Sports Litigation Alert

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Force Majeure in the Covid Era – What Now?

By Elizabeth McGinn, Ryan Pollard, and Anthony Carral

The Covid-19 pandemic has significantly impacted all aspects of the global economy, and sports is among the many industries that moved quickly to minimize the disruption. Very early on, members of the sports industry scrambled to analyze their force majeure clauses as customers, vendors, and key partners sought relief from their contractual obligations.

Legal teams responded to inquiries into the contractual issues raised by Covid-19 in two key ways. One was how existing force majeure clauses would likely be interpreted in light of the pandemic. The other was how to revise force majeure clauses to clearly capture pandemic-related events — and more importantly, to set forth what monetary or other obligations would follow a force majeure event. By most accounts, reliance on the clauses has to this point largely mitigated the adverse effects of the forced cancellation of sporting events and failure to perform by related vendors and key partners due to Covid-19. But the shelf life of the force majeure clause as a safety net for further Covid-19-related issues may be nearing its end.

Force majeure clauses operate to excuse or delay performance under a contract if an event beyond the control of the impacted party arises and prevents that party from so performing. According to Black's Law Dictionary, force majeure clauses serve to allocate "the risk of loss if performance becomes impossible or impracticable" under circumstances that the parties could not have anticipated or controlled.[1]

There is no specific and uniform test for analyzing force majeure clauses, and accordingly, state courts typically have a varied approach in interpreting the clauses. Most courts, however, start with the language of the force majeure provision itself. Force majeure clauses generally share a common structure in that they typically contain a list of triggering events, such as riots, wars, civil disorders, strikes, and acts of God. Not surprisingly, this list of events now generally includes pandemics or epidemics. Courts generally construe the scope and reach of the force majeure provision in any contract narrowly and to extend only as far as the express language provides, which is why alert drafters will include catch-all language such as "any other events beyond our reasonable control" to capture other potential disruptions not specifically identified.

The second key aspect many courts consider in the force majeure analysis is whether the underlying event caused issues that were out of the reasonable control of the party seeking to be excused. The "reasonable control" standard is subjected to court analysis through a number of paths, often (1) a common law requirement regardless of the contracting language, (2) contract language providing that no event gives rise to a force majeure excuse unless it causes events that are beyond the reasonable control of the applicable party, or (3) contract language providing a catch-all provision in the applicable force majeure clause and a specific listed event does not apply.

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1 *Force Majeure Clause,* Black's Law Dictionary (11th ed. 2019).

Based on precedent, courts in California and Pennsylvania read the reasonable control component into the specific wording of the force majeure clause.2 California, for example, requires parties to show that they exercised good faith in not causing the force majeure event, and diligence in taking reasonable steps to ensure performance.3

In Texas, however, the extent to which reasonable control is analyzed depends on the language of the force majeure provision. For example, in Sun Operating Ltd. P'ship v. Holt, the contract contained a list of specific force majeure events and then concluded with the following catch-all definition: "any cause whatsoever beyond the control of the Lessee,"4 and the court found that "before any event can be successfully invoked as force majeure by the Sun parties, it must be outside of their reasonable control."5 The Court determined that the catch-all provision evidenced the intent that the reasonableness qualification apply to each of the force majeure events. On the other hand, in PPG Industries, Inc. v Shell Oil Co., the Fifth Circuit affirmed the district court's interpretation of Texas law holding that the nonperforming party did not have to prove that a specific force majeure event was beyond its reasonable control6 because the matter of control set forth in the catch-all clause preceded the list of force majeure events and therefore did not set the standard for the enumerated list of events – the clause at issue stated that the party would be excused if there was an event beyond its reasonable control or if any one of a list of specific force majeure events occurred.7

What is or is not reasonable is itself hard to predict. It is difficult to argue that the initial spread of Covid-19, the mass shut down, and other adverse effects stemming from the spread could have been prevented, controlled, or mitigated by individual contracting parties. However, as the country settles into its new normal, in which most epidemiologists believe that Covid-19 may very well persist for some time, the reasonableness standard may evolve. With social distancing, testing, and other measures either required or widely prevalent in many jurisdictions, it could over time become more difficult to assert that the spread of Covid-19 was beyond the reasonable control of a party. It is far from clear that the force majeure clauses wisely crafted a few months ago will establish the safety net they were intended to provide. Sports teams that beefed up their force majeure clauses in response to the pandemic may be operating under a false sense of security.

While the problem may be complex, the solution need not be. Parties can separate Covid-19 from force majeure clauses. While force majeure clauses commonly deal with excuses for unknown or unpredictable reasons, they less commonly deal with known or existing issues. Existing environmental concerns are often handled in contracts as standalone provisions or built in as conditions precedent to performance in contracts. Similarly, there is no legal bar or compelling reason why Covid-19 cannot be addressed as a stand-alone provision separate from the force majeure clause. In doing so, parties can subvert the adverse effects and implications of force majeure provisions and address Covid-19 effects with clear rights and remedies identified.

Teams looking to control the effects of Covid-19 should treat it just as epidemiologists do: directly as its own issue and with a clear focus.

2 *See Watson Labs. v. Rhone-Poulenc, Inc., 178 F. Supp. 2d 1099, 1110 (C.D. Cal. 2001); Martin v. Commonwealth, 548 A.2d 675, 678 (Pa. Commw. Ct. 1988).*

3 *See Oosten v. Hay Haulers Dairy Emp. & Helpers Union,* 45 Cal.2d 784, 789-90 (1955) (an event must be the proximate cause of nonperformance of the contract).

4 984 S.W. 2d 277, 280 (Tx. Ct. App. 1998).

5 *Id. at 288.*

6 727 F. Supp. 285, 287–88 (E.D. La. 1989), *aff'd*, 919 F.2d 17 (5th Cir. 1990).

7 *Id.*

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