

## FORCE MAJEURE CLAUSES AND THE COVID-19 PANDEMIC

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### I. Executive Summary

Most complex contractual agreements, from sale, license, distribution and services agreements to merger and acquisition documents will have “Force Majeure” provisions of one kind or another. “Force Majeure” is usually defined as events beyond the parties’ reasonable control or expectation such as the proverbial “Acts of God” that prevent one or both from performing their contractual obligations, and for which the contract provides a remedy. These provisions usually purport to excuse, toll (delay) or modify obligations to perform under a contract, and in some cases, especially when the Force Majeure event is prolonged, even give rise to a right to terminate the contract by the “injured” party, the party whose performance is not impeded by the event. Force Majeure provisions are sometimes standalone contractual provisions, but are also sometimes embedded in other provisions, like “Business Continuity” covenants or “Material Adverse Change” or “Material Adverse Event” clauses, which can excuse performance in M&A contexts.

For the first time in recent memory, even more than on 9/11, we may be living through a Force Majeure event in the form of the Covid-19 pandemic and forced reduction in on-site economic activity, and many ongoing contractual agreements may have Force Majeure provisions that are being pulled out and examined for whether they provide an excuse for performing the contract on time, in a modified way, or ever. It is not a good idea to be caught off-guard by invocation of a Force Majeure clause, and their impact can be minimized by getting out in front of the issue when necessary. Here is what you need to know and do.

### II. How Force Majeure Provisions Appear

Force Majeure clauses appear in a multitude of forms. Here is an example from a stock purchase agreement, but only one of many possible:

*“Target currently maintains, and has maintained for the 12 months prior to the date hereof, a plan with respect to business continuity and disaster recovery activities (the ‘Business Continuity Plan’). The Business Continuity Plan is current and in compliance with current with industry standards and is adequate to ensure that all business operations and records necessary for the overall operation and functionality of Target’s and its Subsidiaries’ business will continue to be available notwithstanding the*

*occurrence of any disaster, act of God, act of war, act of hostilities against the U.S., riots, shutdown of the electrical grid or the Internet backbone (each, a 'Force Majeure Event'). Without limitation of the foregoing, (a) the Business Continuity Plan specifically addresses the ability of Target and/or its Subsidiaries to provide each of the Services as defined herein in the event of a Force Majeure Event and (b) the Business Continuity Plan provides a mechanism for the off-site redundancy or back-up sufficient to ensure that any time-sensitive deliverables will not become unavailable for more than 2 business days due to any Force Majeure Event and that all other deliverables and equipment will function or otherwise be available within 5 business days of a Force Majeure Event."*

While force majeure provisions are often (unfortunately) treated as boilerplate and an afterthought, they are sometimes heavily negotiated, often resulting in "carve-outs" to the general provision, potential events which the parties are negotiating to actually be within their reasonable expectation, although highly unlikely, and for which they wish to contractually allocate responsibility, rather than merely excuse performance in a blanket way.

For example, imagine that the captain of the S.S. Minnow, a small pleasure boat based in Hawaii, runs day tours out of Honolulu, and that the representative of an eclectic group of tourists planning an excursion wishes to charter the Minnow for a three hour tour. The captain might want to include in the charter contract a right to cancel the excursion without full refunds of deposits for Force Majeure events, including Acts of God. The tourists might push back, and demand a carve-out for certain Acts of God, such as "the weather getting rough," on the grounds that the captain is in a better position than they to monitor the Honolulu area weather and plan for it, especially when forecasting only three hours ahead, and that if the captain cancels because of weather, they should be entitled to a full refund. And now, all of you know what first year law school is like, even if you never saw "The Paper Chase."

### III. What to do now

The issue for real contracts is serious, though, and the key is proactivity. The Covid-19 pandemic is a serious enough event in gravity and scope that it is going to be difficult to convince any ultimate court deciding a dispute that no modification of contractual performance affected by it should be excused. Any ongoing contract with executory (outstanding) performance obligations should be reviewed now for how it provides for Force Majeure events, what is covered, what is not, and what remedies the contract provides (delay, modification, excuse, termination, etc.). Whether you are the party prejudiced by another party seeking to excuse its performance based on Force Majeure, or the party claiming the excuse, and especially if an ongoing and substantial business relationship is involved, get out in front of

the issue, communicate with the other party, and seek to negotiate a short form modification that acknowledges the current event as an event of Force Majeure, and which, more specifically than the original contract did, provides for a one-time remedy of partial performance, delayed performance, substituted performance or otherwise. Of course, there may be situations in which termination of the agreement is the best solution, not only for the “injured” party, but sometimes even for the one seeking to excuse performance. Any negotiated solution will serve the parties better than ignoring an existing contractual provision, burying their heads in the sand until the storm passes, and then resuming normal activity to find claims, disputes, losses and damages alleged from not having addressed the problem at the outset.

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