The ongoing global COVID-19 pandemic is upending regular commercial activity across the United States and around the world, and that disruption is expected to escalate. Among the issues confronting our clients, the effect of public health orders and other measures to address COVID-19 is threatening, impacting, and in some cases, outright prohibiting the performance of material contractual obligations. This alert focuses on the interrelationship between three distinct contractual defenses and the COVID-19 pandemic: contractual force majeure clauses, excuse of performance under the California Civil Code, and the legal doctrine of frustration of purpose.

**Force Majeure Clauses**

More than a century ago, the principal contractual impossibility defense to excuse non-performance was that performance was prevented by an "act of God." *Pope v. Farmers' Union & Milling Co.*, 130 Cal. 139 (1900). Over time, the "act of God" impossibility defense came to be routinely embodied in commercial contracts as a force majeure clause. While the language of force majeure clauses varies widely, here is a typical example:

*Force Majeure. Neither party hereto shall be liable for any failure of performance due to causes beyond its reasonable control, the occurrence of which could not have been prevented by the exercise of due diligence, such as Acts of God, acts of civil or military authority, earthquakes, fires, floods, epidemics, windstorms, explosions, natural disasters, sabotage, wars, riots, changes in laws, regulations, tariffs mandated or approved by federal, state or other governmental or regulatory entities, or court injunction or order; provided that written notice of such delay (including the anticipated duration of the delay) shall be given by the affected party to the other party as soon as possible after the event or occurrence (but in no event more than 30 days thereafter).*
In some cases, the *force majeure* clause may mention a global pandemic specifically. Regardless, for the COVID-19 outbreak to constitute a *force majeure* event, the ongoing pandemic must be the proximate cause of nonperformance. See *Hong Kong Islands Line Am. S.A. v. Distribution Servs. Ltd.*, 795 F. Supp. 983, 989 (C.D. Cal. 1991), aff’d, 963 F.2d 378 (9th Cir. 1992). Thus, the focus of the inquiry today is the impact of the COVID-19 pandemic on performance.

In some instances, performance will be delayed or fail due to voluntary human behavior in response to COVID-19, which may or may not be sufficient to constitute a *force majeure* event. Increasingly, restrictive orders issued by federal, state, and local governments to protect public health are interfering with intended contractual performance. While the language of each *force majeure* clause will merit close examination and analysis, where the COVID-19 pandemic is the reason for delayed performance or non-performance, especially when due to governmental orders or other government action, *force majeure* clauses are likely to be implicated and may excuse the non-performance. The fact that a company will lose money fulfilling its contractual obligations during the pandemic, however, standing alone, likely will be insufficient to trigger a *force majeure* clause.

Finally, special attention must be paid to notice provisions within *force majeure* clauses, as it may be critical to give timely notice of the *force majeure* event now due to the ongoing pandemic, even if performance is not due for some time. That said, caution should be exercised to avoid delivering a notice that anticipatorily repudiates the contract. Anticipatory repudiation is the repudiation of obligations of a contract by a party before the time has come for performance on his or her part. If the written notice of the *force majeure* event constitutes an anticipatory repudiation, the non-breaching party may be empowered to rescind the contract, or to treat the repudiation as a complete breach. Thus, written notice regarding difficulties or delays in performance should be communicated without suggesting that the party giving notice is repudiating the contract. Determining how to give proper notice without repudiating a contract can be a delicate task, and knowledgeable legal counsel should be consulted before taking action.

**Causes Excusing Performance Under The California Civil Code**

California law will not require parties to attempt the impossible. “A condition in a contract, the fulfillment of which is impossible or unlawful …, or which is repugnant to the nature of the interest created by the contract, is void.” (Cal. C. Code § 1441) Traditionally, impossibility was measured strictly and objectively such that increases in cost or difficulty in performance were insufficient. More recent cases have brought some subjectivity to the analysis, recognizing impracticability due to excessive and unreasonable difficulty or expense. See *Christin v. Superior Court*, 9 C.2d 526, 533 (1937).

Moreover, the "act of God" defense has been codified and expanded upon in the California Civil Code. Section 1511 provides, in relevant part:


The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate:

1. When such performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not
be an excuse; however, the parties may expressly require in a contract that the party relying on the provisions of this paragraph give written notice to the other party or parties, within a reasonable time after the occurrence of the event excusing performance, of an intention to claim an extension of time or of an intention to bring suit or of any other similar or related intent, provided the requirement of such notice is reasonable and just;

2. When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary; … (emphasis supplied)

Note that § 1511(1) requires "written notice to the other party or parties, within a reasonable time after the occurrence of the event." While the COVID-19 pandemic is in some ways a slow-moving event, a party who determines they will not be able to perform under their contract due to a governmental order must provide written notice to their contractual counterparty within a reasonable time to qualify for relief. What will be a reasonable time will differ depending on the identity of the parties, the nature of the performance, and the reason for the delay. Contracting parties also will need to closely review their agreements to determine if they agreed to waive their rights under section 1511. If written notice is appropriate, the caution given above to avoid inadvertent anticipatory repudiation applies equally here.

**Doctrine Of Frustration Of Purpose**

Unlike *force majeure* clauses and California Civil Code section 1511, each of which is a defense to be raised to excuse non-performance, the doctrine of frustration of purpose is available as a defense where contractual performance remains possible, but has become valueless. This defense to contract enforcement applies when performance is not impossible or impracticable, but has become pointless—i.e., the main purpose of a contract has become frustrated. *Dorn v. Goetz*, 85 C.A.2d 407 (1948)(quoting *Williston*, § 288). A party's inability to pay alone, even if unexpected, will not be sufficient to invoke a frustration defense. Likewise, an increased cost to perform the contract may not be sufficient. To be successful in asserting a frustration defense, the purpose or 'desired object' of both parties must have been frustrated. In other words, the total or near-total destruction of the purpose for which, *in the contemplation of both parties*, the transaction was entered into must be shown. *Id.* (emphasis in original).

**Conclusion**

In every instance in the midst of the disruptions caused by the ongoing COVID-19 outbreak, the best practice will be to reach out to your partners, vendors, manufacturers, suppliers, and contractual counterparties to attempt to negotiate necessary adjustments to performance and to diffuse potential disputes. In parallel, it will be important for you to assess your legal risks, and to take steps to preserve your legal rights to mitigate those risks. Time may be of the essence. Reaching out to counsel to review the particulars of your situation and the relevant terms of your mission-critical agreements will be a good first step in these uncertain times.
For more information, please contact:

**Andrew A. Bassak**, Partner
415-995-5006
ABassak@hansonbridgett.com