Monday, March 16, 2020

The recent surge of the COVID-19 pandemic and its catastrophic effect on worldwide events has put the standard contract clause, “force majeure,” in new light.

A force majeure clause, French for “superior force,” is a negotiated contract provision that allows either party to a contract to suspend or terminate the performance of its personal contractual obligations when certain circumstances beyond their control suddenly occur — making that party’s inability to render its performance inadvisable, impractical, impossible, or potentially illegal.

To determine whether a force majeure clause applies and if it can be used as a basis for non-performance, most state courts generally will review and analyze certain factors, including:

1. The precise language in the clause;
2. Specific evidence to establish the force majeure event was unforeseeable;
3. A causation analysis between the force majeure event being relied upon and its connection to the party’s non-performance of its contractual obligations;
4. Evidence that the impact of the force majeure was so severe that the contractual obligations are incapable of being performed.

Typically, a force majeure clause will include a standard, specific list of events or occurrences that have been agreed on as a basis for either party’s non-performance and deemed unforeseeable. Standard events include “acts of God” (including fire, earthquakes, hurricanes, floods, and tornados), war, riots, strikes, lockouts, specific federal, state, or local governmental actions prohibiting or affecting either party from performing their contractual obligations.

However, as with any contract,

it is important to review this clause at the time the contract is drafted, and, even more importantly, that a careful review of the specific language is conducted before a party attempts to use this “performance escape” promise in today’s pandemic environment.

For example,

if the list of unforeseeable events does not include the phrase epidemic or pandemic, will COVID-19 be considered an excusable “act of God” to forgive performance?

Will a state or local government’s current enactment of temporary attendance limitations still be in place and affect an event in June or July to allow use of a force majeure clause as an excuse for performance in either of those months?
As parties review existing agreements for the potential application of the force majeure clause as a legal basis for non-performance in our current environment, consider the following:

- **What relevant state law application is in the contract?**
  - What are the specific state law enforcement requirements on enforcement of force majeure provisions?

- **What is the timing of the event in question and can the force majeure clause be used to excuse responsibility for an event that will not occur in the very near future?** How close in time is the qualifying force majeure event to the mandated date of performance, 30 days, 60 days, 90 days, or more? Will the qualifying force majeure event no longer have an impact at the time of the scheduled contractual performance?

- **Does the agreement contain any specific notice requirements?** When and to whom must notice be given to the other party regarding the qualifying force majeure event for it to be effective and for the party to be legally excused from performance of its contractual obligations?

- **How will an unresolved dispute over the interpretation of the force majeure clause be handled?**
  - Is there an arbitration provision in the contract or will an unresolved dispute result in litigation?
  - Burden of proof: Typically, the party attempting to use the force majeure clause has the burden to establish that a force majeure has occurred.

While we all focus on the continued safety and health of individuals around the world and efforts to limit the impact of COVID-19, the need to assess the continued feasibility of hosting scheduled events become clearer. Jackson Lewis’ Collegiate and Professional Sports Practice Group is available to assist you in the review and interpretation of any existing contracts that contain force majeure provisions for relevancy as a result of the COVID-19 crisis. Please feel free to reach out to any member of the Collegiate and Professional Sports Practice Group with questions.

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