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Force Majeure and Other Contractual Defenses during the COVID-19 Pandemic

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A contract, in short, is a legally binding promise. As part of that promise, each party agrees to do or pay for something in return for something else. Breaking that promise imposes legal consequences. However, in certain circumstances, parties to contracts may be able to avoid those obligations when unexpected events happen that make performance extremely difficult or impossible. It's important to note that this does not mean that a contract that is merely no longer profitable for one person can be excused- to the contrary, contracts like these are enforced all the time. Only major, unforeseen events may trigger the possible defenses to a breach of contract that may release a party from future obligations without legal consequence. This factsheet is meant to provide a broad overview of these types of potential defenses, especially in light of today's public health emergency.

It is important to note that these are general principles that apply to these types of defenses, but states may apply these doctrines very differently. Also keep in mind that there is a general duty to notify other parties to a contract, in a timely manner, about your inability to perform. If that notification is not made, you may not be able to rely on the defenses. Finally, even if you are able to assert any of these defenses, it is important to enter into the discussion realizing that you may still end up owing the other party for expenses and work that they have already performed, in addition to attorney's fees. At the end of the day your attorney will advise you in the best decision to make based on specific state law as well as the fact and circumstances surrounding your unique agreement.

Force Majeure

The contractual defense of "force majeure" is available when the written contract includes a force majeure clause that excuses a party's non-performance in situations when "acts of God" or other extraordinary and unforeseen events prevent a party from fulfilling its part of the agreement. A contract must specifically include a force majeure clause in order to rely on this defense.

Many force majeure clauses set out specific (and potentially very different) events that may excuse non-performance. Even when an event is extreme and unforeseeable, a party must prove that it is included in the intent of the specific clause.

For a party to successfully rely on this defense, they must show that: (1) they did not reasonably cause or control the event; (2) their ability to perform their obligations under the contract have been "prevented", "impeded" or "hindered" (depending on the language in the contract) by the event; and (3) they have taken all reasonable steps to seek to avoid or mitigate the event or its consequences. These elements are further discussed below:

Element 1: The Event

Force majeure clauses typically are triggered by unexpected natural events or policy changes such as new and unforeseen laws or regulations, war, or natural disasters. The clauses will typically include list of general events that qualify. If the clause does not include language relating specifically to a pandemic or epidemic, then a party must consider whether COVID-19, or its impact on a business or a project, is intended to be covered by the contract's language. Some force majeure clauses are broader in scope than others which necessitates a close examination of the specific wording. If you have a force majeure clause in your contract, but it does not specifically mention a pandemic, you should consult with your attorney for advice on whether the clause should be revised to include the current situation in future contracts.

Element 2: Performance

The affected party must show that the force majeure event caused them to be unable to perform their responsibilities agreed to in the contract. The language of the clause may make it more difficult to invoke the defense. For example, a clause that uses a word like "prevent" would be more difficult to prove than a clause that allows for events that "interrupt" or "impair." The broader the scope of the performance language, the easier it will be to implement this clause.

Element 3: Duty to Mitigate

A party relying on a force majeure clause will usually have to show that it has taken reasonable steps to avoid or mitigate the situation, and that there are no alternate means of fulfilling the contract. Whether a party's efforts to mitigate are reasonable depends on the nature of the contract and the specific facts. For example, fire destroys a tractor on the lot of an equipment dealer after a contract has been signed to sell it,

but before delivery has taken place. How reasonable is it for the dealer to have another similar tractor shipped in to replace it? If it is simply a matter of calling the manufacturer and ordering another, then that will likely be considered a reasonable step to avoid the situation, and this element will be difficult to meet.

Not only does a person have to prove each of these three elements, but they must also notify the other party, in a timely manner, that they will either be unable to perform or that their performance will be delayed. The longer a party waits to give timely notice, the less likely a court is to excuse performance based on the force majeure clause.

Other Defenses: Impracticability, Impossibility, and Frustration of Purpose

Other defenses may also be available if the parties to the contract did not include a force majeure clause; however, they are not mandatory- it is up to the judge as to whether they are recognized in specific situations. Because of this, a party who hopes to rely on any of the following defenses should consider working with an attorney. These defenses are impracticability, impossibility, and frustration of purpose.

Impracticability

Because many agreements do not include a force majeure clause, many states have adopted a statutory defense known as commercial impracticability. This provision gives sellers of "goods" , called merchants, a defense to liability for unfilled orders in circumstances like the COVID-19 pandemic. This defense may not be used by parties to a service contract or a contract for the sale of land.

For a party to invoke the defense of commercial impracticability, it must show that: (1) the contract was for the sale of goods; (2) an event occurred that made performance impracticable; (3) the parties did not consider or plan for the event in the contract or during negotiations; and (4) the seller gave the buyer timely notice of its inability to perform.

The seller must also demonstrate that no alternatives exist for it to meet its contractual without exceptional difficulty or extreme expense. For example, a fertilizer company that contracts to sell its product to a farmer may try to argue this defense if a manufacturer of the main chemical used in its product goes out of business and a new supplier is unavailable or the formula cannot be changed without great cost or delay. The facts and circumstances of why the seller was unable to supply the goods at issue is at the heart of determining whether commercial impracticability is an option as a defense. In some jurisdictions a buyer may also be able to use commercial impracticability; however the buyer will typically have to show that the goods they were going to purchase were to fulfill a specific need that has been made impracticable by the unforeseen event.

Impossibility

Along the same lines, a party may be able to invoke the common law defense of impossibility. "Common

law" means that it is not passed by the state legislature. Instead, it is a defense that has arisen as a result of court cases that have been decided throughout the years.

One benefit of the impossibility defense is that (unlike with impracticability) it is not limited to contracts that involve the sale of a good. Additionally, it is also a defense that is available and may be claimed by either party. Some states recognize impossibility and impracticability as the same defense, but others treat the two as separate defenses that may be claimed individually. Keep in mind that it is often harder to prove that performance is impossible rather than just impracticable.

Generally, impossibility requires that (1) performance is impossible; (2) the parties did not consider the intervening event in the contract or during negotiations; and (3) the party relying on the defense did not cause the event.

An inability to perform under a contract due to financial reasons is generally not enough to claim that performance is impossible (although some states do consider extreme economic hardship when considering the defense of impossibility). However, parties may rely on an impossibility defense when a regulation or government order makes performance impossible if similarly situated parties were also unable to perform because of the order/regulation. Further, if performance is now illegal, a party is not required under the contract to perform.

In the current situation, parties may be able to rely on it for disruptions caused by COVID-19 when performance is truly impossible. For example, if a state orders all non-essential businesses to stop operating in full, affected businesses could claim that it is impossible to fulfil contractual obligations while they are prohibited from operating. Use of this defense will depend on the exact wording of the contract, including language about firm deadlines for completion, and the specific restrictions that the state put in place through the stay-at-home order.

Frustration of Purpose

Some courts also recognize a separate doctrine called frustration of purpose. In this situation, performance is excused when an unforeseen and intervening event makes one party's performance worthless to the other side of the contract. It does not require that a party is unable to perform, but instead that a principal purpose of the contract is defeated without fault of the party relying on the defense.

For example, a farmer contracts with an aerial applicator to spray a field of soybeans for weeds, but before the applicator can complete their task a hailstorm destroys the entire crop. In this case the applicator could easily still apply the pesticide to the field; however, this action would provide no benefit to the farmer. In this example the purpose of the contract was frustrated and the court would likely look at potential remedies.

Notice Requirements and Remedies

Notice Requirements

Typically, a person must notify the other party of its inability to complete its part of the contract before claiming any of defenses discussed above. For force majeure clauses, depending on the exact language in the contract, the person may also be required to inform the other party of the anticipated consequences of the event. Some contracts with force majeure clauses also include a specific time by which the person using the clause needs to notify the other party. Generally speaking, the other defenses also require that the party asserting the defense notifies the other party in a "timely manner". If the disagreement went to court, a judge would decide whether they met that standard. Failure to give timely notice could result in forfeiting the ability to use any of these defenses.

Remedies and Consequences

The normal remedies for the defenses discussed in this factsheet are either an order for delayed performance or for termination of the contract. While the more common remedy is to delay performance of the contract until the event that created the situation has gone away; that is not always practical since some agreements have tight deadlines, or in the case of impossibility, no amount of time will allow the parties to complete the contract.

When parties are forced to terminate the contract, the goal is to return the parties to the position they were in before they entered into the contract. For instance, if the seller incurred expenses before the contract was terminated, then the buyer may still be liable for those costs even though further performance is no longer required. What remedy the court may order will often depend on the specific circumstances surrounding the case.

Conclusion

Possible defenses to a broken contract largely depend on the facts and language found in the agreement, although there are some situations where defenses are available even if contractual language addressing the issue is not included. It is important to note that parties can modify existing contracts to accommodate changes and avoid litigation if both sides are willing compromise. This is a common occurrence, but also one that is often overlooked by the parties to the contract. However, if no agreement can be reached, your attorney can advise you on the best decision of the defense to present at trial based on state law and the facts and circumstances surrounding your unique agreement.

References and Resources:

Agricultural Contracting

102 Am. Jur. Proof of Facts 3d 401 § 6

Excuse by Failure of Presupposed Conditions., Unif. Commercial Code § 2-615

Michael J. Detro et al, COVID-19 and Contractual Force Majeure Provisions, Davis, Wright & Tremaine, available at https://www.dwt.com/blogs/payment-law-advisor/2020/03/force-majeure-provisions-covid-19

Mark P. Henriques, Push the Pause Button? Contracts and COVID-19, AMERICAN BAR ASSOCIATION, available at https://www.americanbar.org/groups/business_law/publications/blt/2020/04/contracts-covid-19/

Restatement (Second) of Contracts § 261, 265 (1981) (October 2019 Update)