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CONSIDERATIONS FOR SUSPENDING BUSINESS OPERATIONS UNDER FORCE MAJEURE CLAUSES

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COVID-19 is significantly disrupting commerce as companies and individuals voluntarily curtail normal operations and activities and as state and local governments impose increasingly stringent restrictions daily. Recently, for example, New York Governor Cuomo issued Executive Order 202.6, which ***requires*** 100% of the workforce of non-essential businesses to stay home. See our recent LEGALcurrents® here for more information.

In light of governmental mandates like Executive Order 202.6 and the disruption caused by COVID-19 generally, you may wonder if you or the other party to your agreement can suspend performance. You may be wondering if your agreements contain force majeure clauses and what they cover—something that neither you nor the other party probably gave much, if any, attention to when you negotiated those agreements.

Every agreement is different. Not every agreement has a force majeure clause. For those that do, no two clauses are the same. In addition, not every agreement is governed by the same law and, to complicate matters further, different jurisdictions interpret these clauses and related concepts differently. You also may not (and probably should not) approach every agreement the same way depending on the context (e.g., if you really need that relationship in place once the current situation abates you may think twice before claiming force majeure).

The following summary is a non-exhaustive outline of considerations for approaching whether a business can suspend performance under an agreement.

What is a Force Majeure Clause?

A force majeure clause allows a party to suspend certain performance obligations for a period of time (or possibly terminate an agreement) due to specific unforeseen or extraordinary events beyond its control (e.g. fires, wars, insurrections, terrorism, natural disasters, "acts of God," etc.).

How to Approach the Issue.

- **Does the Agreement Have a Force Majeure Clause?**
  - **No?** If an agreement does not contain a force majeure clause, then a business will have to determine if common law concepts of frustration of purpose or commercial impracticability or impossibility apply (discussed below).
  - **Yes? Does the Provision Actually Cover COVID-19 and Related Fall-Out?** Just because an agreement has a force majeure clause does not mean that it covers COVID-19 or its impacts. Most force majeure clauses will set forth a specific list of events which are deemed to be beyond the control of the parties like the ones noted above. A specific reference will make it easier to break an

agreement (presuming the other elements of the force majeure are met); however, a more general concept or a "catch-all" provision within a force majeure clause also has the potential to pick up certain events (although this is a more difficult argument). In looking at the current COVID-19 crisis, the following listed events might provide the basis for you to claim the existence of a force majeure event:

- Pandemic, epidemic or outbreak of any disease – This language would pick-up COVID-19;
- Governmental order or restrictions – Executive Order 202.6 as a mandatory prohibition would fall squarely within this (as opposed to a ***suggested*** course of conduct such as social distancing);
- Shortages of or delays in receiving raw materials, supplier or subcontractor delays, including any quantity or quality defects, and transportation delays—although none of these are unique to COVID-19, any disruptions of this nature impacting performance may be grounds for claiming force majeure.

If an agreement does not cover COVID-19 or its impacts, you will have to rely on common law concepts of frustration of purpose or commercial impracticability or impossibility (discussed below).

- **Can You Actually Suspend Performance?** Even if the current situation is covered by the force majeure clause, you can only suspend performance if your performance is impossible and you cannot reasonably mitigate the situation. This means that you cannot refuse to perform merely because your performance is simply more expensive, difficult or undesirable.
- **What Process Do You Need to Follow to Suspend?** Many agreements containing a force majeure clause also contain a process by which you invoke the clause. For example, to effectively suspend performance you may be required to provide the other party with written notice within a certain number of days after the force majeure event, or after any delay or failure caused by a force majeure event, before suspending performance (or, in some cases, before permitting termination). If you are looking to claim force majeure, therefore, you need to make sure you follow the process.

n **Does the Agreement have Other Relevant Provisions to Consider?** There may be other provisions of an agreement that may be relevant or impacted by invoking a force majeure clause and should be factored into your decision, including those related to liquidated damages and termination rights. Finally, even if you do not have the ability to claim force majeure (or rely on the other concepts discussed below), you should look at damage waivers, liability limits and related carve-outs, indemnification provisions, liquidated damages, and fee-shifting provisions to understand your downside in the event of a breach.

What Recourse Do You Have If There is no Force Majeure Clause or if your Clause Does Not Cover Disruptions Due to COVID-19?

In the absence of an applicable force majeure clause, parties to an agreement may be able to turn to the limited doctrines of "commercial impracticability or impossibility" or "frustration of purpose" to excuse performance, but these concepts rarely apply. The doctrine of "frustration of purpose" applies in some jurisdictions when, due to an unforeseeable event the non-occurrence of which both parties assumed when the contract was made, the underlying purpose of the contract can't be achieved. The purpose of the contract must be "substantially frustrated" without fault by the party invoking the doctrine. The doctrine

focuses on the parties' motivation for entering into the contract; however, courts have made clear that making a profit is rarely an accepted "purpose" of a contract.

The doctrines of "commercial impracticability or impossibility" look at whether a party's performance under an agreement has been made impracticable or impossible due to an unforeseeable event the non-occurrence of which both parties assumed when the contract was made. The doctrine focuses on whether or not performance itself is possible, similar to the idea of force majeure. Proving impracticability or impossibility is difficult, however, as courts often find that performance is not really impracticable or impossible if there is another feasible way to perform, even when that other way is significantly more expensive. Additionally, if a supplier's ability to perform is only partially impacted, it must allocate its supply among customers in a fair and reasonable manner.

Proving the commercial impracticability and impossibility doctrine or frustration of purpose doctrine is a high bar, and thus, whether these doctrines apply to the COVID-19 situation requires an analysis of the facts at hand and governing law.

If you would like more information on force majeure clauses, please contact a member of our Corporate practice group at 585.232.6500, 716.853.1616, or visit www.hselaw.com.For more information, visit www.hselaw.com.

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