

To Our Clients and Friends
Memorandum



**COVID-19 AND THE LAW:
TIME TO CHECK YOUR *FORCE MAJEURE* CLAUSE**

March 24, 2020

The COVID-19 pandemic has left many businesses in limbo. Government shutdowns and health restrictions designed to limit the spread of the coronavirus are disrupting contractual relations throughout the world. The question in such instances is, who must ultimately bear the economic brunt of these unprecedented developments?

Enter the *force majeure* clause. Rarely the subject of negotiation, a *force majeure* provision typically hides in the back of the contract, lurking amidst the various boilerplate provisions for notice, severability, choice of law, and whatnot. A typical clause will say what happens in the event of any of a parade of horrors, such as earthquakes, storms, floods, fire, plague, and other “Acts of God,” as well as man-made disasters such as terrorism, riots, war, insurrection, nuclear and chemical contamination, and failures of public infrastructure.

As articulated by the New York courts, the purpose of a *force majeure* clause is to “relieve a party from its contractual duties when its performance has been prevented by a force beyond its control or when the purpose of the contract has been frustrated.”ⁱ Unforeseen or unanticipated difficulty or inconvenience, or changed circumstances or impracticality, however, are not usually recognized as justifying non-performance of a contractual obligation. Rather, the event must be “beyond the control and without the fault or negligence” of the party relying on the *force majeure* provision, and the non-performing party has a duty to show what action it took to perform its contractual duties despite the calamity relied upon to excuse performance.ⁱⁱ

For the current crisis, we recommend three steps:

- #1: Check your contract. Does it contain a *force majeure* clause? If not, then the parties may have to resort to fuzzier common law doctrines of impossibility and/or frustration of purpose to resolve their dispute. If the contract does contain such provision, does it specifically list epidemics or government shutdowns? New York, in particular, “narrowly construes *force majeure* provisions, and limits them to contingencies specifically listed or similar to those listed.”ⁱⁱⁱ

- #2: Consider your context. How, specifically, was contractual performance impacted by the pandemic? Was it made impossible by government decree, or only more difficult by unavailability of person or product?
- #3: Call your counterparty. As with other contract matters, litigation is a last resort, not a first step. Contracting parties should try to work together to resolve issues created by this epidemic, rather than seek to exploit them.

If a matter does require litigation, our legal system--once it resumes full operation--should be well equipped to deal with it. While pandemics may seem new to us, the courts have been dealing with them for centuries. Indeed, much of our current civil law descends from the 6th century Justinian Code, which was shaped during decades of bubonic plague that infected half the population of Europe.

In 1857, for instance, the Supreme Judicial Court of Maine was called on to decide the case of a laborer who skipped out on his shift at the local sawmill, “by reason of the alarm and danger occasioned by the prevalence of the cholera in the vicinity.”^{iv} The Court held that: “The plaintiff was under no obligation to imperil his life by remaining at work in the vicinity of a prevailing epidemic so dangerous in its character that a man of ordinary care and prudence, in the exercise of those qualities, would have been justified in leaving by reason of it...”^v

Judges and juries of our own era will soon be called on to make similar determinations. You should expect your specific contract language to govern most disputes. If a matter runs the risk of litigation, you should consult your legal counsel early in the process, to better understand your rights, the law, and the range of possible outcomes in the courts.

Authors:
John Dellaportas
Beth Khinchuk

Emmet Marvin Litigation Practice Group New York City

[Paul Weinstein \(Co-Head\)](#)

Tel: +1.212.238.3090

pweinstein@emmetmarvin.com

[John Dellaportas \(Co-Head\)](#)

Tel: +1.212.238.3092

jdellaportas@emmetmarvin.com

ⁱ *Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd.*, 782 F.2d 314, 319 (2d Cir. 1985).

ⁱⁱ *United States v. Brooks-Callaway Co.*, 318 U.S. 120, 122–23 (1943).

ⁱⁱⁱ *Wuhan Airlines v. Air Alaska*, 1998 WL 689957, *3 (S.D.N.Y. Oct. 2, 1998).

^{iv} *Lakeman v. Pollard*, 43 Me. 463, 467 (1857).

^v *Id.*