



SWRA Commercial Webinar Series: Force Majeure and Commercial Real Estate

Speaker:



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Pennsylvania | New Jersey | Delaware | New York | Florida

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Basic Definition of “Force Majeure”

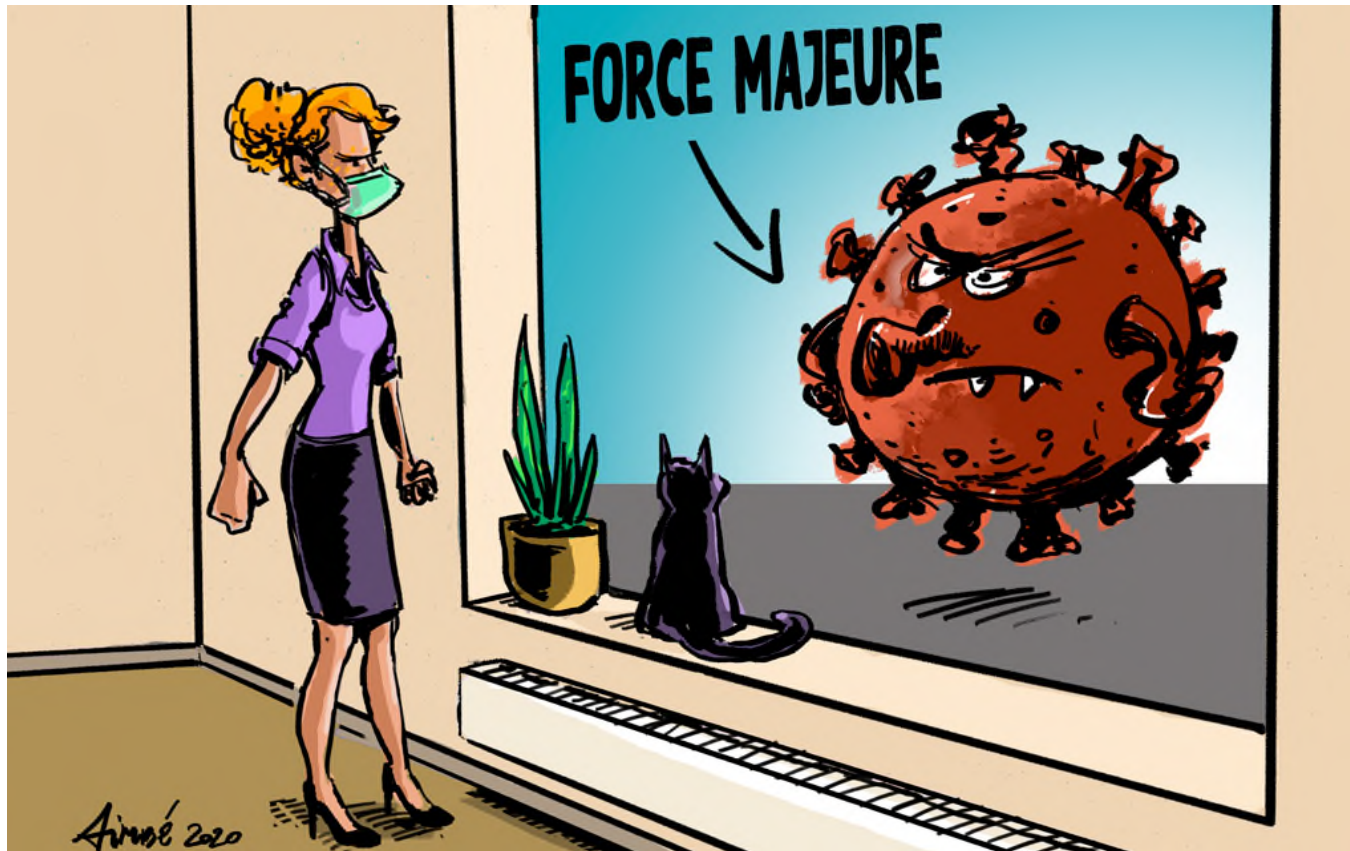
A photograph showing the word "Definition" spelled out using ten small, light-colored wooden blocks. The blocks are arranged in a single row on a rustic, textured wooden surface. Each block has a single letter printed on it in a black, sans-serif font. The letters are D, e, f, i, n, i, t, i, o, n. The lighting is even, and the wood grain of the background is clearly visible.

“Where an event, or series of events, triggers a force majeure clause, the party invoking the clause may suspend, defer, or be released from its duties to perform without liability.”

Pennsylvania Definition of Force Majeure

"[T]he basic purpose of force majeure clauses . . . is . . . to relieve a party from its contractual duties when its performance has been prevented by a force beyond its control or when the purpose of the contract has been frustrated."); Kaplan v. Cablevision of PA, Inc. , 671 A.2d 716, 721 n.3 (Pa. Ct. 1996)

Other Terminology



- Force Majeure is also referred to in contracts and literature as “Impossibility of Performance” or “Frustration of Purpose.” In reality, these are slightly different concepts.

Differences between Legal Concepts

- “Force Majeure” generally refers to situations like “Acts of God” or war that make performance of the contract undoable.
- “Impossibility of Performance” refers to situations where because of outside events (such as fires during construction) it is impossible to perform the contract.
- “Frustration of purpose” refers to where the contract can be performed, but because of outside events it would be pointless to do so.

Famous Example of Force Majeure



One of the earliest examples of Force Majeure (really “Frustration of Purpose”) was the scheduled coronation of King Edward VII of Great Britain in 1902

Famous Example of Force Majeure



The case involved the lease of an apartment for the purpose of viewing the coronation procession (*Krell v. Henry* (1903) 2 K.B. 740).

The coronation was postponed due to illness, but the lessee still could have used the apartment for the view. The British Court ruled however that the purpose of the lease was to use the apartment during the procession. As this did not occur, the purpose of the lease was frustrated and the lease was discharged.

Landlord-Related Concerns

- Can it complete construction, Tenant Fit-Up Etc.?
- Does it get an abatement of the time frame for any such construction?
- If a new tenant is scheduled to take possession on a certain date and can't do so, what happens?
- Does the Landlord have to accept a security deposit as rent during the pandemic (see NJ Governor Murphy's Executive Order)

Tenant-Related Concerns

- Must it continue to pay rent for space it can not occupy, or can only partially occupy?
- Does it get an automatic extension of its lease term or any sub-term?
- Are the time frames for rent adjustments automatically extended?

Seller-Related Concerns

- Is Seller in default of its contract if it can not provide access during a Due Diligence Period?
- Is Seller in default of its contract if it cannot clear up title issues within the appropriate time frame?
- Must the Seller extend the time frames that Buyer has in a contract to match the limitations required by the pandemic?

Buyer-Related Concerns

- Must the Buyer complete its sale if its business has been badly hurt by the pandemic?
- Does the Buyer get an automatic extension of time frames in which to perform its due diligence?
- If you theoretically can close on a property but the Buyer cannot logistically do so during the pandemic, is that a default under the Agreement of Sale?

Implied Standard of Force Majeure

- In Pennsylvania, there is no concept that each contract contains within it an implied doctrine of “Force Majeure”.
- This is slightly different than in New Jersey where in a 2007 case, Facto v. Pantagis, the New Jersey Superior Court ruled that a force majeure provision can be implied against one party even if the contract only contained force majeure language excusing the other.

Basic Pennsylvania Law

- Pennsylvania courts generally have tended to construe “Force Majeure” clauses very narrowly, and only if they’re in the contract. The party claiming “Force Majeure” usually must prove two things:
 1. The claimed event of “Force Majeure” truly was beyond the party’s control; and
 2. The party tried to perform the contract but could not.

Basic Pennsylvania Law (continued)

- Pennsylvania courts rarely enforce a “catch-all” provision in a “Force Majeure” clause. *See Martin v. Commonwealth DER, 120 Pa. Commonwealth 269, 548 A.2d 675 (1988).*
- Pennsylvania courts also will rarely enforce a “Force Majeure” clause if another clause in the contract dealt more specifically with the issue (e.g. casualty situations; *see Portnoy v. Omnicare Pharmaceuticals, inc., 204 WL 153780 (EDPA 2004).*

Existing Market Conditions

- Pennsylvania courts have not allowed a change in market conditions to excuse performance.
- In Dorn v. Stanhope Steel, Inc., 368 Pa. Super 557, 524 A.2d 796 (1987) the Court said applied a legal treatise called the Restatement (2nd) of Contracts to hold that ...”mere market shifts or financial inability do not usually affect discharge under the rules stated in this section.”

Other State Laws – New Jersey

- New Jersey law is more lenient than Pennsylvania in this area. In NJ the Court will look to the language of the Force Majeure clause (or imply one if none exists), then also will look at impossibility of performance and frustration of purpose, all of which have been recognized by New Jersey courts (*see Duff v. Trenton Beverage Company (1950); and M.J. Paquet v. NJDOT (2002)*)

Other State Laws – Texas and California

- Texas law governs many energy contracts. There is no implied “force majeure” and Texas courts review these clauses carefully to make sure there is no human cause in any “Acts of God”. Texas does recognize Impracticability of Performance and Frustration of Purpose.
- California law has “force majeure” codified in Civil Code Section 1511, but the circumstances must be extreme and can not just be an increase in expense or difficulty.

Other State Laws – New York

- In New York, historically the law appears to be that the event which triggers force majeure must be explicitly stated in the document.
- See *Wuhan Airlines v. Air Alaska, Inc.*, 97 Civ. 8924 (JSR), 1998 U.S. Dist. LEXIS 15529, at *7 (S.D.N.Y. Oct. 1, 1998) (citing *Kel Kim Corporation v. Central Markets*, 70 N.Y.2d 900, 902, 524 N.Y.S.2d 384, 385, 519 N.E.2d 295 (1987)). In *Kel Kim*, a unanimous Court of Appeals said: "Generally, once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome."

Per Lewis Taishoff, Esq.

Balancing of Harms Suffered

- In the end, the likely result is going to be a balancing by the Courts and the respective legislatures of where the loss should fall.
- For contracts like real estate leases, the tenant can say it can't use the property so it shouldn't need to pay the rent, the landlord can say that it still has to pay its mortgage loan, the bank can say that if the landlord doesn't pay the loan it has to report the loan as non-performing for regulatory purposes etc.

The CARES Act

Coronavirus Aid, Relief, and Economic Security Act



Example of COVID19 Clause for Agreement of Sale

Seller and Purchaser acknowledge that, in response to the COVID-19 pandemic, (i) on March 13, 2020, a declaration of emergency was declared by the City of Philadelphia, Pennsylvania (the “City Declaration of Emergency”), (ii) on March 19, 2020, Pennsylvania Governor Tom Wolf issued an Order, as amended, requiring the closure of all Pennsylvania businesses that are not deemed life-sustaining (the “Order”), and (iii) the Centers for Disease Control and Prevention (the “CDC”) and the Pennsylvania Department of Health (the “DOH”) have instituted certain operational restrictions regarding social distancing that have led to the closure or operational restriction of all non-essential municipal, county, and state agencies and businesses in the Commonwealth of Pennsylvania (the “Social Distancing Restrictions” and together with the City Declaration of Emergency and the Order, collectively the “COVID-19 Restrictions”). As a result of the COVID-19 Restrictions, the performance of Purchaser’s due diligence and related activities is temporarily impractical, if not impossible, until the COVID-19 Restrictions are removed. **Accordingly, Purchaser and Seller have agreed that the term “Due Diligence Period” shall mean the period commencing on the first (1st) Business Day after all of the COVID-19 Restrictions have been removed and ending sixty (60) days thereafter (such period, the “Due Diligence Period”);** provided, however, that if the last day of the Due Diligence Period would fall on a Saturday, Sunday or a legal holiday in the Commonwealth of Pennsylvania, the Due Diligence Period shall be extended to the next Business Day.

Example of Typical Force Majeure Clause in a Commercial Lease

- In the event that Lessor or Lessee shall be delayed, hindered in or prevented from the performance of any act required hereunder by reason of inability to procure materials due to lack of availability, failure of power, governmental laws or regulations prohibiting the Permitted Use, riots, insurrection, the act, failure to act or default of the other party, war, biological, viral or similar mass epidemic or pandemic, or other reason beyond their control (an event of “Force Majeure”), then performance of such act shall be excused for the period of the delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay.
- The provisions of this SECTION 26 shall not be applicable with respect to payment of rent or any obligation to pay money except that the occurrence of the Effective Date shall be subject to this SECTION 26. In order to claim a delay for an event of Force Majeure, the party claiming a delay for Force Majeure shall notify the other party in writing of the same within fifteen (15) business days of the date such party becomes aware or should have become aware of the occurrence of the event and provide a description of the event constituting Force Majeure.

AIA Form A201 (Section 8.3.1)

- Should Contractor be obstructed or delayed in the commencement, prosecution or completion of the Work, without fault on its part, by reason of: failure to act, direction, order, neglect, delay or default of the Owner, the Architect, Consultants, or any Separate Contractor employed (by Owner) upon the Project; by Change Orders; Concealed Conditions; fire, lightning, earthquake, enemy action, act of God or similar catastrophe; **by Government restrictions in respect to materials or labor** or by other circumstances beyond Contractor's reasonable control, and absent any fault or neglect on the part of Contractor...

Triggering Event

One key issue is going to be to determine the “triggering event” of the force majeure or inability to perform. Is it a pandemic, an administrative decree, etc?



Triggering Event



CITY OF PHILADELPHIA
OFFICE OF THE MAYOR
DEPARTMENT OF PUBLIC HEALTH

WHEREAS, on March 17, 2020, the Mayor and the Commissioner of the Department of Public Health (“Health Commissioner”) jointly issued an Emergency Order prohibiting operation of non-essential businesses to prevent the spread of COVID-19; and

WHEREAS, on March 19, 2020, the Governor and the Secretary of the Pennsylvania Department of Public Health issued orders requiring all non-life-sustaining businesses to close across the Commonwealth, to help stop the spread of the virus and the Governor and Secretary updated the aforementioned orders and list of life-sustaining and non-life sustaining businesses on March 20, 2020 and, again, on March 21, 2020; and

WHEREAS, on March 22, 2020, the Mayor and the Health Commissioner jointly issued an Emergency Order Temporarily Prohibiting Operation of Non-Essential Businesses and Congregation of Persons to Prevent the Spread of COVID-19, which superseded the Emergency Order issued by the Mayor and Health Commissioner dated March 17, 2020, which prohibited, *inter alia*, most construction work in Philadelphia (the “March 22, 2020 Prohibition on Non-Essential Business”); and

Example of Request Letter and Issues to Watch Out For

We can demonstrate to your satisfaction that through no fault of our own, our operation has been drastically impacted by all the effects of COVID-19. We, therefore, request that our rent be waived at your facility for the period such conditions continues to exist, understanding that your authority will reserve the right to determine when the applicable rent requirement shall be reinstated. During this period of cessation, we will continue to pay the Authority for all other monthly fees as directed in our lease agreement.

Example of Email Received by Airports



April 3, 2020

11:36 AM

Re: Temporary Payment Modifications



To Our Airport Partners:

This follows prior correspondence and follow up communications seeking Minimum Annual Guarantee ("MAG"), rent, and other relief from the Airport under our concession and land agreements. The entire airport community is devastated by the COVID-19 pandemic as well as associated orders from federal, state and local governments, and particularly the rapid decline in airline bookings and passenger counts, which directly affect rental car customer traffic and make it impractical to make certain payments.

That said, we are encouraged by the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") which provides airport relief to share with concessionaires, as well bold initiatives by airport management, authorities, cities, and states across the country providing temporary and long-term relief in recognition of these unprecedented circumstances. ABG is immensely grateful to its partners who have led the way on these efforts, including the entire State of Hawaii (HNL, OGG, KOA, LIU, ITO), DFW, ATL, BWI, MCO, DEN, AUS, IAH, HOU, DCA, PHL, RSW, CMH, JAX, LEX, MCI, SEA, PIH, SLC, MAF, BGR, ACY, ISP, ROA, AVP, ELM, PBI, AVL, CHA, ECP, SRQ, VPS, GSP, COS, ASE, ACT, AMA, STS, DRO, GTF, IFP, HVN, ERI, PSC, BTM, HLN, SDF, ACT, FSM, GJT, SBN, CAK, LNK, SPI, LCH, LIT, SAV, MYR, and many others that continue to respond.

In March, 's reservations and revenue began to be negatively affected as travel restrictions were broadly implemented. The outlook for April and beyond is challenged with airport reservations down approximately 60% and with the potential for further decline. Travelers are staying home, cancelling vacations and business trips, and simply not renting cars at our nation's airports.

At this point in the pandemic curve, 's primary concern is to maintain our strong partnership with Airport, preserve the necessary compliment of employees, operations, and cash, and be ready to emerge stronger than ever when customers return. Toward this end, must modify certain payment obligations to Airport commencing immediately. Where relief has already been granted or proposed, we will diligently pursue implementation of modified terms as presented by Airport.

In lieu of MAG obligations due for the month of April 2020, will pay a straight ten percent (10%) of estimated gross revenue on April reservations. At the same time, we will look back to actual gross revenue for March 2020, and set off payment made above 10% of March gross revenue. will pay 20% of fixed rent obligations, and in every case operating expenses to keep the lights on as required. Payments will be made in early April. We believe this is a responsible and fair approach to today's challenges.

As the effects of this pandemic subside, operations are restored, and as relief and opportunities are better understood, we look forward to right sizing our obligations. The extremely rapid rate of revenue decline and irreversible impact on our business and operations have forced to take extraordinary measures.

We very much appreciate our partnership over the past several decades. We are optimistic that with these initiatives, which represent our sincerest good faith efforts, will preserve rental car service at the Airport in the short-term and be ready to emerge stronger than ever when our mutual customers return.

Thank you in advance for your commitment to navigate this uncharted territory together.

Current Pandemic is Unique

Regardless of what the law has been in a particular state, this current situation is so unique that all historic legal precedent might not apply





Contact Information:

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