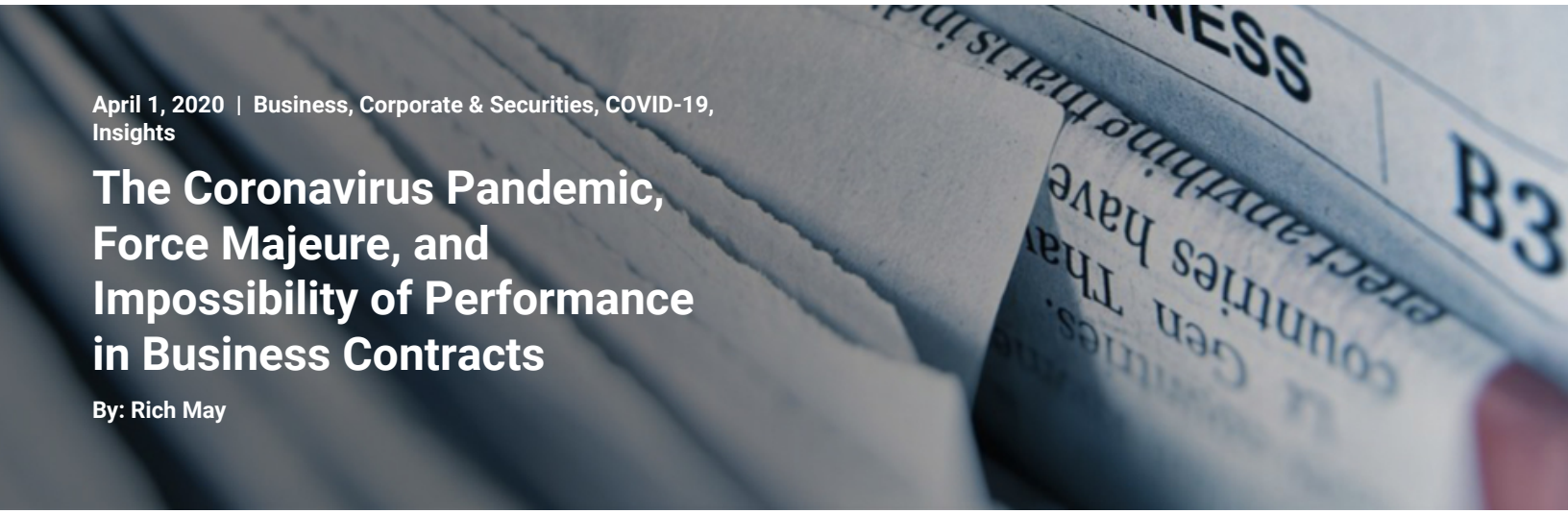

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The Coronavirus Pandemic, Force Majeure, and Impossibility of Performance in Business Contracts

By: Rich May

As the coronavirus (COVID-19) pandemic continues to severely disrupt businesses across the country and globally, forcing employees to self-quarantine and facilities to shut down, many businesses are questioning how they will meet existing contractual obligations. Below is a review of force majeure contract clauses as well as the doctrines of impossibility or impracticability, which may be of assistance to anyone struggling to fulfill their contractual obligations in these challenging times.

Force Majeure Clauses

A force majeure clause is a contractual provision that excuses performance under the contract if certain events occur that both sides agree, in advance, would by their very nature make performance of the contract impossible or impracticable. Colloquially these provisions are sometimes referred to as “acts of God” clauses.

Force majeure clauses can vary substantially from contract to contract. Therefore an analysis of whether any force majeure clause can be invoked requires a fact intensive inquiry and a review of the specific language in the contract. Such clauses are generally read narrowly and intended only to cover specific enumerated events, so catch-all language cannot be relied on to be effective. By way of some examples, force majeure events enumerated in contracts may include:

1. ‘acts of God,’ such as severe natural disasters including floods, fires, earthquakes, or hurricanes;
2. war, acts of terrorism, and epidemics;
3. acts of governmental authorities such as expropriation, condemnation, and changes in laws and regulations;
4. strikes and labor disputes; and
5. miscellaneous specified accidents.

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If a force majeure clause specifies epidemics or pandemics then the recent declarations by state and national governments, as well as by international authorities such as the World Health Organization, will provide strong support for the proposition that the provision has been triggered. However, force majeure clauses sometimes include additional requirements before taking effect, such as when the pandemic occurs in relation to the contractual performance, what declarations of emergency are made and by what entities, how long the pandemic must last, or specific notice requirements that must be met. If a force majeure clause does not specify epidemics or pandemics, other categories such as government action or an act of God might still apply depending on the language of the contract and intent of the parties. Every contract must be analyzed individually and in the context of its unique facts. Contact a Rich May attorney for help analyzing your specific contractual language and related circumstances.

Lastly, specific to the coronavirus pandemic, it is worth noting that due to governmental lockdowns in China, the quasi-governmental agency called the China Council for The Promotion of International Trade (CCPIT) has been providing businesses in China with force majeure "certificates," potentially bolstering certificate holders' claims that such provisions have been triggered by this pandemic.

Other Theories to Excuse Contract Performance

If a contract does not contain a force majeure clause or the current situation does not fall within the language of the clause, there are other options for businesses struggling with contractual obligations during the pandemic. A variety of common law theories might apply depending a business' unique circumstances. For example, Massachusetts recognizes the doctrines of impossibility, impracticability, and frustration of purpose. Impossibility or impracticability generally require (1) the occurrence of an event that has made performance impossible or extremely or unreasonably difficult; (2) that the event occurred without the fault of the party seeking to excuse performance; (3) that the nonoccurrence of the event was a basic assumption upon which the contract was made; and (4) that the party seeking relief did not assume the risk of the event it is asserting as the basis for discharge. Common examples are the death or incapacity of a person essential to performance, when something could now only be done at an excessive and unreasonable cost, or where performance would contravene a government regulation or order. Similarly, performance may be excused where a party's principal purpose in entering the contract is substantially frustrated by circumstances outside of his control which were not contemplated when the contract was made.

Additionally, in the case of contracts for the sale of goods, the Uniform Commercial Code articles 2-613 through 2-616 will likely be applicable to any determination of whether the seller's performance is excused on the basis of impracticability. The Code excuses a seller from performing "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." See 2-615(a).

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Finally, it is worth noting that temporary impossibility or impracticability generally only excuses performance for as long as the condition lasts. The coronavirus pandemic's harmful impacts on businesses will eventually fade, and any attendant delay in contractual performance is likely to be only temporary. The extent to which any party to a contract is excused from performance is another fact intensive inquiry.

Conclusion

In the coming weeks and months the coronavirus pandemic will continue to severely disrupt many industries, and businesses will likely struggle to meet existing contractual obligations. However, whether a party can successfully invoke a force majeure clause or assert an impossibility or impracticability defense in order to excuse performance under a contract is a fact intensive inquiry and must be assessed on a case-by-case basis.

Disclaimer: This summary is provided for educational and informational purposes only and is not legal advice. Any specific questions about these topics should be directed to attorney Nathaniel Donoghue, David Glod or J. Allen Holland.

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