JOHNSTON ALLISONHORD

October 22, 2020

NAVIGATING A FORCE MAJEURE CLAUSE

With the outbreak of the COVID-19 pandemic earlier this year, even non-lawyers became familiar with "force majeure." Force majeure is a legal concept that (in certain cases) allows one party to a contract to suspend, excuse, or even terminate its contractual obligations. It is usually a separate clause buried in the back of a contract, but with the global disruption caused by COVID-19, force majeure has taken on increasing prominence in seemingly everything from property leases, to supply relationships, to wedding planning.

One of the key purposes of the force majeure clause is to allocate risk among the parties as to the occurrence of an unlikely event, which if were to occur, could severely impact a party's ability to perform its contractual obligations. The concept is simple enough, but the devil is in the details of how the clause is written.

North Carolina courts generally adhere to the principle of "freedom of contract," meaning they will give effect to the terms the parties negotiate into their contract. As a result, the actual text of the contract is critical in understanding the rights and obligations of the parties. A force majeure clause typically will do three things: (1) identify what constitutes an event subject to force majeure, (2) describe the options and obligations of the party adversely affected by a force majeure event, and (3) set out the rights and remedies of the other, unaffected party. Taking each of these three components in turn:

1. Traditionally, force majeure language includes items such as natural disasters, war, violence, and other "Acts of God." While broad language certainly would capture the most dramatic force majeure events, imprecise language may leave parties uncertain as to how to apply force majeure clauses in other situations. This can be avoided by being clear and specific. For example, the risk of pandemic should be specifically addressed and not presumed to fall under general language. If that lesson was not learned during the avian and swine flus, it certainly should be now. Additionally, careful thought should be given to any particularly applicable outside risks, including specific disasters or other risks outside of your control that could hamper performance. General "catch-all" language often will be included to cover what wasn't thought of. During an adverse event, all parties will be better served if they can spend their time dealing with the business repercussions of the emergency rather than trying to decide if the situation falls into poorly thought out language.

2. If a valid force majeure event has occurred, and if one party is unable to perform its obligations as a result, the contract typically will provide that the impacted party is excused from its performance. Depending on the contract language, the impacted party may still have an obligation to (i) use its best efforts to perform, (ii) keep the other party informed of its status,

and/or (iii) attempt to change the way in which it performs its obligations under the contract. For example, if a contract required a person to deliver a presentation to a large assembly, and the COVID-19 outbreak made the in-person gathering impossible, the speaker might still be required to deliver the presentation over a video conference. This is sometimes referred to as the obligation to mitigate the harm caused by the force majeure event.

3. The threshold issue for the unaffected party (i.e., the party whose performance is not directly impacted by the force majeure event) is whether it agrees that a force majeure event has occurred. Assuming there is no dispute about that, the unaffected party will not be able to hold the other party in breach of the contract due to its nonperformance – that is at the very heart of the concept of force majeure. That said, a well-drafted contract typically will allow a partyto terminate the contract after a certain period of time, if the force majeure event continues. The unaffected party also would have a claim if the other party does not comply with the requirements of the force majeure clause itself, for example, by not attempting to mitigate the harm.

A force majeure clause can be a critical component of managing contractual risk and this often-overlooked provision should be carefully reviewed with legal counsel *prior* to executing any contract. For a person or business impacted by an unforeseen event, force majeure can help minimize liability. But the consequences of relying on force majeure when it does not apply, or does not function as expected, can be severe – the party would be in breach of the contract and the other party could sue. So any person or business thinking of invoking force majeure protections is well served to review the clause with legal counsel.

If you are need of counsel in relation to a force majeure clause, complete our **General Contact Form**.