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Best Practice With Notices for Force Majeure Events

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As the wave of reopening orders sweeps across the country, businesses see a light at the end of the tunnel. That light, however, in many instances is still yellow, and may be so for some time to come. Serious restrictions continue to hamper the habitual functioning of America's businesses, customers have dwindling cash to pay for goods, supplies are restricted or cut, and social distancing practices and protocols reduce productivity. Companies, therefore, continue to take a closer look at their contracts to determine their rights, including whether force majeure and other provisions may still be invoked.

This article is set forth in three parts. First, it describes general considerations in deciding whether and how to invoke force majeure, encouraging contracting parties to take a holistic view of the entire contractual relationship. Second, the article addresses best practices in drafting force majeure notices, including general points to consider, what form a notice should take, and what to include in the notice. This portion of the article includes a draft template that can be tailored to the specific business and legal context. Third, this article describes general notices, a tool often used in construction contracts, as an alternative to specifically addressing force majeure. This section recognizes that there are often instances in which other contractual remedies are more attractive than force majeure.

General Considerations

When drafting a notice related to a force majeure event, it is important to keep in mind a few general themes, including the objectives, contract terms, an understanding of the force majeure event, the business relationship, and, as always, the potential for litigation.

- **Objectives.** It is imperative to determine the objective that the force majeure notice will serve. What are you trying to accomplish with the force majeure notice? Is an extension of time sought? Is the recovery of prolongation costs in addition to schedule relief needed? While many have knee-jerk reactions to serve a notice under the contractual force majeure provision the instant an unforeseen event impacting performance occurs, it is critical to make sure the objective of the notice is clear before sending. Keep in mind that typical force majeure provisions may only offer an extension of time to perform. There may be, however, certain circumstances in which invoking force majeure is not the best route to accomplish the objective, particularly when other contractual remedies afford more practical or attractive solutions to meet your objectives.
- **Contract terms.** Force majeure notices are contractually driven. The form and contents of the notice are governed by the force majeure provision in the contract. However, after establishing objectives, what if the remedies available in the force majeure provision do not match those objectives? Does the contract contain other clauses that provide a better remedy more in line with your objectives? Knowing all of the nuances of the contract becomes critical to determining your course of action. It is also crucial to consider the contractual

options of your contract opponent. Will you trigger a reason to terminate or withhold payment? Will you trigger a claim of anticipatory breach? Be familiar with all contractual terms before drafting any force majeure notice.

- **Understand the impacts caused by the force majeure event.** This may seem obvious, but it is necessary to consider the possible scenarios occurring at the beginning of the force majeure event, and afterwards as well. There have been numerous federal and state shutdown and stay-at-home orders issued, and now we are beginning to see reopening orders being implemented. As the shutdown and stay-at-home orders are lifted, there will be a “ramp up” period in which businesses will open, but not be operating at full capacity. Will this ramp-up period, when an emergency declaration is no longer in place, still impact one’s ability to perform under the contract? Moreover, what impact will social distancing have on your business for the weeks or months after the technical force majeure event ends? Offices may operate at half-staff, stores may limit the number of guests allowed at a time, and factories may limit the number of staff at the facility. Considering all of the possible impacts of the force majeure event will be key in determining what to include in a notice.
- **The business relationship.** It is always important to strictly abide by contractual notice requirements. However, the strength of your business relationship can impact how your notice is received. A longstanding business partner may accept a simple contract-compliant notice that generally explains the delays and increased costs due to the force majeure event, while other more litigious business partners may require a more detailed explanation. There may be other outside laws, regulations or considerations that impact the force majeure notice, including whether there are administrative notice requirements, whether the parties conduct other business together, and whether the force majeure event has impacted that business as well. While it is important to understand the contract between the parties in drafting a force majeure notice, it is just as important to have a complete understanding of the business relationship and the people involved.
- **The potential for litigation.** As always, keep in mind that there could be litigation resulting from the force majeure event. Accordingly, the notice should be drafted as if giving notice for any other legal purpose, with a long-term view in mind. Be flexible with the notice, and avoid limiting rights and remedies to prevent hamstringing legal positions down the road. Remember, courts have held that “[t]he failure to give proper notice is fatal to a defense based upon a force majeure clause requiring notice.” *Sabine Corp. v. ONG Western, Inc.*, 725 F. Supp. 1157, 1168-69 (W.D. Okla. 1989) (dismissing defendant’s force majeure affirmative defense for failure to provide sufficient and proper notice of invoking force majeure).

With that background, here are some best practices when drafting force majeure notices.

Drafting Force Majeure Notices

Form and Service of Notice

When issuing either a force majeure notice or more general notice of delay, there are a few practical concepts to keep in mind regarding what form the notice should take. These three tips will ensure your notice is proper and serves its intended purpose.

- **Comply with the contract terms.** The general form of the notice will be guided by the terms of the contractual force majeure provision. This will include the means of communicating the notice, the way in which the notice is to be served, and the time in which the notice must be served. Parties typically must strictly adhere to the requirements set forth in notice provisions to be effective.
- **If impossible, then substantially comply.** There may be instances, however, when strict compliance is impossible. For example, if personal service is required, governmental restrictions limiting business operation may prevent a party from providing personal service within the time period allotted. Under these circumstances, substantial compliance may excuse failure to achieve literal compliance with the contract terms. Courts have held that a reasonable effort to provide notice as soon as possible may constitute valid notice, even if it is not in strict compliance with the contractual terms. See *Toyomenka Pac. Petroleum, Inc. v. Hess Oil Virgin Islands Corp.*, 771 F. Supp. 63, 68 (S.D.N.Y. 1991) (granting summary judgment and holding that six-day delay in providing notice did not prevent defendant from force majeure defense because defendant made reasonable effort to give notice as soon as possible).

- **Keep and maintain documentation of all notice activities.** Where strict compliance is impossible to achieve, keep careful records of all attempts to serve and provide notice. Complete records will be critical to combat later arguments that a notice was ineffective because it was not served in compliance with the contract.

Substance of a Force Majeure Notice

After identifying your objectives, understanding the event, analyzing the business relationship, and reviewing your contract, you decide that invoking force majeure is the best option. Each of the below points should be included in your force majeure notice. Including these points should ensure your force majeure notice will constitute valid notice under your contract.

- **Identify the force majeure event.** Regardless of how obvious or apparent the force majeure event may be, the force majeure event must be specifically identified in the notice. It is common for contractual force majeure provisions to specifically reference events like government acts, pandemics, epidemics or health emergencies. Some force majeure provisions are more general, and may only reference events like “acts of God.” If the event does not fall squarely within an enumerated event covered by the force majeure clause, mirror the language of the force majeure clause when explaining the event. If intent on invoking the force majeure clause, cite specifically to the section and language of the force majeure provision in the contract when detailing the event. Keep in mind, however, you should do this only if you have gone through the contract and concluded that invoking force majeure is the best option. If other, better remedies are available in the contract, then including reference to the specific force majeure section may limit your potential rights and remedies during a litigation. Thus, you should include a citation to the specific force majeure clause only if force majeure is the desired course and you do not plan to ever seek additional forms of relief. Otherwise, as discussed further below, your notice should not include reference to the force majeure provision to avoid limiting future rights.
- **Explain how the force majeure event impacts performance.** The notice should provide an explanation of how the force majeure event is preventing performance of contractual obligations and how long it is expected to impact performance. Reference sections in the contract that are specifically impacted, such as clauses detailing work, deliverables or services to be provided. Characterize and quantify the loss of time, ability or money suffered as a result of the force majeure event. Include attempts taken to mitigate, and, if possible, consider providing supporting documentation. Keep in mind, however, that if there is an expected insurance or government investigation into the force majeure event, providing documentation such as photos should only be done if absolutely necessary.
- **Identify the relief the force majeure notice seeks.** Here is where knowing your contract and having clear goals come into play. Are you seeking an extension of time to perform? Are you seeking termination of the contract? While the available remedies may be contract-dependent, the notice should include the relief sought.
- **Include adequate assurances.** In order to avoid any claims for anticipatory breach, it may be necessary to include adequate assurances of performance once the force majeure event subsides. Include how and when performance will be fulfilled once possible. This is especially important if only a suspension of performance is sought, and not termination of the contract. Note that updates will be given if circumstances change, and keep the possibility of continuing the contractual relationship if feasible. If there are no alternatives and termination is sought, notify and memorialize any attempts made to perform, and be clear in noting the force majeure event’s impact on the ability to perform.
- **Do not limit rights.** Circumstances change. Litigation may arise. The notice may be an exhibit to a pleading. Be sure to reserve all rights and remedies, both contractually and at law, in the notice. In addition, consider whether you might be able to rely on the common law doctrines of impossibility, impracticability or frustration of purpose, and make reference to each in your notice to ensure they are not waived.
- **Supplement as more information becomes available.** Keep the lines of communication open. Advise that regular updates will be given. Show good faith in the attempts to perform and mitigate damages. This will go a long way for the business relationship and in potential litigation, especially during times of uncertainty.

To go along with the best practices, a template force majeure notice that can be used to invoke a force majeure provision is available here. It is consistent with the guidance and best practices above. It should be tailored depending on the terms of the contract, the relationship of the parties, the type of force majeure event, and the ultimate goals in issuing a force majeure notice. Keep in mind, however, that while the template serves as a guiding framework, the notice must ultimately be consistent with the terms of the contractual requirements and the law of the relevant jurisdiction.

General Notice Instead of Force Majeure Notice

In certain circumstances, particularly in construction contracts, the remedies afforded in the force majeure clause may not align with the objectives for issuing a force majeure notice. Moreover, there may be other provisions that provide better relief than force majeure. One example would be if the force majeure provision only affords an extension of time to perform while other provisions may permit the recovery of lost profits or other prolongation costs. If there is any question regarding which provision should apply, a broader, more general notice may be more practicable in order to avoid limiting available rights and remedies should a dispute arise. Here are some key points to consider when drafting a general notice of delay as opposed to a force majeure notice.

- **Identify the event.** Similar to a force majeure notice, the general notice should identify the event causing the delay or hindering performance. It should not call the event a “force majeure event” or reference the specific force majeure section of the contract. Doing so may give the appearance of simply invoking the force majeure clause instead of a more beneficial clause in the contract. The notice should instead establish the date when the event impacting performance began and provide dates when it is expected that the event will subside or cease interference with performance.
- **Explain how the event impacts performance.** Provide a similar explanation as to how the event is preventing performance. Provide assurances that, once possible, performance under the contract will be completed.
- **Define the relief sought.** Explain the relief sought as a result of the event. When calculating or determining the relief sought, be sure to take into account all relief sought by any “downstream” entities reporting to you as well. For example, if a general contractor needs 50 additional days to complete a task due to an unforeseen event, and a subcontractor informed the general contractor that it will need an extra 20 days to perform, the general contractor, in putting together its notice of delay, should request 70 days to encompass what will be needed for the project to be completed.
- **Do not limit rights or remedies.** When it is unclear which clause should be invoked, do not limit your remedies to those in the force majeure clause. Do not cite to a specific provision for which you are providing notice when providing a general notice of delay. Because the goal is to provide a general notice for all possible applicable provisions offering relief in the contract, citing to a specific provision may waive the future exercise of other clauses. To simultaneously provide contractual notice of delay without citing to a specific provision in the contract, explain that the notice will be “in satisfaction of all notice requirements in the contract.” Finally, include a reservation of rights and remedies both within the contract and at law.
- **Provide “downstream” notices “upstream.”** Particularly in construction, the entire supply chain, including suppliers, subcontractors and general contractors, may be impacted by a similar event. For anyone who has to pass notice “upstream,” it is imperative to provide any and all notices received from “downstream” parties. For example, a supplier may provide a notice to a subcontractor, who also provides notice to the general contractor. In order to give the property owner or developer a more complete understanding of the impact of the event, and to ensure you provide notice for all of the relief sought, it is critical to incorporate notices received from all subcontractors and suppliers in your upstream notice to the owner or developer.

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