

AN UPDATED CHECKLIST & FLOWCHART FOR ANALYZING FORCE MAJEURE CLAUSES DURING THE COVID-19 CRISIS

To Our Clients and Friends:

In March of 2020, as the COVID-19 pandemic and the consequent government shutdown orders forced business closures and event cancellations across the United States, we provided a [four-step checklist and flowchart](#) on evaluating contracts' *force majeure* provisions in order to aid contracting parties in understanding their options. *Force majeure* (or "act of god") provisions are the most common terms in commercial contracts that address parties' obligations when they become unable to comply with contract terms. These provisions generally set forth limited circumstances under which a party may suspend performance, fail to perform or, in some cases, terminate the contract, without liability due to the occurrence of an unforeseen event.^[1]

In the months since March 2020, as commercial disputes over these clauses have wended their way through the courts, some patterns have emerged regarding litigants' and courts' treatment of *force majeure* clauses in light of the pandemic. The courts' discussions of these clauses in decisions over the past sixteen months provide supplemental guidance regarding the four steps of analysis of the application of *force majeure* clauses.

STEP 1: Does COVID-19 trigger the force majeure clause? *The first step is to review the triggering events enumerated in the force majeure clause.*

First, as we explained back in March 2020, *force majeure* clauses pre-COVID tended to be interpreted narrowly and therefore COVID-19 might not be a covered event under the general rubric of "acts of God" absent reference in the relevant clause to a specific triggering event.^[2] Among those triggering events can be events relating to diseases, including "epidemic," "pandemic," or "public health crisis." At the onset of the 2020 crisis, there was general consensus that COVID-19 would be covered under any of these categories, and that has not changed. Likewise, other clauses referring to government actions also seemed likely to be triggered by the restrictive executive orders regulating the size of gatherings or shuttering certain businesses, and our guidance has not altered on this point. "Catch all" language invoking other events or causes "outside the reasonable control of a party" seemed likely to broaden the interpretation of such clauses to reach COVID-19 and its derivative impacts, except in the case where such language is qualified by an exclusion of events of general applicability.

The great majority of the early published decisions on *force majeure* continue to adhere to the principles in our early guidance; however, litigants in cases to date appear to have primarily engaged the courts to resolve disputes over the *effect* of triggering their *force majeure* provisions and therefore have not engaged in litigation over *whether* COVID-19 triggered the relevant *force majeure* clause in the first place.

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For example, in *Future St. Ltd. v. Big Belly Solar, LLC*, 2020 WL 4431764 (D. Mass. July 31, 2020), the issue confronting the court was whether the difficulties in making certain minimum purchases and payments under the parties' contract was **caused** by COVID-19 or not; there did not appear to be a dispute that the relevant force majeure provision would have been triggered if COVID-19 had indeed been the precipitating cause. The court in that case held, consistent with the prior case law, that the plaintiff failed to establish causation but assumed without discussion that "the pandemic and effects of same" were a valid triggering event under the relevant *force majeure* clause, which excused failure to perform "occasioned solely by fire, labor disturbance, acts of civil or military authorities, acts of God, or any similar cause beyond such party's control." *Id.* at *6.

Similarly, in *Palm Springs Mile Assocs., Ltd. v. Kirkland's Stores, Inc.*, 2020 WL 5411353 (S.D. Fla. Sept. 9, 2020), the parties raised the issue of whether the defendant (who was seeking to excuse its failure to pay rent) had adequately demonstrated that county regulations restricting non-essential business operations "**directly** affect[ed] [its] ability to pay rent." *Id.* (emphasis added).[3] The court concluded he had not. And in something of a "split the baby" decision, *In re Hitz Rest. Grp.*, 616 B.R. 374 (Bankr. N.D. Ill. 2020), held that the triggering of a *force majeure* clause only "partially excuse[d]" a restaurant tenant's obligation to pay rent after Illinois' executive order suspending in-person dining services went into effect. Examining the factual record, the *Hitz* court held that the restaurant could have used approximately 25% of its space to conduct activities that were still permitted following the executive order, including food pick-up and delivery services. Accordingly, the court held that the tenant was still on the hook for 25% of the rent. *See, id.* at 377 (finding *force majeure* clause to have been "unambiguously triggered" by an executive order).

Thus, because litigants generally have not disputed that COVID-19 falls within one or more of the enumerated events in the clauses to have been considered by courts thus far, most courts have not had occasion to opine on whether COVID-19 would trigger a clause that listed only "acts of god" without specific triggering events such as pandemic. The one outlier appears to be a single case from a New York federal court, which concluded that COVID-19 qualifies as a "national disaster" based on a number of factors, including Black's Law Dictionary's definition of "natural" and "disaster"; the Oxford English Dictionary's definition of "natural disaster"; and the fact that "the Second Circuit has identified 'disease' as an example of a natural disaster." *See JN Contemporary Art LLC v. Phillips Auctioneers LLC*, 2020 WL 7405262, at *7 and n.7 (S.D.N.Y. Dec. 16, 2020) ("It cannot be seriously disputed that the COVID-19 pandemic is a natural disaster."). Interestingly, the generic "acts of God" category in a force majeure clause has been interpreted to include "national disasters" even as it has been interpreted to exclude public health events like pandemics. What the Southern District of New York decision does not clarify is whether the Court now views COVID-19 as covered by a generic "acts of God" provision even if that provision does not specifically enumerate "national disasters." It also remains to be seen whether other courts will follow in the footsteps of the federal court's expansion of jurisprudence or whether other courts will continue to adhere to the notion that *force majeure* provisions should be interpreted narrowly.

STEP 2: What is the standard of performance? *The second step is to review what specifically the force majeure clause excuses.*

As described above, a number of early cases have tackled the causation component of force majeure, concluding that, consistent with prior cases, a litigant must establish a direct relationship between the alleged triggering event and the performance he or she alleges should be excused. A review of COVID-19 *force majeure* cases also reveals that courts have taken a narrow approach when analyzing the related question of whether the remedy sought by the litigant invoking *force majeure* is available under the express language of the contract. For example, in *MS Bank S.A. Banco de Cambio v. CBW Bank*, 2020 WL 5653264 (D. Kan. Sept. 23, 2020), the plaintiff sought to delay the defendant’s termination of a service agreement based on *force majeure*, but the court analyzed the agreement and held that “nothing in the Services Agreement” allowed the plaintiff “to forestall termination based on *force majeure*.”

Similarly, in *NetOne, Inc. v. Panache Destination Mgmt., Inc.*, 2020 WL 6325704, (D. Haw. Oct. 28, 2020), the plaintiff argued that the defendant had breached its agreement by refusing to refund a deposit after the plaintiff terminated its event contract based on the agreement’s *force majeure* provision. The court held for the defendant, finding no language in the contract that obligated the defendant to refund deposits based on a triggering of the *force majeure* clause. In contrast, the *force majeure* clause in the contract at issue in *Sanders v. Edison Ballroom LLC*, No. 654992/2020, 2021 WL 1089938, at *1 (N.Y. Sup. Ct. Mar. 22, 2021), expressly stated that defendant would “refund all payments made by” the plaintiff in the event that the clause was triggered. The court in *Sanders* therefore awarded summary judgment to the plaintiff, requiring defendant to refund the full deposit previously paid by plaintiff on an event space due to the fact that the act of a “governmental authority” had made it “illegal or impossible” for the defendant to hold the event, thus triggering the *force majeure* clause. *Id.* at *3.

Ultimately, as we cautioned in March 2020, it is vital to understand not just whether or when your *force majeure* clause has been triggered, but what happens next. Often, such a clause provides an excuse for delaying performance, but only if that failure is directly caused by the *force majeure* event, as in many of the cases discussed herein. Other contracts provide that that performance may be delayed in light of a *force majeure* event, but only so long as the *force majeure* event continues.

It is worth noting that all of the foregoing cases were analyzing contracts entered into before COVID-19 came to dominate all of our lives. It will be interesting to see how courts analyze force majeure clauses in contracts executed after March 2020 and whether that context will make a difference in terms of how narrowly courts read such provisions.

Does the <i>force majeure</i> clause broadly cover events caused by conditions beyond the reasonable control of the performing party without enumerating specific events?	No <input type="checkbox"/>	Yes <input type="checkbox"/>		If yes, proceed to Step 2. Inquiry should also be made into what additional elements a party may need to demonstrate based on the applicable law. Some courts may require a party invoking a
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				<p><i>force majeure</i> provision to demonstrate that the triggering event was beyond its control and without its fault or negligence and that it made efforts to perform its contractual duties despite the occurrence of the event.</p>
<p>Does the <i>force majeure</i> clause specifically reference an “epidemic,” “pandemic,” “disease outbreak,” or “public health crisis”?</p>	No <input type="checkbox"/>	Yes <input type="checkbox"/>		<p>If yes, proceed to Step 2.</p> <p>Inquiry should also be made into what additional elements a party may need to demonstrate based on the applicable law. Some courts may require a party invoking a <i>force majeure</i> provision to demonstrate that the triggering event was beyond its control and without its fault or negligence and that it made efforts to perform its contractual duties despite the occurrence of the event.</p>
<p>Does the <i>force majeure</i> clause refer specifically to “acts of civil or military authority,” “acts, regulations, or laws of any government,” or “government order or regulation”?</p>	No <input type="checkbox"/>	Yes <input type="checkbox"/>		<p>If yes, proceed to Step 2.</p> <p>Inquiry should also be made into what additional elements a party may need to demonstrate based on the applicable law. Some courts may require a party invoking a <i>force majeure</i> provision to demonstrate that the triggering event was beyond its control and without its fault or negligence and that it made efforts to perform its contractual duties despite the occurrence of the event.</p>
<p>Does the <i>force majeure</i> clause cover only “acts of God”?</p>	No <input type="checkbox"/>	Yes <input type="checkbox"/>		<p>If yes, proceed to Step 2.</p> <p>While some courts have interpreted the phrase “act of</p>

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				<p>God” in a <i>force majeure</i> clause in a limited manner, encompassing only natural disasters like floods, earthquakes, volcanic eruptions, tornadoes, hurricanes, and blizzards, one court to consider the question head-on has found that COVID-19 clearly constitutes a “natural disaster,” suggesting that COVID-19 may trigger provisions covering only “acts of God.”</p>
<p>Does the <i>force majeure</i> clause have a catchall provision that covers “any other cause whatsoever beyond the control of the respective party” and contains an enumeration of specific events that otherwise do not cover the current situation?</p>	No <input type="checkbox"/>	Yes <input type="checkbox"/>		<p>If yes, the <i>force majeure</i> clause may not have been triggered because courts generally interpret <i>force majeure</i> clauses narrowly and may not construe a general catch-all provision to cover externalities that are unlike those specifically enumerated in the balance of the clause.</p> <p>But depending on the jurisdiction, courts may look at whether the event was actually beyond the parties’ reasonable control and unforeseeable and the common law doctrine of impossibility or commercial impracticability may still apply, depending on the jurisdiction.</p>

Step 2a. What is the standard of performance?

<p>Does the <i>force majeure</i> clause require performance of obligations to be “impossible” (often, as a result of something outside the reasonable control of a</p>	No <input type="checkbox"/>	Yes <input type="checkbox"/>		<p>If yes, the <i>force majeure</i> clause may have been triggered if the current government regulations specifically prohibit the fulfillment of contractual obligations. Proceed to Step 2b.</p>
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party) before contractual obligations are excused?				
Does the <i>force majeure</i> clause require only that performance would be “inadvisable” or “commercially impractical”?	No <input type="checkbox"/>	Yes <input type="checkbox"/>		If yes, the <i>force majeure</i> clause may have been triggered due to the extreme disruptions caused by COVID-19. Proceed to Step 2b.

Step 2b. What remedy is available when the *force majeure* clause is triggered?

Does the contract clearly provide that the remedy sought is available upon the triggering of the <i>force majeure</i> clause?	No <input type="checkbox"/>	Yes <input type="checkbox"/>		If yes, then proceed to Step 3. For example, a party seeking to terminate an agreement, to obtain a refund of a deposit, or to obtain some other remedy will need to demonstrate that such remedy is expressly contemplated by the contract upon the occurrence of a <i>force majeure</i> event.
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Step 3. When must notice be given?

Does the contract require notice?	No <input type="checkbox"/>	Yes <input type="checkbox"/>		If yes, proceed to Step 4. Timely notice must be provided in accordance with the notice provision, or termination may not be available even though a triggering event has occurred. Some notice provisions required notice <i>in advance</i> of performance due. Others required notice <i>within</i> a certain number of days of the triggering event. Still others require notice within a specified number of days from the date that a party first asserts the impact of force majeure, without
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Step 4. Are there requirements for the form of notice?

Does the contract contain specific provisions for the <i>method</i> of notice?	No <input type="checkbox"/>	Yes <input type="checkbox"/>		If yes, notice provisions may specify the form of the notice, to whom it must be sent, and the manner in which it must be sent. Specific notice language may also be required.
Does the contract require specific <i>language</i> to give notice of a force majeure event?	Yes <input type="checkbox"/>	No <input type="checkbox"/>		If yes, determine whether required wording is present in any notice. Some contracts may even have form of notices attached as exhibits to the contract.
Does the contract specify a specific <i>method</i> for delivery of such notice?	No <input type="checkbox"/>	Yes <input type="checkbox"/>		If yes, notice may be required by email, priority mail, or through use of a particular form addressed to specific people.

[1] The COVID-19 pandemic ultimately thrust these clauses to the mainstream, with prominent media outlets covering the effect of force majeure clauses on sports league cancellations and broadcast contracts. *See, e.g.*, https://www.espn.com/nba/story/_/id/29050090/under-plan-nba-players-receive-25-less-paychecks-starting-15; <https://nypost.com/2020/04/28/dish-demands-disney-pay-for-espn-refund-over-no-live-sports/>

[2] *See, e.g., Kel Kim Corp. v. Cent. Mkts., Inc.*, 70 N.Y.2d 900, 902-03 (1987) (“[O]nly if the force majeure clause specifically includes the event that actually prevents a party’s performance will that party be excused.”).

[3] The *force majeure* clause at issue in *Palm Springs* excused delays that were “due to” the *force majeure* event.



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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. For additional information, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Coronavirus (COVID-19) Team or Litigation, Real Estate, or Transactional groups, or the authors:

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