

## FORCE MAJEURE: WILL THE SECOND WAVE OF COVID-19 BE CONSIDERED A FORCE MAJEURE EVENT?

Earlier this year, businesses attempted to invoke force majeure clauses, claiming they were unable to perform their contractual obligations due to quarantines, travel restrictions, and supply chain issues associated with the novel coronavirus (“COVID-19”). Now, as states issue new stay-at-home orders due to COVID-19 outbreaks, many wonder whether the second wave of outbreaks will have the same legal implications as the first.

### **Brief History of Force Majeure**

The principle of force majeure (French for “superior force”) originated from the English common law concept of frustration of purpose.<sup>i</sup> In *Taylor v. Caldwell*, an English court discharged the parties’ obligations under a contract when the parties’ performance thereunder depended wholly on the availability of a venue that was destroyed in a fire.<sup>ii</sup> The U.S. Supreme Court later adopted the *Taylor* holding,<sup>iii</sup> from which the force majeure clause emerged.

### **The Force Majeure Clause**

A force majeure clause is “a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event or effect that the parties *could not have anticipated* or controlled.”<sup>iv</sup> Generally, contracts require an event triggering a force majeure clause to meet the following criteria: (1) the event was external to the contract and to the parties; (2) the event was not reasonably foreseeable to the parties; and (3) the occurrence of the event was beyond the control of the parties.<sup>v</sup> In other words, a force majeure clause is typically invoked upon the occurrence of an event that was not foreseeable to, or controlled by, the parties.

However, the precise scope of a force majeure clause largely depends on the language in the contract. For example, courts have held that foreseeable events, or those within the reasonable control of the parties, may trigger a force majeure clause if such events were expressly contemplated thereunder.<sup>vi</sup> For that reason, parties seeking greater protection may negotiate the terms of a contract to include a list of specific events that trigger a force majeure clause, and thus, avoid the requirements of foreseeability and lack of control. In doing so, the parties excuse non-performance in instances where state law governing force majeure contract interpretation may not.<sup>vii</sup>

### **Invoking the Force Majeure Clause**

Upon the occurrence of an event that hinders a party’s performance under a contract, the party should first review the contract to determine whether a force majeure clause is included therein. If it is, then the party must determine the scope of the force majeure clause. To do so, the party should consider whether the provision lists specific force majeure events, whether it provides a general, catch-all definition of a force majeure event, or whether it includes both.

In the absence of specifically-defined force majeure events, the party must review applicable state law to determine whether the language of the force majeure clause contemplates such an event. Because force majeure clauses are governed by state law, their interpretation can vary widely from state to state. Some states narrowly construe force majeure clause language by requiring qualifying events to be expressly listed therein, while other states broadly interpret the provision to allow the most protection thereunder.

It is important to note that although state law differs regarding the interpretation of broad force majeure clauses, most courts generally hold that there are two situations in which parties are prohibited from invoking the force majeure clause. First, because force majeure events must impact parties' abilities to perform under the contract, parties may not invoke a force majeure clause in anticipation of a force majeure event.<sup>viii</sup> Second, parties may not invoke a force majeure clause due to unanticipated economic loss, only.<sup>ix</sup>

Finally, after determining that an event does trigger the force majeure clause, the party seeking to invoke the same must timely comply with all notice requirements under the contract. These requirements typically include providing to the other party immediate written notice of the force majeure event, which specifies the details of the event and sets forth its expected duration. Because failure to properly provide notice of a force majeure event may constitute a breach of contract (and not excuse a party's non-performance), the party must carefully determine the appropriate timing, form, and recipient of the notice. From there, the parties can determine their remaining obligations under the contract.

### **Force Majeure and the Second Wave of COVID-19**

Having reviewed the background of, and general process for invoking, force majeure clauses, one must now consider whether the second wave of COVID-19 will be considered a force majeure event. As set forth above, the scope of a force majeure clause depends on the specific language in the contract. Thus, unless the definition of a force majeure event expressly includes the words "pandemic", "epidemic", or "illness", parties will find it difficult to successfully invoke a broad force majeure clause due to the second wave of COVID-19.

Unlike the unanticipated impact of the first COVID-19 outbreak, subsequent outbreaks are foreseeable and widely publicized. Virtually every news source in the world has reported that a second wave of COVID-19 is imminent. In fact, White House trade advisor, Peter Navarro, reported that President Trump and his advisors are preparing for the second wave of COVID-19.<sup>x</sup> Thus, the question is not whether there will be another wave, but when will it strike? According to John Hopkins Medicine, "[a] second surge [of COVID-19] could happen before fall, with human behavior playing a major part."<sup>xi</sup> Thus, it is imperative for parties to understand how the foreseeability of the second wave of COVID-19 may impact their ability to invoke broad force majeure clauses.

In the absence of expressly enumerated pandemic or epidemic-related force majeure events, parties to a contract may attempt to invoke the force majeure clause under a catch-all phrase, such as an "act of God".<sup>xii</sup> However, unless state law defines an "act of God" to include a pandemic, epidemic, or illness, a court will likely hold that the omission was intentional, and require the parties to demonstrate that the act of God was unforeseeable.<sup>xiii</sup> Under the circumstances, it is unlikely that parties will be unable to make this showing because the second wave of COVID-19 is imminent and widely publicized. Accordingly, the second wave of COVID-19 will not likely be considered a force majeure event.

If you have questions regarding force majeure clauses, then Droel, PLLC can help. Please contact Ariel Buczak (abuczak@droellaw.com) or Emily Donaher (edonaher@droellaw.com).

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<sup>i</sup> See *Taylor v Caldwell*, 122 Eng.Rep. 309 (1863).

<sup>ii</sup> *Id.*

<sup>iii</sup> *The Tornado*, 108 U.S. 342, 351-52 (1883).

<sup>iv</sup> Force Majeure Clause, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added).

<sup>v</sup> See e.g., *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, 931 N.Y.S.2d 436 (N.Y. App. Div. 2011).

<sup>vi</sup> See e.g., *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 183 (Tex. App. Houston [1st Dist.] 2018), *review denied* (Aug. 30, 2019).

<sup>vii</sup> Charles L. Knapp, PROBLEMS IN CONTRACT LAW 753 (8th ed. 2016).

<sup>viii</sup> *Id.*

<sup>ix</sup> *Id.*

<sup>x</sup> Alex Leary and Jacob Gershman, *White House Preparing for Second Wave of Coronavirus, Trade Advisor Says*, THE WALL STREET JOURNAL (June 21, 2020, 5:40 p.m.), <https://www.wsj.com/articles/white-house-preparing-for-second-wave-of-coronavirus-trade-adviser-says-11592761397>.

<sup>xi</sup> Lisa Lockerd Maragakis, *First and Second Waves of Coronavirus*, JOHN HOPKINS MEDICINE, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/first-and-second-waves-of-coronavirus> (last visited Jul. 22, 2020).

<sup>xii</sup> See *Valero Transmission Co. v. Mitchell Energy Co.*, 743 S.W.2d 658, 660 (Tex. App. Houston [1st Dist.] 1987).

<sup>xiii</sup> *Id.*