. We analyze below various remedies that courts have applied when facing force majeure disputes.

1. Termination of contract and excuse of nonperformance

Many force majeure clauses expressly provide for cancellation of a party's contractual obligations, relief from liability, or excuse from performance of certain obligations. Where the contract provides for such relief, courts will generally award it. For example, in *Itek Corp. v. First Nat. Bank of Bos.,* 730 F.2d 19 (1st Cir. 1984) a contractual force majeure provision between an American manufacturer and the Iranian government permitted cancellation of the contract if the United States government cancelled the manufacturer's necessary export licenses. The manufacturer's license fell into suspension and was not renewed. Further, there was virtually no probability of renewal because Iran was in the midst of a revolution. *Id.* at 26. Under the circumstances, the court deemed cancellation of the contract appropriate. *Id.*

Another common remedy in force majeure cases is to simply excuse a party's nonperformance. In those circumstances, the nonperforming party will not be deemed liable for breaching the contract and is thus free from contractual damages. For example, in *Ab v. Harris Corp.,* a manufacturer and a products dealer entered into an agreement for parts. 1990 U.S. Dist. LEXIS 20006, No. CIV-88-679T, at *1-4 (W.D.N.Y. Dec. 11, 1990). The government intercepted one shipment of parts, rendering the products dealer unable to fulfill product orders. *Id.* The court determined that the government's action triggered the parties' force majeure clause and excused the products dealer's nonperformance. *Id.* at *12.

Similarly, a government action triggered a force majeure defense in *Trump on the Ocean, LLC v. Ash,* 24 Misc. 3d 1241(A) 1,2 (N.Y. App. Div. 2009). There, the parties entered into a rental agreement that contained rent payment obligations and a force majeure clause. After a government agency denied a construction permit, the court determined that the parties could not have anticipated the government's actions, and that constituted a force majeure event. The court then excused the renter's non-payment of rent until the government issued the permit necessary to begin construction. *Id.* at 11-12.

2. Suspension of performance

In some instances, parties will not want to lose the entire benefit of their contract by virtue of a force majeure occurrence. In those cases, the parties may (and should) negotiate a force majeure clause that includes a temporary suspension of performance instead of a wholesale contract cancellation. For example, in *Haverhill Glen, LLC v. Eric Petroleum Corp.,* 67 N.E.3d 845 (Ohio App. 2016), the parties entered an oil and gas lease in which the defendant negotiated and paid for specific limiting language in the lease's force majeure clause. That language provided that the lease "shall not terminate because of [ ] prevention or delay, and shall be maintained in force and effect for so long as prevention or delay continues, and for ninety (90) days thereafter." *Id.* at 846-847. Defendants needed to survey a well as part of their performance, but were denied access to the well. *Id.* at 850. Citing the force majeure clause, the defendants demanded an extension of the lease. *Id.*

The court found that "[defendants] have the right to rely upon the language contained [in the force majeure clause] to protect their investment." *Id.* at 851-852. The court thus extended the lease term based on the express language of the force majeure clause, which again provided that a delay in performance was not grounds to terminate the lease completely. Again citing the express language in the force majeure provision, the court held that the lease would remain in effect for as long as the force majeure event continued. *Id.*

3. Refund of pre-payment

Some contracts require advance payments. And in some cases, force majeure events occur after the party makes those advance payments but before contract performance begins. For example, in *Gillespie v. Simpson*, 41 Colo. App. 577, 578, 588 P.2d 890, 891 (1978) a government entity and a lessee signed two leases for development and production of geothermal products from certain state lands. The lessee then assigned her interest to a sublessee. The director of the Oil and Gas Conservation Commission advised the lessee that it would not issue permits for geothermal wells until it had adopted rules and regulations relating to geothermal wells .*Id.* The lessee had made required advance payments, and later invoked the lease's force majeure clauses to ensure she was entitled to a credit on future rent for the payments she had already made. *Id.* The government entity refused, but the court ordered a refund of the advance payments. *Id.* The court of appeal affirmed, holding that the state's failure to adopt regulations deprived the lessee of an opportunity to develop the leasehold for payment of the rentals. Interestingly, the court ordered the refund even though the force majeure provision did not expressly provide for that specific remedy.

4. Damages

Courts may also award traditional contract damages in force majeure cases. In *VICI Racing, LLC v. T-Mobile USA, Inc.,* 763 F.3d 273 (3d Cir. 2014), for example, the owner of a sports car racing team entered a sponsorship agreement with T-Mobile. The agreement required the racing team to field one T-Mobile-sponsored racecar during the 2009 racing season, and two T-Mobile-sponsored racecars during the 2010 and 2011 seasons. *Id.* at 279. The agreement stated that all of the cars were to display T-Mobile's logo. *Id.* In exchange, T-Mobile agreed to pay the racing team $1 million for the 2009 season and $7 million for each of the 2010 and 2011 seasons. *Id.*

"Courts may also award traditional contract damages in force majeure cases."

The contract also contained a force majeure provision that excused performance of certain obligations if conditions beyond a party's control prevented performance. *Id.* The force majeure clause required any nonperforming party to provide prompt notice of the conditions preventing performance, and required the nonperforming party to resume performance once those interfering conditions ceased. *Id.* at 279-280. It also provided that the nonperformance during the interfering event would not constitute a breach of the agreement. *Id.*

In 2009, the racecar crashed and could not race for 45-60 days. *Id.* at 280. T-Mobile failed to pay the 2010 installment payment and attempted to terminate the agreement. The racing team sued, and T-Mobile countersued. *Id.* at 281. The District Court held that the parties' force majeure provision excused the racing team's nonperformance because an unexpected crash beyond its control caused the nonperformance. *Id.* at 282. The District Court also awarded the racing team $7 million in expectation damages for T-Mobile's failure to pay, reasoning that the team had relied upon T-Mobile's payment of the 2010 $7 million payment to pay its expenses and to prepare for the upcoming race season. *Id.* Although the racing team also sought to recover the $7 million payment for the 2011 season, the District Court refused to award that sum because it considered a $14 million award "unreasonably large" and because the racing team failed to mitigate its damages. *Id.*

The Third Circuit Court of Appeals upheld the $7 million award. It found that the District Court correctly applied the force majeure provision in excusing the racing team's nonperformance. *Id.* at 286-287. The Third Circuit likewise found that the District Court applied the proper standard in awarding the $7 million in expectation damages. *Id.* at 293-298. Notably, however, the Third Circuit faulted the District Court's analysis on the 2011 payment, and remanded the case for further consideration of whether the racing team was entitled to the second $7 million payment.

The *VICI Racing* case is interesting because the force majeure clause did not contain any express reference to monetary damages. Nevertheless, both the District Court and the Third Circuit applied general principles of contract damages to award a significant sum to the racing team.

5. Summary: Remedies available in Force Majeure cases

Below is a chart that summarizes the remedies that various jurisdictions have recognized when ruling on force majeure questions.

Termination of contract	MA
Excuse of nonperformance	AL AR CA CT GA HI IL KS KY MI KS NE NV NY ND OK VT WA
Suspension of performance	LA MS NY OH TX
Refund of prepayment	CO NJ
Consequential damages	AR DE NE NV
Liquidated damages	NJ TX
Expressly refused to award damages	CA GA ID

7. Affirmative relief

May businesses seek compensation for government-compelled closures?

Thus far, this paper has discussed the defenses and remedies pertinent to force majeure questions. COVID-19's forced business closures and other restrictions raise a separate question beyond defenses and excuses for nonperformance: may businesses seek compensation where state or local governments force them to close? One possible avenue for such relief is the regulatory taking doctrine found in the Fifth Amendment of the U.S. Constitution.

1. Regulatory Takings

Regulatory takings occur when private property is "taken" for public use. In those cases, the private property owner is entitled to receive "just compensation" from the government entity that took the property. *Miller Bros v. Dep't of Nat. Res.,* 203 Mich. App. 674, 679 (1994) (citing US Const. Am V; Const. 1963, art 10, § 2). "In the regular context, a compensable taking occurs when the government uses its power to so restrict the use of property that its owner has been deprived of all economically viable use." *Id.* (citing *Electro-Tech, Inc. v. H F Campbell Co.,* 433 Mich. 57, 67-68 (1989)). When the state temporarily deprives parties of use of their properties, it may be required to pay "rent" as compensation for the temporary taking. *Id.* at 688 (citing *W H Pugh Coal Co. v. Wisconsin*, 157 Wis. App. 2d 620 (1990)).

Courts have identified two forms of regulatory takings: (1) "categorical" takings, where an owner is deprived of "all economically beneficial or productive use of land," and (2) a taking recognized by a case-specific balancing test. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104, 124 (1978). With categorical takings, a property owner is automatically entitled to recover for the taking of his property. *Lucas*, 505 U.S. at 1015. Categorical takings exist where (1) there is a physical invasion of the property by the government or (2) a regulation forces an owner to sacrifice *all* beneficial use of land for the common good. *Id.* at 1019.

In the absence of a categorical taking, courts balance the following factors to determine whether a compensable taking has occurred: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interfered with "distinct investment-backed" expectations; and (3) the character of the government action. *Penn Cent.*, 438 U.S. at 124 (explaining that a "taking" is more likely to "be found when the interference with property can be characterized as a physical invasion by government").

In the context of the global pandemic, if the government has commandeered an owner's property to, for example, use the property as a shelter or a hospital, courts may find that a compensable taking has occurred. *See Penn Central Transportation Co.*, 438 US at 104 (noting a taking is more readily found when the interference can be characterized as a physical invasion of the property). On the other hand, a temporary measure to close certain businesses may be viewed as an act that "substantially advance[s] a legitimate state interest". *Jarvis Assocs. V. Charter Ypsilanti*, 2008 Mich. App. LEXIS 2362, *13-14 (2008). In those situations, the landowner must establish that the regulation deprived the owner of all economically beneficial or productive use of their property and/or satisfy other jurisdiction-specific requirements.

8. An international comparison

1. Contractual Force Majeure protection

We have compared the themes identified above in our review of U.S. jurisdictions with the force majeure position in nine key global jurisdictions: (i) Belgium, (ii) China, (iii) England, (iv) France, (v) Germany, (vi) Greece, (vii) Kazakhstan, (viii) Singapore, and (ix) the UAE (onshore/DIFC/AGDM).

These jurisdictions include a diverse range of legal systems, from civil law European jurisdictions to those based on English Law. However, despite this diversity, a comparison reveals a strong synergy between the key issues applicable to force majeure relief identified in a U.S. state survey and the position in the surveyed international jurisdictions. Perhaps this should come as no surprise. Contractual force majeure is a matter of party agreement and, as such, in any jurisdiction, it is likely to be the terms of the contract that adopt paramount importance to the determining court. Further, force majeure is strongly rooted in international trade and, as such, international commonality in approach is a natural consequence.

None of the international jurisdictions we surveyed required specific enumeration of the pandemic as a trigger event. It follows that for what has occurred in the past, catch-all wording may be sufficient, albeit that each case may still turn on the construction of the specific contract. That said, this may not continue into the future. All international jurisdictions surveyed would base their interpretation on objective principles and on a case-by-case basis. It must be questionable whether courts will continue to regard COVID-19-related interventions of the kind seen in the recent health crisis as falling outside normal risks allocated through contract terms.

Likewise, across international jurisdictions, foreseeability requirements are generally determined by the wording of the contract itself. Courts would normally expect "unforeseeability" to form part of the wording of a force majeure provision in use in the jurisdiction. Application of this requirement is context-specific and will vary from case to case.

As in the U.S., the causal link between the event and the unperformed obligation is an issue that the surveyed international jurisdictions may closely scrutinize. However, ultimately, the contract wording remains king in determining the causation standard. In particular, it remains important in determining whether the drafting sets out the causation requirement in terms of prevention or hindrance of performance. In *Seadrill Ghana Operations Limited v. Tullow Ghana Limited* [2018] EWHC 1640 (Comm), an English court found that force majeure must be the "sole cause" of the non-performance. But this test is not fixed in stone and was assessed as a matter of contractual construction. Faced with the varied impact of the pandemic on different sectors, courts addressing causation may find utility in examining the objective intent of the parties in agreeing the force majeure clause: did the parties intend that non-performance concurrently caused by other matters should be excused by the trigger event?

"In the civil law jurisdictions surveyed, force majeure relief in addition to that contractually agreed may be implied into the contract as a matter of statute or civil code."

2. Alternative Defenses

With alternative defenses, a clear difference is apparent internationally between jurisdictions based on civil law and common law jurisdictions derived from English law.

In the civil law jurisdictions surveyed, force majeure relief in addition to that contractually agreed may be implied into the contract as a matter of statute or civil code. For example, in Belgium, relief for force majeure is implied into contracts under articles 1147 to 1148 of the Belgian Civil Code. Parties therefore have a backstop position providing relief in the absence of contractual agreement.

That said, the statutory origin of the alternative force majeure protection comes with potential drawbacks in terms of stricter threshold requirements focused on impossibility and full prevention of performance rather than impracticability. In Germany, force majeure events are subject to the rules of impossibility (section 275 of the BGB) or the disruption of the basis of business (section 313 of the BGB). Previous case law has been restrictive and impossibility and disruption of the basis of the contract are rarely found to apply. In Greece, a statutory force majeure event requires an extraordinary and unavoidable event. In Kazakhstan, the statutory force majeure event is described in terms of "insuperable force."

Foreseeability is also likely to be an issue for parties seeking reliance on statutory force majeure protection given that the requirement stems from the application of a fixed code rather than the more flexible construction of the contract. In Belgium, our survey response viewed it as unlikely that a party could argue unforeseeability in the context of force majeure, post the commencement of the COVID-19 pandemic. Likewise, causation may be stricter under statutory provisions than contractual. The position in China is that the event must be a direct cause of the disrupted performance. Parties should beware other nuances. In the UAE (DIFC), force majeure will not apply to an obligation to pay. Local jurisdiction statutes may also include strict notification requirements or time limits.

Statutory force majeure relief therefore offers a backup option to parties in many civil law jurisdictions but potentially at a more exacting standard.

The alternative defenses available in jurisdictions derived from English law are much more limited, even in comparison with U.S. state jurisdictions. Essentially, under English law and in the absence of force majeure, a party would need to argue frustration of contract in order to seek relief from the performance of its contractual obligations. However, this is a restrictive doctrine and frustration a blunt-edged instrument.

In order to invoke contractual frustration, a party must demonstrate that the circumstances of performance of the contract are **radically different** from those that were anticipated when the contract was entered into – "it is not this that I agreed to do." At first sight, this looks equivalent to the "basic assumptions" test used in many U.S. jurisdictions and described above. Yet, in practice, it tends to be equated with near impossibility rather than a lesser standard of impracticability.

Notably, additional expense or cost in performance is almost always insufficient as a ground for frustration, as exemplified by a series of cases concerning the Suez canal crisis in 1956. The point here being that although an alternative route around Cape Horn would be more expensive, it was still possible (*see, in particular, Ocean Tramp Tankers Corporation v. V/O Sovfracht "The Eugenia"* [1964] 2QB 226). Temporal impossibility is also unlikely to suffice as a ground for frustration. In a real estate context, this means frustration has traditionally been difficult to argue as a basis for relief from lease commitments (*see Canary Wharf (BP4) T1 Ltd and others v. European Medicines Agency* [2019] EWHC 335 (Ch)).

A further difference arises from the law on frustration of purpose. In English law, the frustrated purpose must be **mutual**. As parties often have diverged economic interests, this has made frustration on this ground virtually impossible to establish. In a COVID-19 context, the English Commercial Court summarily dismissed an argument by an airline that an aircraft lease had been frustrated due to pandemic restrictions preventing the use of the aircraft. The purpose of flying the aircraft was not mutual under a lease in which the lessor's interests were economic (*see Salam Air SAOC v. Latam Airlines Groups SA* – [2020] EWHC 2414 (Comm)).

In terms of effect, frustration under English law is all or nothing. If a frustrating event has occurred, then that kills the contract. All obligations are discharged and the loss is largely left where it falls (subject to a limited entitlement to reclaim repayments under statute (in England, the Law Reform (Frustrated Contracts Act) 1943). There is no provision under English law for damages claims for lost expectation due to frustration. Nor can a contract be partially frustrated to provide for a suspension from performance obligations. This may not work for parties seeking a more nuanced commercial outcome.

The overall lesson across all international jurisdictions is for contracting parties to understand the approach of their chosen jurisdiction to force majeure and alternative defenses. This, in turn, can inform their stance in negotiating force majeure and/or COVID-19 clauses and how hard to push for agreed contractual protection.

9. What do you do now?

Key steps that businesses should consider in a post-COVID Force Majeure world

As noted at the outset of this paper, the COVID-19 pandemic has elevated the profile and importance of the force majeure doctrine. Going forward, businesses and their counsel must continually monitor the rapidly growing body of force majeure jurisprudence in the COVID-19 context. In the interim, we list below several steps businesses can – and should – take to reduce the risk of contentious force majeure disputes and resulting litigation.

1. Carefully Review Your Contracts for Force Majeure Clauses, Other Language Excusing Nonperformance, and Damage / Remedies Provisions. The specific language of a contractual force majeure provision will likely remain the most important factor in determining whether or not force majeure is available, what triggers it, what requirements a party must meet to use it, and what relief may be available if it applies. First, confirm that your contracts contain force majeure provisions. If they do not, develop and implement a force majeure provision that includes a wide range of specific triggering events (including epidemics, pandemics, and other health crises). Further, while courts vary in their approaches to "catch-all" force majeure provisions, it remains prudent to include "catch-all" language in your contracts in addition to specified events.

If your contracts already include force majeure provisions, re-evaluate their scope. Avoid broad, general phrasing such as "Acts of God," or unspecified "unforeseen events," as courts now give little credence to such broad language. Confirm that your force majeure clause does not exclude all events other than those specifically enumerated (you may accomplish this through effective "catch-all" language). And with respect to "catch-all" phrases, be careful to avoid language that limits the catch-all provision to events similar to those specifically enumerated.

If you find yourself in a force majeure dispute before you have an opportunity to develop a force majeure clause, turn next to the common law defenses discussed above, such as impossibility of performance, impracticability, frustration of purpose, U.C.C. Section 2-615, and the Restatement (Second) of Contracts.

You should also re-evaluate contractual provisions that identify remedies and damages. If, for example, your contracts contain liquidated damages provisions, consider whether it is prudent to specify that liquidated damages will not apply in the event of a force majeure event. Further, consider whether your force majeure provision specifies that a nonperforming party shall not be deemed in breach of the contract during force majeure occurrences. That level of specificity could eliminate ambiguity as to whether you may remain liable for some form of contractual damages even if excused from performance.

2. Determine the *Specific* Cause of Nonperformance. Many jurisdictions impose a causation requirement when evaluating force majeure questions. In other words, the defense will not apply unless the force majeure event partially or fully causes the nonperformance. In some jurisdictions, even if a force majeure event is specifically listed in the force majeure provision, a party's nonperformance will not be excused if this event did not cause the nonperformance. Numerous jurisdictions hold that an economic downturn or general financial hardship does not amount to force majeure. Moreover, courts are growing reluctant to view the COVID-19 pandemic as a blanket excuse from performance. Parties should consider carefully precisely how the pandemic (or any other force majeure event) rendered them unable to perform.

3. Determine The Governing Law. Review your contracts for choice of law and venue provisions. As noted, jurisdictions differ greatly in their approaches to force majeure issues. It is therefore wise to tailor and/or revise your force majeure provisions with an eye towards the approach that your jurisdiction takes.

4. Notify Your Counterparty. Many force majeure clauses include notice requirements and deadlines by which a party must notify its counterparty that it seeks to invoke force majeure. Even if the force majeure clause does not contain a notice requirement, the sooner the party claiming force majeure sends a notice of force majeure or impossibility of performance, the better its chances are of succeeding on the defense. Further, if a notice requirement does exist and you fail to satisfy it, you may lose the right to invoke the force majeure clause or some of the remedies it contemplates, even if you have satisfied all other requirements.

5. Take Reasonable Steps to Mitigate Damage. In situations where a force majeure event occurs, parties may be required to take reasonable steps to mitigate their damages and to act reasonably. Even if this is not legally required in a particular jurisdiction, it is usually a commercially wise course to take in any event. Courts will not look favorably upon parties who invoke force majeure but then remain inactive, allowing the impact of nonperformance to worsen.

6. Consider The Overall Impact Before Invoking Force Majeure. Before declaring force majeure, consider the consequences and whether or not it is the best option under the circumstances. Most businesses spend considerable time and resources negotiating the terms of their commercial agreements, and may not want to relinquish all of the benefits those contracts provide. Instead of hastily declaring force majeure and terminating the parties' contractual rights and obligations, consider whether renegotiating or amending contractual terms may bring the most practical and commercially beneficial relief.

7. Consider Developing a COVID-Specific Provision: As noted, the global pandemic has highlighted the importance of adding health crises and other epidemics to force majeure provisions. In the current environment, it may be wise to develop a standard contractual provision that addresses COVID-19 specifically. At this point, COVID-based business disruptions are arguably foreseeable. As time passes, courts will likely expect parties to anticipate future COVID-related issues and to incorporate them into their contracts. Businesses should consult with their counsel to determine whether standard COVID-based contractual language makes sense.

Conclusion

The true magnitude of COVID-19 on the business community remains unknown. But one thing is certain: it will be profound. For that reason, it is now more important than ever that businesses take affirmative steps to protect themselves from unforeseeable and unprecedented events like the one we currently face. Structuring commercial agreements with comprehensive force majeure provisions is one such step that could go far in protecting your business from the unexpected.

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