COVID-19: FORCE MAJEURE CHECKLIST FOR THE GC'S OFFICE

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U.S. Litigation and Dispute Resolution Alert

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The coronavirus (COVID-19) pandemic has impacted, and will continue to impact, many types of commercial contracts for goods and services. In addition to “force majeure” provisions that exist in many contracts, there are other “contract-avoidance” doctrines that can also be asserted. Whether any of these doctrines applies requires a case-by-case determination that is highly dependent on the contract language and the facts associated with the specific event. While you are assessing your company's obligations under a contract and perhaps the possibility that your non-performance might be excused, you may also have to assess a counterparty's assertion that their threatened or actual non-performance is excused.

The following provides a checklist of items/issues you should consider when assessing a claim of force majeure or other contract-avoidance doctrine.

Notes regarding this checklist:

- The checklist is phrased to address a company's assessment of its own assertion of force majeure or other contract-avoidance doctrine. However, you can use the same checklist to assess the merits of a counterparty's assertion.
- The law of the applicable jurisdiction(s) will control. While many contract-avoidance doctrines are treated similarly across jurisdictions, jurisdiction-specific laws and issues can vary significantly and may affect the analysis. Further, local emergency government orders may also affect the analysis.

A checklist for assessing a force majeure or other contract-avoidance assertion follows:

1. DEFINE THE EVENT:

WHAT SPECIFIC EVENT IS BEING RELIED UPON?

- What specifically is happening to impact the ability to perform under the contract?
- What facts are triggering the need for this analysis in the first place?
  - Is it WHO's declaration of the pandemic?
  - Is it the local authority's issuance of a stay-at-home order?
  - Is it a supply chain issue?
- Drill down with relevant company personnel regarding specific facts:

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- Is performance simply rendered more difficult or expensive? For example, are there alternative supply channels or transportation modes available to you (but perhaps at increased cost), or are there no other options?
- Is performance simply not possible irrespective of what efforts the company takes?

2. REVIEW YOUR CONTRACT TERMS AND SPECIFICALLY LOOK FOR A FORCE MAJEURE CLAUSE: IF THERE IS ONE:

- Is the specific event noted in the inclusions in that clause?
  - If the clause includes “pandemic” or “epidemic” it would appear to apply.[1]
  - Other terms typically included in a force majeure clause may cover the specific event, such as: act of God, act of government, quarantine, closure, or even a catch-all clause, such as one addressing “or any other event that prevents performance.”
  - State law can vary considerably on the meaning of specific terms.[2]
- Is the specific event noted in the exclusions in that clause?
- Does the specific event meet the standards/criteria referenced in the clause (e.g., “unanticipated by either party,” “renders performance impossible,” or “inadvisable”)?
- If the clause is triggered, what does it allow for: complete termination of the contract, temporary relief from performance, relief from specific deadlines, relief from minimum quantity requirements or exclusivity, etc.?

3. REVIEW YOUR CONTRACT FOR OTHER RELEVANT CLAUSES: THE CONTRACT AND RELATED DOCUMENTS MAY CONTAIN OTHER CLAUSES THAT CAN AFFECT PERFORMANCE OBLIGATIONS:

- Are there other provisions that might apply to excuse performance, for example, a material adverse change clause? What do those clauses require?
- Is there an exclusivity clause that might impact your ability to use alternatives?
- Are there any provisions that address, implicitly or explicitly, the allocation of the risk of the event occurring?
  - Your counterparty may argue that certain provisions arguably allocate certain risks to you. Such risk transfer provisions may be found in warranty clauses, damage provisions, technical specifications, and/or performance criteria.
- Are there multiple applicable contract documents that perhaps contain contradictory clauses? Which prevails?
- How have any prior performance issues been addressed? Is there a course of dealing that might apply?
- Is there a dispute or “escalation” clause that dictates how you must first raise an issue under the contract?

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4. ARE THERE ANY NOTICE REQUIREMENTS? BE SURE TO IDENTIFY AND COMPLY WITH ANY NOTICE PROVISIONS:

- Some force majeure provisions specify as little as 3-5 days to provide notice.
- Consider updating notice as events and circumstances change, for example, newly imposed government restrictions that arise after initial notice was given.

5. CONSIDER OTHER PERFORMANCE-AVOIDANCE DOCTRINES BEYOND FORCE MAJEURE: COMMON LAW DOES NOT RECOGNIZE FORCE MAJEURE, BUT THERE ARE OTHER COMMON LAW DOCTRINES THAT CAN EXCUSE PERFORMANCE. THESE DOCTRINES INCLUDE:

- Commercial impracticability
- Illegality
- Unconscionability
- Impossibility
- Frustration of purpose

The facts of each situation (and the law of the relevant jurisdiction) will determine whether a given doctrine will excuse performance and to what extent.

6. EXPLORE COMMERCIAL SOLUTIONS: BE SURE TO VIEW YOUR SITUATION FROM A LEGAL AND A COMMERCIAL PERSPECTIVE. IF YOU ARE IN AN IMPORTANT "PARTNER-TYPE" RELATIONSHIP WITH YOUR COUNTERPARTY, YOU MAY BE ABLE TO ACHIEVE A COMMERCIAL RESOLUTION, THROUGH RENEGOTIATED TERMS. HOWEVER, AT THE SAME TIME, YOU SHOULD BE DEVELOPING AND PROTECTING YOUR LEGAL POSITION FOR USE SHOULD THE COMMERCIAL APPROACH FAIL TO RESOLVE THE ISSUES FULLY. A PURELY COMMERCIAL SOLUTION NOW MAY REQUIRE PROPER LEGAL DOCUMENTATION TO PROTECT LONGER-TERM COMPANY INTERESTS. YOU MIGHT CONSIDER:

- Form a team to develop your position, and include legal, commercial, and insurance / risk management personnel.
- Keep the team in the loop on all developments so that your plan is comprehensive and coordinated and can easily evolve as circumstances change. Have the team meet periodically.
- When exploring commercial solutions, reserve your rights.

7. ADDRESS INSURANCE / RISK MANAGEMENT ISSUES:

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- Examine all relevant insurance policies and consult with appropriate attorneys/department/agents/brokers/etc.
  - Is there coverage for business interruption or other types of losses?
  - If so, provide timely notice.
- Keep your insurance / risk management team involved.
- Be careful that positions you take in one area do not adversely impact you in another area. For example, correspondence with your counterparty addressing a commercial solution could affect an insurance claim.

8. MITIGATE YOUR LOSSES: PARTIES ARE GENERALLY REQUIRED TO MITIGATE DAMAGES:

- You may need to "cover" the impacted performance, even if it is more costly than provided for in the contract. While that would appear to apply more on the "inbound" situation (e.g., where you purchase what you need at increased costs), it can also apply in the "outbound" situation (where you are not completely excused from performance or where performance is not truly impossible, you might be required to perform even if it is more costly to do so).
- The contract terms may impact whether and what type of mitigation is required.

9. DOCUMENT THE FACTS OF YOUR SITUATION AS YOU PROGRESS: COLLECT EVIDENCE OF RELEVANT FACTS AS YOU PROCEED. IT WILL BE MUCH MORE DIFFICULT (AND PERHAPS IMPOSSIBLE) TO CAPTURE THIS INFORMATION MANY MONTHS (OR YEARS) LATER WHEN IT MAY BE NEEDED. EXAMPLES INCLUDE:

- Keep detailed records of the chronology of events and how they are impacting your business—do not wait.
  - Collect press releases, news articles, government proclamations, and the like regarding impacts on a given area, industry, plant, transportation hub, etc. Be prepared to prove later that a particular area or facility was closed and how and why it was closed.
  - Start tracking and capturing company data regarding impacts on your business. Has a "stay at home" or "shelter in place" order closed or impacted your business? Was it mandatory (having the force of law) or merely recommended or voluntary? What portion of your workforce was impacted and at which locations? Was working remotely possible in your business or was physical presence required?
- Be aware how other confounding events are also affecting performance, and collect evidence to address this issue:
  - Prior to the specific event, was performance on track?
    - Pre-event performance will be relevant in any dispute

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- You may have to address later whether a confounding event caused or contributed to the inability to perform. Ask this question: had the COVID-19 pandemic not occurred, would the other event have affected or prevented performance (and to what degree)?

10. COORDINATE YOUR MESSAGE AND AVOID INCONSISTENCIES:

- Make sure you are communicating a consistent message, internally and externally, especially if you are on both sides of the force majeure issue.
- Assess how invocation of force majeure may affect other contractual obligations.
- Are there other company contracts where counterparties may invoke/have invoked force majeure?

11. TAKE STEPS TO AVOID UNNECESSARY NON-PRIVILEGED COMMUNICATIONS:

- Remind all personnel of the appropriate means to communicate.
- A single email from a mid-level manager could make things difficult. Examples:
  - "It might be difficult, but we can make deliveries."
  - "When we did the contract, we promised to deliver no matter what."
  - "This is going to drive delivery costs through the roof."

12. EXPERT ASSESSMENT OF DAMAGES AND PERFORMANCE BARRIERS MAY BE NEEDED:

- Depending on the magnitude of the damages and the ability to establish the causal connection between the event and the performance difficulties, expert analysis, either internal or external, might be necessary.
- Consider using internal/external "audits" to assess these issues.

13. BE AWARE OF THE UNDERLYING "CAUSATION" ISSUE:

- Even with the most straightforward force majeure event, your counterparty may argue you were not performing or could not perform consistent with the agreement, notwithstanding the force majeure event.
- Understand what other potential "non-performance" issues might exist to assess the risk associated with invocation of force majeure or any other contract-avoidance doctrine.
  - As noted above, preservation of relevant material/evidence will be critical.
- Contract language and applicable law may provide guidance on whether the "force majeure" event must be the sole cause of performance problems, a "but for" cause, or a contributing cause?

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14. ADDRESS POTENTIAL COVID-19 IMPACTS IN FUTURE AGREEMENTS: FOR ANY NEW AGREEMENTS, AMENDMENTS, EXTENSIONS, ETC., BE SURE TO ADDRESS POTENTIAL COVID-19 IMPACTS ADEQUATELY.

FOOTNOTES

[1] On March 11, 2020, the World Health Organization characterized COVID-19 as a pandemic.

[2] This cannot be overemphasized. As an example, California has a statutory provision that looks like a force majeure clause. See California Code, Civil Code - CIV § 1511(2) (excusing performance “When it is prevented or delayed by an irresistible, superhuman cause, unless the parties have expressly agreed to the contrary.”)

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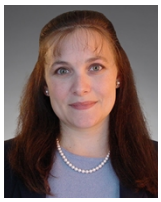
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