The Contract Implications of COVID-19

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We are undoubtedly in uncharted and unprecedented times with the rapid spread of COVID-19 in the United States and around the world. Contractual relationships in virtually every business and industry have been impacted and will continue to be impacted in the coming weeks. As a result, the following analysis should be undertaken when a party is unable to perform its contractual obligations due to the effects of COVID-19:

STEP 1: Review the contract to determine whether a *Force Majeure* provision exists, and if so, what events or conditions excuse performance.

Generally speaking, *Force Majeure* provisions excuse the performance of contractual obligations when certain events outside of the parties' control prevent performance from occurring—acts of God, epidemics, disease, war, terrorism, or other emergencies. Aukema v. Chesapeake Appalachia, LLC, 839 F. Supp. 2d 555, 560 n.5 (N.D.N.Y. 2012) ("[a] force majeure clause in a contract excuses nonperformance when circumstances beyond the control of the parties prevent performance"); Team Mktg. USA Corp. v. Power Pact, LLC, 41 A.D.3d 939, 942 (N.Y. App. Div. 3d Dep't 2007) (force majeure provisions "relieve a party of liability when the parties' expectations are frustrated due to an event that is an extreme and unforeseeable occurrence, that was beyond [the party's] control and without its fault or negligence") (internal quotation marks omitted).

The intention of the parties is paramount in determining whether COVID-19 and its attendant business disruptions fall within a contract's *Force Majeure* provision. Courts will look to the language of the *Force Majeure* clause in ascertaining the intent of the parties.

In addition, courts will narrowly construe a *Force Majeure* provision. Parties should take care to ensure that the event or condition claimed to excuse performance is either specifically referenced in the *Force Majeure* provision or encompassed by a catchall phrase in the provision before choosing to invoke the provision in either an offensive or defensive manner.

STEP 2: Even if the contract does not contain a *Force Majeure* provision, all may not be lost. Other common law contract doctrines are relevant and may be applicable, such as the doctrines of impracticability or impossibility.

For example, under Connecticut law, the impracticability doctrine excuses performance when "certain conditions cannot be met because of unforeseen occurrences." Dills v. Town of Enfield, 210 Conn. 705, 717 (1989). "A party claiming that a supervening event or contingency has prevented, and thus excused, a promised performance must demonstrate that: (1) the event made the performance impracticable; (2) the nonoccurrence of the event was a basic assumption on which the contract was made; (3) the impracticability resulted without the fault of the party seeking to be excused; and (4) the party has not assumed a greater obligation than the law imposes." Id. "Under the doctrine of frustration of purpose, as under the impracticability doctrine, the event upon which the obligor relies to excuse his performance cannot be an event that the parties foresaw at the time of the contract." O'Hara v. State, 218 Conn. 628, 638 (1991).

Similar common law defenses are also available under Massachusetts law in the absence of a *Force Majeure* clause. For instance, the doctrine of impossibility is widely recognized in Massachusetts and excuses performance when there exists "an unanticipated circumstance [which] has made performance of the promise vitally different from what should reasonably have been contemplated by the parties." Republic Floors of New England, Inc. v. Weston Racquet Club, Inc., 520 N.E.2d 160, 165 (Mass. App. Ct. 1988) (internal quotation marks omitted). "The type of circumstances envisioned by courts when applying the doctrine of impossibility generally involve extreme or unreasonable difficulty or expense that make it virtually, if not scientifically, impossible for a party to perform its obligations under a contract." Gurwitz v. Mercantile/Image Press, Inc., 2006 WL 1646144, at *2 (Mass. Super. 2006). "[I]t has long been assumed that circumstances drastically increasing the difficulty and expense of the contemplated performance may be within the compass of impossibility." Id. (internal quotation marks omitted).

Likewise, under the impracticability doctrine in Massachusetts, performance is excused "if the hardships or risks are so unusual and have such severe consequences that they must have been beyond the assignment of risks inherent in the contract, that is, beyond the agreement made by the parties." Wagner and Wagner Auto Sales, Inc. v. Land Rover North America, Inc., 539 F. Supp. 2d 461, 472 (D. Mass. 2008) (internal quotation marks omitted). In considering whether performance is excused on the basis of impracticability, Massachusetts courts examine "the foreseeability of the supervening event, allocation of the risk of the occurrence of the event, and the degree of hardship to the promisor." Id. (internal quotation marks omitted).

Lastly, in the case of a contract for the sale of goods, the Uniform Commercial Code, Section 2-615, regulates when a seller's performance is excused on the basis of impracticability. According to UCC § 2-615 (a), unless a seller has assumed a greater obligation, a seller's failure to make timely delivery of goods in whole or in part is excused "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 …" According to Official Comment 4, "a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance is within the contemplation of this section." In the event a seller's ability to perform is affected only in part, UCC § 2-615 (b) mandates that the seller "must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture." Finally, pursuant to UCC § 2-615 (c), a seller is required to seasonably notify the buyer of any delay or non-delivery, as well as the estimated quota made available for the buyer when allocation is required.

STEP 3: As we noted above, we are in uncharted and unprecedented times. Therefore, contract parties should act reasonably and practically in the event either their performance or their counterparty's performance is in doubt due to COVID-19. If performance is unlikely to occur, we recommend that contract parties promptly notify each other about the situation and maintain open lines of communication in an effort to reach an acceptable resolution. As always, it is imperative to document any discussions.

For now, it appears that uncertainty and volatility will only continue in the coming weeks as COVID-19 continues to spread. The resulting impacts on businesses are only likely to increase as well. As this occurs, any assessments of whether COVID-19 and its effects excuse the performance of contractual obligations, under either a *Force Majeure* provision or applicable common law doctrine, will need to be made on a case-by-case basis, only after a careful review of the contract at issue and the relevant facts.

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