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Force Majeure Provisions

PRESENTED BY

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- Dan is a member of Rose Law Group's Real Estate Transactions and Business and Corporate Transactions practice groups. He practices a range of real estate and business matters, including commercial transactions, real estate investment, development, financing, leasing, joint ventures, and opportunity zone investments.
- Dan co-hosts The Rose Report podcast, which endeavors to break down legal issues embedded in current events.
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- 2017 ASU Sandra Day O'Connor graduate
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 - Arizona Court of Appeals clerk for Hon. Jon Thompson
- Civil litigation and criminal defense work at RLG
 - Admitted in Arizona and U.S District Court of Arizona
 - Frequent article contributor to Rose Law Group Report
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What is force majeure?

- Arizona Revised Statutes have defined *force majeure* as “an act of God or of nature, a superior or overpowering force or an event or effect that cannot reasonably be anticipated or controlled . . .” A.R.S. § 33-801. Title 33 - property.
- One court defines *force majeure* as “an equitable legal principle pursuant to which a party to a contract whose performance has been made physically and/or economically impossible (or at least impracticable) due to circumstances totally beyond his control, can be given certain types of relief.” *Russo v. Barger*, 239 Ariz. 100, 102, ¶ 5, 366 P.3d 577, 579 (App. 2016).

Origins of force majeure

- Roman and French law origins, then to English common law.
- Adopted into US common law by the Supreme Court in 1883 in a case called *The Tornado*, 108 U.S. 342.
 - A ship owner was hired to deliver freight to a buyer.
 - Before setting sail, the ship caught fire, rendering it unseaworthy.
 - The contract did not include language to address this situation.

Importance of force majeure clause today

- Allows a party to suspend or terminate the performance of its obligations when circumstances beyond their control arise, making performance inadvisable, commercially impracticable, illegal, or impossible
- Common clause in most contracts, but often boilerplate and broad
- Specificity is crucial – as COVID-19 has shown

Sample force majeure clauses

Sample 1

Other than parties obligations under this Agreement that can be performed by the payment of money (e.g., payment of rent and maintenance of insurance), whenever a period of time is prescribed in this Agreement for action to be taken by either party, such party will not be liable or responsible for, and there will be excluded from the computation of damages for any such period of time, any delays due to strikes, riots, natural disasters, acts of God, shortages of labor or materials, war, terrorist acts or activities, governmental laws, regulations, or restrictions which are beyond the control of such party and cause such party to be unable to perform its obligations hereunder (collectively, the “Force Majeure Events”), except if the party otherwise chargeable with breach or default was negligent. The parties shall notify each other immediately when a party desires to exercise its rights under this paragraph.

Sample force majeure clauses

Sample 2

Notwithstanding anything to the contrary contained herein, neither party shall be liable for any delays or failures in performance resulting from acts beyond its reasonable control.

Sample 1

What is good about this force majeure clause?

Other than parties obligations under this Agreement that can be performed by the payment of money (e.g., payment of rent and maintenance of insurance), whenever a period of time is prescribed in this Agreement for action to be taken by either party, such party will not be liable or responsible for, and there will be excluded from the computation of damages for any such period of time, any delays due to strikes, riots, natural disasters, acts of God, shortages of labor or materials, war, terrorist acts or activities, governmental laws, regulations, or restrictions which are beyond the control of such party and cause such party to be unable to perform its obligations hereunder (collectively, the "Force Majeure Events"), except if the party otherwise chargeable with breach or default was negligent. Each party shall notify the other promptly when such party desires to exercise its rights under this paragraph.

Sample 2

Why is this force majeure clause weak?

Notwithstanding anything to the contrary contained herein, neither party shall be liable for any delays or failures in performance resulting from acts beyond its reasonable control.

- Does not exclude payment obligations.
- What does “outside a party’s reasonable control” mean?
- Should be tied to expectations of the parties as well.
- Should include examples of specific events constituting force majeure.

What can be done?

- Going forward, expect contracting parties to have learned from this unique worldwide phenomenon and anticipate future *force majeure* provisions in contracts to move away from boilerplate language and be narrowly tailored to provide protections to encompass this sort of situation.

Other remedies?

Common law remedies:

- Frustration of purpose
 1. Principal purpose
 2. Material
 3. Non-occurrence of the event was a basic assumption
 4. Party seeking relief should not bear the risk of loss
 - Coronation cases, *Krell v. Henry*

- Impossibility
 - Foreseeability comes into play
- Impracticability.
 - Severity of performance comes into play

- Impossibility and impracticability still have high bars for proof. Arizona courts have said that to use the doctrine of commercial impracticability a party must be able to demonstrate that performance under the contract requires, “so much beyond the parties’ contemplation that it becomes an exercise in commercial futility.” *Willamette Crushing Co. v. State By & Through Dept. of Transp.*, 188 Ariz. 79, 83, 932 P.2d 1350, 1354 (App. 1997).

Questions?

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Thank you!