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Coronavirus: Buying Time in Uncertainty

The economic consequences of Coronavirus (COVID-19) will be felt for years to come. For businesses facing decisions critical to their survival, time has become the most precious commodity to ride out the storm. Below, our team lays out some of the issues faced globally relevant to a successful invocation of the doctrine.

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As the global economy deteriorates at an unprecedented speed, revenue streams dry up, and the U.S. dollar appreciates dramatically against other currencies, companies are facing critical decisions to ensure their survival. Debt and other contract obligations pile up while workers are sent home to quarantine themselves and business prospects evaporate. COVID-19 will have brutal economic consequences for the foreseeable future. Preserving cash has become critical for many businesses. Time becomes a precious commodity to ride out the storm.

If gaining time is critical to the continued operations of a company, preparing to invoke *force majeure* in loans with lenders, or with other counterparties, can significantly increase the likelihood of a positive commercial outcome and a positive outcome in subsequent legal cases.

Force Majeure in Pandemics

Most commercial agreements governed by New York or English law contain a *force majeure* clause (meaning "superior force") that may be used to excuse one or both parties from their obligations when an unforeseen act or difficulty occurs, out of either party's control, that materially impedes, delays, or prevents performance of obligations under contract.

These clauses sometimes reference a health epidemic as a reason to excuse performance and suspend obligations for one party. They may also contain a time limit on how long the crisis can extend, and if it exceeds that time then either party may terminate an agreement, normally without penalty.

One challenge is that *force majeure* clauses do not typically contain language that expressly states when a party may invoke *force majeure*. Contracts may also not contain a *force majeure* clause at all. The COVID-19 pandemic is a unique event in modern history, yet there are no clear tests to determine if the COVID-19 pandemic would constitute a *force majeure* event. The strength of a *force majeure* argument will be determined by the wording of the contract, the nature and circumstances of the contract and the circumstances of the counterparties.

Courts have not developed clear guidance as to whether epidemics or pandemics constitute *force majeure* events.

The analysis to determine whether a pandemic constitutes *force majeure* under New York law, for example, is complex because there are different events arising out of the pandemic (e.g., stock market falls, "acts of prince", lockdown regulations by governments, fear, etc.), and courts could consider that each event would have a different level of foreseeability and level of control for the parties to actually comply with the obligation. Thus, a New York court is likely to analyze force majeure cases by looking at the circumstances that drove the party invoking *force majeure* to suspend obligations under the contract.

English courts have recognized pandemics to be *force majeure* events, subject to the specific facts of the case in question. Under English law, the catch-all wording "beyond reasonable control" may be sufficient if a court determines that the factual circumstances caused by the pandemic are beyond the reasonable control of the parties and no other factors prevented the invoking party from performing.

In Brazil, courts have also previously recognized epidemic and pandemic events, such as H1N1, to qualify as *force majeure* events. The main factor of a *force majeure* event that Brazilian courts have looked at is its inevitability, and that it derives from natural events, such as earthquakes, floods and, in this case, an epidemic.

Under Argentine law, *force majeure* is codified in the civil code and defined as an event that could not have been foreseen or that, having been foreseen, could not have been prevented. A global pandemic can also trigger another legal theory known as the hardship provision under which performance would be delayed in the event of a change in circumstances, and for as long as the emergency lasts, but would not relieve the invoking party from complying with the original obligations once the unforeseeable event has passed.

Preparing to Invoke Force Majeure

The bar for successfully invoking *force majeure* is high. Lenders and other commercial counterparties, who are not themselves looking to be excused from performance, can be expected to vigorously contest a party invoking *force majeure*. Therefore, it is critical to lay the ground carefully in any given jurisdiction before invoking a *force majeure* doctrine to stand the best chances of a successful outcome whether through negotiation or in court or arbitration.

The law that governs the contract at issue will be the one to determine if the COVID-19 pandemic constitutes a *force majeure* event. Even if a contract does not contain a *force majeure* clause, the governing law of the agreement may provide relief.

Legal requirements to succeed in *force majeure* litigation vary significantly from one jurisdiction to another. Designing a strategy that is customized to the facts and law governing the contract is important given the differences. For example, New York excuses performance only when it is truly impossible, rather than merely impracticable, to perform, which generally requires showing that destruction of the subject matter of the contract, or the means of contractual performance, make the satisfaction of obligations impossible. California, on the other hand, allows *force majeure* to be invoked when it is impracticable to perform, meaning that performance would require excessive or unreasonable expense.

KEY TAKEAWAY: Companies that have New York or English law contracts would benefit from proactively preparing to invoke *force majeure* to preserve the highest likelihood of success in future litigation if a commercial solution becomes unviable. For companies that must conserve cash to ensure survival, successfully invoking *force majeure* in their contracts with lenders may be the only viable option.

About Kobre & Kim's Claim Monetization & Dilution Team

Kobre & Kim is a conflict-free Am Law 200 law firm focused on disputes and investigations, often involving fraud and misconduct.

We are the only firm that provides holistic, integrated services for complex, cross-border claims disputes. Our integrated team of former U.S. federal prosecutors, Hong Kong solicitors, UK solicitors and barristers (including King's Counsel) and offshore lawyers, uniquely positions us to drive and anticipate strategies on both sides of a given dispute. Additionally, our conflict-free model enables us to maintain our independents ready to litigate against virtually any institution.

Many of our cases involve closely coordinated cross-border proceedings, and we are able to either advocate directly, or to work cooperatively with local counsel, in jurisdictions in the U.S., Latin America, EMEA, Asia and key offshore financial centers.