To Our Clients and Friends
Memorandum

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COVID-19 AND THE LAW: TIME TO CHECK YOUR *FORCE MAJEURE* CLAUSE

July 20, 2021

The ongoing COVID-19 pandemic continues to leave businesses in limbo. Prolonged government shutdowns and health restrictions designed to limit the spread of the coronavirus have disrupted contractual relations across the globe. Sixteen months in, the question remains, who will bear the ultimate economic consequence of the shutdowns?

Enter the *force majeure* clause. Rarely the subject of active negotiation, a *force majeure* provision typically lurks in the back of a contract, amidst the various boilerplate provisions for notice, severability, and whatnot. A *force majeure* clause will ordinarily say what happens in the event of a parade of horribles, such as earthquake, storm, flood, fire, plague, and/or other "Acts of God," as well as man-made disasters such as terrorism, riot, war, insurrection, nuclear and chemical contamination, and/or failure of public infrastructure.

As articulated by the New York courts, the purpose of a *force majeure* clause is to "relieve a party from its contractual duties when its performance has been prevented by a force beyond its control or when the purpose of the contract has been frustrated."[i] Unforeseen or unanticipated difficulties, and/or changed circumstances, however, are not usually recognized as justifying non-performance of a contractual obligation. Rather, the event at issue must be "beyond the control and without the fault or negligence" of the party relying on the *force majeure* provision, and the non-performing party must show what action it took to perform its contractual duties despite the calamity relied on to excuse performance.[ii]

For contracting parties, we recommend <u>three steps</u>:

#1: <u>Check your contract</u>. Does it contain a *force majeure* clause? If not, then a party seeking relief from its contractual duties may have to resort to fuzzier common law doctrines, such as impossibility or frustration of purpose. If the contract does have such a provision, does it specifically list epidemics or government shutdowns? New York law, in particular, "narrowly construes *force majeure* provisions, and limits them to contingencies specifically listed or similar to those listed."[iii]

#2: Consider your context. How was contractual performance impacted by the pandemic? Was it made impossible by government decree, or only more difficult by unavailability of person or product?

#3: Call your counterparty. As with all contract matters, litigation is a last resort, not a first step. Contracting parties should try to resolve issues created by the epidemic, rather than seek to exploit them.

If a matter does require litigation, our legal system—which has recently begun resuming full operations—should be equipped to deal with it. While pandemics may seem new to us, the courts have been dealing with them for centuries. Indeed, much of our current civil law descends from the 6th century Justinian Code, which was shaped during decades of bubonic plague that infected half the population of Europe.

In 1857, for instance, the Supreme Judicial Court of Maine ruled in favor of a laborer who skipped out on his shift at the local sawmill, "by reason of the alarm and danger occasioned by the prevalence of the cholera in the vicinity," holding that he "was under no obligation to imperil his life by remaining at work in the vicinity of a prevailing epidemic so dangerous in its character that a man of ordinary care and prudence … would have been justified in leaving by reason of it..."[iv] More recently, two Bankruptcy Courts issued split decisions on the applicability of *force majeure* to COVID-19, with one holding that it partially relieved the debtor restaurant of its rental obligation,[v] while the other Court denied such rental relief to CEC, the bankrupt owner of Chuck E. Cheese, holding that: "[t]he Court is sympathetic to the hardship which CEC has endured as a result of the global pandemic. However, neither the Bankruptcy Code, the *force majeure* clauses of the leases, nor the doctrine of frustration afford CEC the relief requested."[vi]

Future decisions are in the pipeline. Specific contract language will likely govern most of these disputes. If your matter runs the risk of litigation, you should consult counsel to better understand your rights, the law, and the range of possible outcomes.

Authors:
John Dellaportas
Beth Khinchuk

Emmet Marvin Litigation Practice Group, New York City

Paul Weinstein (Co-Head)
Tel: +1.212.238.3090
pweinstein@emmetmarvin.com

John Dellaportas (Co-Head)
Tel: +1.212.238.3092
jdellaportas@emmetmarvin.com

[i] *Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd.*, 782 F.2d 314, 319 (2d Cir. 1985).
[ii] *United States v. Brooks-Callaway Co.*, 318 U.S. 120, 122–23 (1943).
[iii] *Wuhan Airlines v. Air Alaska*, 1998 WL 689957, at *3 (S.D.N.Y. Oct. 2, 1998).
[iv] *Lakeman v. Pollard*, 43 Me. 463, 467 (1857).
[v] *In re Hitz Rest. Grp.*, 616 B.R. 374, 377-78 (Bankr. N.D. Ill. 2020).
[vi] *In re CEC Ent., Inc.*, 625 B.R. 344, 364 (Bankr. S.D. Tex. 2020).