

COVID-19

**SPECIAL EDITION
PANDEMIC RESPONSE**



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*Force Majeure:
Covid-19*

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Force Majeure: Covid-19

*(or: May the Force Majeure
Be With You)*

Case Law from the Spanish Flu

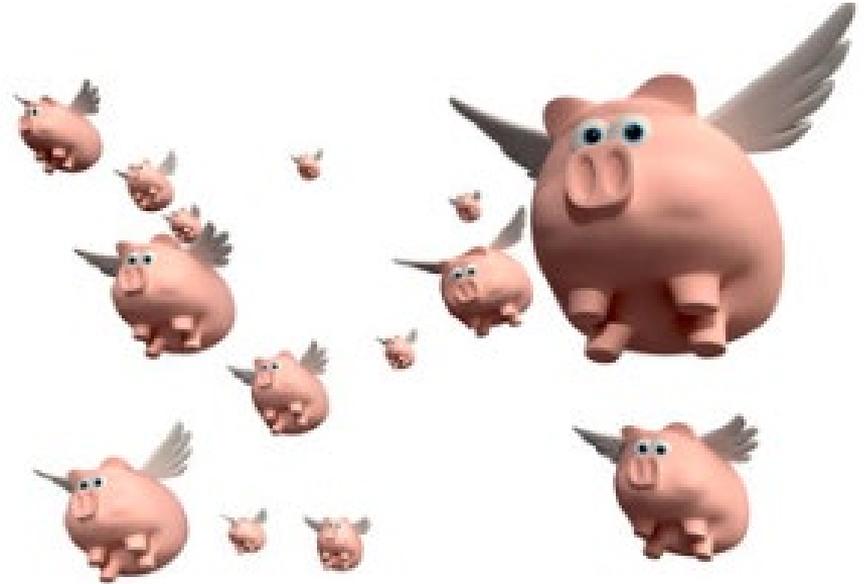
- ▶ *Phelps v. Sch. Dist.*, 302 Ill. 193, 134 N.E. 312, (1922); and
- ▶ *Sandry v. Brooklyn Sch. Dist.*, 47 N.D. 444, 182 N.W. 689 (1921).

Topics we're covering:

- ▶ Common Law / UCC (Implied Contract Clauses):
 - ▶ Impossibility / Impracticability
 - ▶ Contract in Violation of Government Order
 - ▶ Frustration of Purpose
- ▶ Force Majeure (Express Contract Clauses):
 - ▶ Terms and Effects
- ▶ *Caveat: Each State's Law (and Each Country's Law) Differs;*
- ▶ *See ICC's Force Majeure Sample Clause and Information at:*
<https://iccwbo.org/publication/icc-force-majeure-clause-2003icc-hardship-clause-2003/>

Impossibility / Impracticality:

- ▶ Restatement of Contracts (Second) § 261 (1981).
- ▶ Uniform Commercial Code § 2-615(a).



Contract in Violation of Gov't Order:

- ▶ Restatement of Contracts (Second) § 264 (1981).
- ▶ Uniform Commercial Code § 2-615(a).



Frustration of Purpose:

- ▶ Restatement of Contracts (Second) § 265 (1981).
- ▶ Uniform Commercial Code § 2-615(a).



ICC Force Majeure (Model) Clause 2003:

1. Unless otherwise agreed in the contract between the parties expressly or impliedly, where a party to a contract fails to perform one or more of its contractual duties, the consequences set out in paragraphs 4 to 9 of this Clause will follow if and to the extent that that party proves: [a] that its failure to perform was caused by an impediment beyond its reasonable control; and [b] that it could not reasonably have been expected to have taken the occurrence of the impediment into account at the time of the conclusion of the contract; and [c] that it could not reasonably have avoided or overcome the effects of the impediment.
2. Where a contracting party fails to perform one or more of its contractual duties because of default by a third party ~~who~~ was engaged to perform the whole or part of the contract, the consequences set out in paragraphs 4 to 9 of this Clause will only apply to the contracting party: [a] if and to the extent that the contracting party establishes the requirements set out in paragraph 1 of this Clause; and [b] if and to the extent that the contracting party proves that the same requirements apply to the third party.
3. In the absence of proof to the contrary and unless otherwise agreed in the contract between the parties expressly or impliedly, a party invoking this Clause shall be presumed to have established the conditions described in paragraph 1 [a] and [b] of this Clause in case of the occurrence of one or more of the following impediments: [a] war (whether declared or not), armed conflict or the serious threat of same (including but not limited to hostile attack, blockade, military embargo), hostilities, invasion, act of a foreign enemy, extensive military mobilisation; [b] civil war, riot rebellion and revolution, military or usurped power, insurrection, civil commotion or disorder, mob violence, act of civil disobedience; [c] act of terrorism, sabotage or piracy; [d] act of authority whether lawful or unlawful, compliance with any law or governmental order, rule, regulation or direction, curfew restriction, expropriation, compulsory acquisition, seizure of works, requisition, nationalisation; [e] act of God, plague, epidemic, natural disasters such as but not limited to violent storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tidal wave, tsunami, flood, damage or destruction by lightning, drought; [f] explosion, fire, destruction of machines, equipment, factories and of any kind of installation, prolonged break-down of transport, telecommunication or electric current; [g] general labour disturbance such as but not limited to boycott, strike and lock-out, go-slow, occupation of factories and premises.
4. A party successfully invoking this Clause is, subject to paragraph 6 below, relieved from its duty to perform its obligations under the contract from the time at which the impediment causes the failure to perform if notice thereof is given without delay or, if notice thereof is not given without delay, from the time at which notice thereof reaches the other party.
5. A party successfully invoking this Clause is, subject to paragraph 6 below, relieved from any liability in damages ~~other~~ or contractual remedy for breach of contract from the time indicated in paragraph 4.
6. Where the effect of the impediment or event invoked is temporary, the consequences set out under paragraphs 4 and 5 ~~shall~~ apply only insofar, to the extent that and as long as the impediment or the listed event invoked impedes performance by the party invoking this Clause of its contractual duties. Where this paragraph applies, the party invoking this Clause is under an obligation to notify the other party as soon as the impediment or listed event ceases to impede performance of its contractual duties.
7. A party invoking this Clause is under an obligation to take all reasonable means to limit the effect of the impediment or event invoked upon performance of its contractual duties.
8. Where the duration of the impediment invoked under paragraph 1 of this Clause or of the listed event invoked under paragraph 3 of this Clause has the effect of substantially depriving either or both of the contracting parties of what they were reasonably entitled to expect under the contract, either party has the right to terminate the contract by notification within a reasonable period to the other party.
9. Where paragraph 8 above applies and where either contracting party has, by reason of anything done by another contracting party in the performance of the contract, derived a benefit before the termination of the contract, the party deriving such a benefit shall be under a duty to pay to the other party a sum of money equivalent to the value of such benefit.

Sample (Short) Force Majeure Clause:

- ▶ “Neither party shall be liable for its failure to perform hereunder if said performance is made impracticable due to any occurrence beyond its reasonable control, including acts of God, fires, floods, wars, sabotage, accidents, labor disputes or shortages, governmental laws, ordinances, rules and regulations.”
- ▶ 14 *Corbin on Contracts* § 74.19 (2019) (further citations omitted).

Anatomy of Force Majeure Clause:

- Mutual or One-Way
- Covered Events
- Effect of Clause
- Notice of Event



Dissecting (Short) Force-Majeure Clause:

- ▶ “Neither party shall be liable for its failure to perform hereunder if said performance is made impracticable due to any occurrence beyond its reasonable control, including acts of God, fires, floods, wars, sabotage, accidents, labor disputes or shortages, governmental laws, ordinances, rules and regulations.”
- ▶ 14 *Corbin on Contracts* § 74.19 (2019) (further citations omitted; highlighting added).

Dissecting Another Sample Force-Majeure Clause:

- ▶ “**(30) FORCE MAJEURE:** MFI may suspend performance during the occurrence of an excusable delay, which shall mean and include any delay not occasioned by the fault or negligence of MFI and which results from the act of God or public enemy, restrictions, prohibitions, priorities, or allocations imposed by governmental authority, embargoes, floods, fires, typhoons, earthquakes, epidemics, unusually severe weather, delays of similar nature or governmental causes, and strikes or labor disputes or any cause outside the reasonable control of MFI then the time for performance of the affected obligation of MFI shall be extended for a period equivalent to the period of such delay, interruption or prevention.”
- ▶ *In re Coronet Foods, Inc.* , No. 5:04-bk-03822, 2005 Bankr. LEXIS 1293, at *20-21, 2005 WL 1552633 (Bankr. N.D.W. Va. June 3, 2005) (highlighting added).

Sample Notice Provision in Force Majeure Clause:

- ▶ “Where either party claims an excuse for nonperformance under this Section, it must give prompt telephonic notice, promptly confirmed by written notice, of the occurrence and estimated duration of the Force Majeure Event to the other party; and shall give prompt written notice when the Force Majeure Event has been remedied and performance can recommence hereunder.”
- ▶ *SNB Farms, Inc. v. Swift & Co.* , Nos. C01-2077, C01-2078, C01-2080, 2003 U.S. Dist. LEXIS 2063, at *29 (N.D. Iowa Feb. 7, 2003).

Conclusions / Takeaway Lessons (Slide One):

- ▶ Check your Force-Majeure Clauses. Is there one?
 - ▶ If not, does common law or UCC impracticability or frustration of purpose doctrines apply?
 - ▶ If so, what do they say about:
 - Mutual or One-Way?
 - Covered Events?
 - Effect of Clause?
 - Notice of Event required?

Conclusions / Takeaway Lessons (Slide Two):

➤ Notice:

- ▶ If you're invoking, have you done your notice?
- ▶ If the other side isn't performing, has it done its notice?

➤ What is the reason for not performing?

- ▶ Financial difficulties (likely contract still enforceable), or
- ▶ Impracticality, illegality, or frustration of purpose (likely contract is no longer enforceable).

➤ Can performance still occur in an alternative manner?



QUESTIONS?

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