Can Businesses Be Excused from Their Contractual Obligations in the Midst of Coronavirus? Definitely, Maybe.

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With no end to the coronavirus and widespread "stay-at-home" orders in sight, companies in virtually every sector are being impacted in ways making it difficult, if not impossible, to fulfill their contractual obligations. During these uncertain times, it is crucial that businesses carefully review and understand their contracts as well as relevant laws governing their enforceability.

To the extent the coronavirus and the government's containment responses are interfering with their ability to perform, companies should consider legal options to lessen the impact of this crisis. This article is intended as a short primer on *force majeure* and similar doctrines that can be used to accomplish this goal. Yet the uncertainty of how effective these doctrines will be in excusing nonperformance should encourage businesses, more so than ever, to consider compromise where feasible.

What is *force majeure*?

Force majeure is a legal doctrine providing that a party may be relieved from nonperformance under the terms of a contract when "acts of God" or man-made circumstances beyond that party's

control render performance untenable or impossible. This doctrine is not a legal defense to a breach of contract claim but rather describes a contractual provision that can excuse performance under certain circumstances.

Courts in most jurisdictions have historically discouraged reliance on *force majeure* provisions and thus strictly construe contracts in favor of performance. However, given the rapidly developing effects of the coronavirus and its potential ramifications on economic activity and commerce, the legal landscape remains fluid and can be expected to evolve over time.

The terms of the contract control.

Typical *force majeure* clauses require (i) the disruption of performance go beyond the invoking party's reasonable control and (ii) that the triggering event was not reasonably foreseeable. Nonperformance will typically be excused only where the occurrence is an objective event that is explicitly identified in the contract.

A well-drafted provision will define specific categories of disruptive events that excuse noncompliance. Examples of categories include naturally occurring events like floods and earthquakes as well as human related events such as acts of government, war, or civil disobedience. Though uncommon in today's business agreements, contracting parties would be wise to insist that all future agreements contain a *force majeure* provision that specifically includes "disease, viruses, epidemics, pandemics, quarantines and government closure orders" as triggering events that excuse nonperformance.

Practical considerations.

It is important to note that *force majeure* provisions only apply to events that directly affect a party's ability to perform under the contract, not its ability to make a profit. A party may not rely on these provisions where it could have mitigated its nonperformance or where performance, while difficult or unprofitable, was still possible. In fact, to protect against opportunistic parties utilizing crises or other unforeseen events as a pretext to avoid their obligations, courts generally require the nonperforming party to affirmatively establish it has taken all reasonable steps to avoid the event or lessen its consequences.

Business contracts also typically require the nonperforming party to "invoke" a *force majeure* provision by promptly notifying its counterpart of a triggering event. The notice should include information detailing the nature and scope of the event, the impact on the business and the effect of it will have on contractual performance. Businesses should also be mindful of any agreed upon dispute resolution requirements in the event of a breach.

What if the contract lacks a *force majeure* clause?

If a business is unable to comply with its contract due to the coronavirus but the agreement lacks a *force majeure* provision, most jurisdictions – including Illinois, New York, California, Florida and Texas [1] – recognize the common law defenses of "commercial frustration" and "impossibility

of performance." These default rules, while limited in scope, may also provide relief to non-performing parties.

Under the "commercial frustration" doctrine, courts will invalidate and/or rescind a contract if a party's performance under the agreement is rendered meaningless due to an unforeseen change in circumstances. This defense focuses on the underlying objective of the contract. It is generally asserted where the occurrence of an event undermines the entire purpose of the agreement so as to make one parties' performance virtually worthless to the other party. Examples of successful application of this defense include the judicial termination of a commercial lease between the owner of a clothing store and landlord where the rented premises was destroyed in a fire during the lease term, thus rendering the lease useless. [2]

"Impossibility of performance" (sometimes also referred to as "performance impracticability") is another defense that may allow a party to avoid performance under a contract. This legal remedy, which effectively cancels the contract and returns the parties to their original position, can be utilized when the performance by one party has become objectively impracticable or impossible to perform due to the destruction of the subject matter of the contract. This doctrine focuses on the ability of a contracting party to perform, as opposed to the nature of the agreement itself.

Like commercial frustration, impossibility of performance hinges on the foreseeability of the triggering event. The mere fact that performance becomes economically burdensome will not ordinarily excuse performance. The vital question, therefore, is whether the unanticipated circumstance has made the performance of the contractual promise substantially different from what was reasonably contemplated by the parties at the time the agreement was reached.

Will Courts be more receptive to *force majeure* provisions and commercial frustration or performance impossibility defenses in response to the coronavirus?

Reliance on f*orce majeure* clauses is generally disfavored, thus these provisions are narrowly applied by the courts. Similarly, "the doctrines of commercial frustration and of impossibility of performance are limited in application so as to preserve the certainty of contracts...Courts must be spare in finding commercial frustration to a degree that it relieves the parties of their contractual obligations. This is because the doctrine of commercial frustration is an exception to the general rule that parties must abide by their contract in spite of contingencies."[3] A party's nonperformance under an agreement will be excused only in extreme circumstances.

Given the widespread and significant anticipated impact of the coronavirus on economic activity (as well as the expected onslaught of related commercial litigation), courts will potentially take a second look at these legal doctrines in the months and years ahead. Indeed, in the face of the very real hardships arising from the pandemic, some trial courts could become more receptive to the application of *force majeure*, commercial frustration and/or performance impossibility going forward. This is particularly true in jurisdictions that will be hardest hit by the coronavirus. The longer-term test of the adaptability of these legal concepts to the present crises will be not be fully understood until litigation has made its way through the appellate courts. Ultimately, the courts in some states may arrive at final determinations that differ from those in other states.

Operations will invariably be disrupted as businesses struggle through the pending economic downturn. It is imperative that companies understand their contractual rights and obligations and properly situate themselves to protect their financial and legal interests to the greatest extent possible. The uncertainty in how courts will apply conventional principles of contract law to the devastating impact of the coronavirus makes the reasonable settlement of soon-emerging contract disputes as compelling as ever.

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[1] *See e.g., Illinois-American Water Co. v. City of Peoria*, 332 Ill. App. 3d 1098 (3d Dist. 2002); *Kolodin v. Valenti*, 115 A.D. 3d 197 (2014); *Habitat Tr. For Wildlife, Inc. v. City of Rancho Cucamonga*, 175 Cal. App. 4th 1306 (2009); *Harvey v. Lake Buena Vista Resort, LLC*, 568 F. Supp. 2d 1354 (M.D. Fla. 2008); *Tractebel Energy Mktg., Inc. v. E.I. Du Pont De Nemours & Co.*, 118 S.W. 3d 60 (Tex. App. 2003).

[2] *Smith v. Roberts*, 54 Ill. App. 3d 910 (4th Dist. 1977).

[3] 30 Williston on Contracts § 77:95 (4th ed.)