

THE DAILY RECORD

COVID-19 and Force Majeure Provisions

By Jeffrey Murphy, Esq.

COVID-19 is affecting life around the world, and the real estate sector is no exception. As parties review their existing contractual relationships and consider new transactions, they should pay particular attention to force majeure provisions.

Many commercial contracts—including lease agreements, construction contracts and loan documents—contain a force majeure provision. Force majeure (French for “superior force”) is based on the principle that a party should not be obligated to perform—and should not be liable for failing to perform—its contractual obligations if uncontrollable circumstances preclude such performance.

The applicability, scope and effect of force majeure depend on the language of the contract.

Force majeure provisions are either exclusive or non-exclusive. A *non-exclusive* provision excuses a failure to perform “caused by events or circumstances beyond the party’s reasonable control” and may include “without limitation” a list of such factors. On the other hand, an *exclusive* provision excuses a failure to perform only if caused by a factor that is expressly stated in the contract.

COVID-19 is beyond anyone’s control and therefore is likely to be covered by a non-exclusive force majeure provision.

If an exclusive provision lists “pandemics,” “epidemics” or “quarantines,” then it’s also likely that COVID-19 will trigger force majeure, since the World Health Organization declared COVID-19 to be an epidemic and a pandemic and governmental authorities are instituting quarantines. “Acts of G-d” and “government actions” also might qualify. More attenuated factors may include “supply chain disruptions” and “unavailability of labor or materials.”

Conversely, if the provision is exclusive and does not include any of these causes, then it’s unlikely that force majeure will apply.

Even if COVID-19 falls within the parameters of a force majeure provision, the party’s failure to perform must be a direct result of the virus.

Absent a force majeure provision, an “act of G-d” is not, in and of itself, a legal excuse for failing to perform.

When reviewing a force majeure provision, consider these factors:

- Must the party claiming force majeure give notice to the other party “promptly” or within a specified number of days? What are the requirements for notice to be effective under the contract?

- Who determines whether there exists a claim for force majeure? Is it subject to independent verification? Is there a dispute resolution procedure? Are any particular events or obligations expressly carved out from force majeure?
- To what extent must the party claiming force majeure attempt to mitigate its effects? Are there any alternative means of performing?
- Does the party not relying on force majeure have any remedies, such as the right to terminate the contract if the circumstances giving rise to force majeure continue for more than a certain period of time?
- What are the consequences for improperly invoking force majeure? Can the other party claim repudiatory breach of contract or seek damages?
- Does a claim of force majeure affect a party’s obligations under other agreements? For example, does force majeure under a lease trigger a “material adverse change” notice requirement to the lender under a loan agreement? Must a landlord attempt to resist its tenant’s claim of force majeure lest the landlord risk breaching a covenant under its loan agreement to enforce the terms of its leases?
- Does business interruption or other insurance cover losses from the force majeure event? What are the terms and conditions of, and are there any prerequisites to, such coverage? Must a claim be filed within a certain period of time?
- How does applicable case law interpret and apply force majeure provisions?

In these uncertain times, parties seeking to understand their rights and obligations under existing contracts, and the risks and consequences of new deals, should scrutinize the applicability, scope and effect of force majeure provisions when determining how to proceed.



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