



SCHUELKE LAW

Coronavirus/Covid-19 And *Force Majeure* Clauses

Many commercial contracts have a *force majeure* clause that will excuse a party's nonperformance of its contractual obligations for something outside the control of the parties.

In the wake of the Covid-19 pandemic, many people and companies find themselves in a position where they can't perform under their contracts. The liabilities of those parties will often depend on the language in the *force majeure* clauses in their contracts.

To make this a little more interesting, I'm going to look at something fun — the NBA collective bargaining agreement — to look at some of the issues that parties will need to answer when trying to determine their liability.

THE *FORCE MAJEURE* CLAUSE

I'm simplifying it, but the NBA's collective bargaining agreement, which sets out rules for payment of players, provides:

5(a). "Force Majeure Event" shall mean the occurrence of any of the following events or conditions, provided that such event or condition either (i) makes it impossible for the NBA to perform its obli-

gations under this Agreement; or (ii) frustrates the underlying purpose of this Agreement; or (iii) makes it economically impracticable for the NBA to perform its obligations under this Agreement: wars or war-like action; sabotage; terrorism or threats of sabotage or terrorism; explosions; epidemics; weather or natural disasters, including but not limited to, fires, floods, droughts, hurricanes, tornados, storms or earthquakes; and any governmental order or action; provided, however, that none of the foregoing enumerated events or conditions is within the reasonable control of the NBA or an NBA team.

(b) If a Force Majeure Event occurs and, as a result, one or more Teams are unable to play one or more games, then, for each missed game during such period that was not rescheduled and replayed, the compensation payable to each player who was on the roster of a team that was unable to play one or more games during the Force Majeure Period shall be reduced by 1/92.6th of the player's compensation for the season.

(d) Upon the occurrence of a Force Majeure Event, the NBA shall have the right to terminate this Agreement as of the sixtieth (60th) day following delivery to the Players Association of a written notice of termination, which must be delivered to the Player's Association with sixty (60) days of the Force Majeure Event.

THE ANALYSIS

Using this clause as an example, there are several issues that a party must examine to determine the party's liability when something prevents performance. Because every *force majeure* clause is different, it is critical to look at the wording of the contract.

1) What Are The *Force Majeure* Events?

Most contracts have a list of specific *force majeure* events. Here, the NBA contract is very specific and lists at least two specific items that would likely allow the NBA to invoke the *force majeure* clause in the contract.

First, the NBA contract is one of the rare contracts that lists an epidemic as a *force majeure* event (though we'll expect to see "epidemic" and "pandemic" added to many boilerplate contracts in the future). It would be difficult to argue that our current Covet-19/Coronavirus reality wouldn't fall under this provision.

Second, the "governmental order or action" provision, which is more likely to be found in most boilerplate agreements, would also likely be a *force majeure* event, especially in the markets where gatherings of 10 or more people have

been banned.

Another thing unique about this agreement is that it does not have an Act of God provision. Many boilerplate agreements list "Act of God" as a *force majeure* event. An Act of God clause is obviously broad, allowing for interpretation (and litigation) over what constitutes an Act of God. Courts throughout the country treat Act of God clauses in different ways, but it's fair to say that most jurisdictions are conservative on its applicability. If you are relying on the Act of God provision, be ready for a fight.

The NBA agreement also does not have a general provision. Many boilerplate agreements have a list of specific *force majeure* events and then add a provision that a party is also excused "for any similar events" or something similar to that phrase. Again, these general provisions are treated differently by courts around the country, but most jurisdictions are very strict when relying on the general provisions.

2) Was The *Force Majeure* Event Foreseeable?

In Texas, if the *force majeure* event is specifically enumerated in the contract, then the provision applies even if the event was foreseeable. However, other states have different rules on this, and many states require that the event must be unforeseeable, even for enumerated events. Obviously, there is debate in the political realm about whether it was foreseeable that a pandemic might occur. So this might be an issue for litigation in some jurisdictions.

3) Was The *Force Majeure* Event The Sole Cause Of Non-Performance?

In some jurisdictions, the *force majeure* event must be the sole cause of non-performance. Otherwise, if there was another cause of non-performance, then the party can't rely on the *force majeure* clause to defend its actions.

Some jurisdictions are hybrids. For example, in Texas, the best arguments seem to indicate that if a party is relying on an Act of God event, then the Act of God has to be the sole cause, but for other enumerated events, being the sole cause is not required.

4) What Is The Triggering Standard?

Every *force majeure* clause has a triggering standard that must be met before the *force majeure* clause kicks in.

Here, the NBA *force majeure* clause kicks in if (1) the triggering event makes the NBA's compliance with the contract impossible, (2) the triggering event frustrates the underlying purpose of the agreement, or (3) the triggering event makes it economically impracticable for the NBA to comply with the agreement.

This provision, which sets out three of the more common standards required for a party to invoke the *force majeure* clause, is better than most contracts.

Most contracts have one standard that is often fairly vague. Other common standards in contracts include that the triggering event makes compliance illegal, difficult or unreasonable.

Obviously, whether the standard is met is a ripe area for dispute in litigation.

5) Did You Try To Overcome The *Force Majeure* Event?

In Texas, the party does not have an obligation to use reasonable diligence to try and overcome the *force majeure* event. But many other states require that a party relying on a *force majeure* clause must use reasonable diligence to try and overcome the *force majeure* event.

6) When Do You Have To Give Notice That You Are Invoking The *Force Majeure* Clause?

The first part of the NBA's *force majeure* clause doesn't have a notice provision. However, the provision regarding canceling the collective bargaining agreement entirely (subpart d), provides that the NBA must give notice to the NBA Player's Association within 60 days of the Force Majeure Event.

In this case, this area is ripe for litigation. What is the day that the *force majeure* event occurred? Was it the day the first case hit the US? Was it the day the WHO declared a pandemic? Was it the night that the first NBA player tested positive leading to the first canceled game?

These notice provisions will be a source of contention in many of these cases.

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