FORCE MAJEURE.

In French it is also known as “cas fortuit” which means a “chance occurrence.” For us in the United States it means “a superior force.” For us as lawyers it is a clause many of us have long seen as boilerplate language. One of those last 7-13 clauses in every contract that form the last two pages that so many lawyers just say, “forget those, just sign.” Nobody thought just 2 months ago that those 2 words would become one of the most searched and asked about terms in the law for the rest of 2020 and beyond. It is now a clause landlords and tenants; business owners and vendors and performance agreements everywhere are and will be addressing and discussing and often litigating for years to come. So, what do you do if you are on either side of having to construct a position, a defense, or an argument around these “Force Majeure” or “Unforeseeable Events” clauses that most contracts contain?

First you should speak to a lawyer who can discuss that with you. Second, armed with a trusted legal opinion in hand, you should be human first regardless of what side you are on. As we advised with a client as to a COVID-19 Force Majeure issue recently, they reached out to the Landlord themselves as the effected tenant as opposed to having their lawyer do it. Yes, we did advise a client not to hire us yet. In that situation we felt a letter from their lawyer could send the wrong message at a time they are hurting too for the same reason. These times are unprecedented, and the other side will have been affected by both your actions and other contracts they likely have as well. Reach out and discuss the problems. If you are a small gym as one client is, a month closed kills you and opening again in 2 months to an enclosed gym many clients will still be afraid to go to doesn’t help so kicking the can down the street for them doesn’t seem best. Look at the reality of your situation and not the fantasy of it. Speak to your lawyer about that too. Getting out fully now as opposed to painfully later is the reality of ripping the band-aid and that may be best with a refocus during this time on how you will innovate your business on the other side of this.

Acts of God and Terrorism are customarily included boilerplate language within these clauses that will be the subject of negotiations and possible litigation. Yes, even terrorism. The 2002 Terrorism Risk Insurance Act defines terrorism as “an act that is dangerous to human life or infrastructure…to have been committed by an individual or individuals acting on behalf of any foreign person or foreign interest.” That is going to be enough definition to potentially trigger the use of terrorism to define the COVID-19 pandemic and its effect on the possibility of contractually obligated performance. In Florida, Acts of God is a “well recognized defense to the nonperformance of a contract” as set forth by the Florida Supreme Court way back in 1944. *Fla. Power Corp. v. City of Tallahassee,* 154 Fla. 638, 18 So.2d 671, 675 (1944). Negotiations and litigation over factual circumstances where for example a breach occurred prior to the COVID-19 pandemic but the pandemic was the colossal nail in the coffin. The chicken or the egg scenario there becomes an issue. We already have courts in Florida that have found that subcontractor delays to a Builder or mistaken assumptions about future events of worsening economic conditions are not an excuse for a Builder to claim force majeure. This pandemic will be a different matter altogether. You will have options.

These terms plus “frustration of purpose” and the interplay of government mandated closures make the COVID-19 pandemic legally and significantly different than a singular attack like September 11th or a Hurricane, Fire or Earthquake. Contact us to discuss your issues or contact another lawyer but you should not leave your contract, or your lease unchecked during this time.