



Mark Solomon on Applying 'Force Majeure' Clauses in Mergers and Acquisition Deals

April 21, 2020

Dallas Corporate partner Mark Solomon spoke to *Law360* about applying force majeure clauses to mergers and acquisitions deals, especially in the wake of the coronavirus pandemic as many clients look to pull out of deals. A "force majeure" clause is a provision in a contract allowing parties involved to forfeit their contractual obligations due to unforeseeable circumstances.

Attorneys caution that many M&A agreements don't include force majeure clauses, and for those that do, it can be difficult to justify implementing the clause to pull out of a contract.

Comparing force majeure clauses with material adverse effect clauses, Mark said that one of the key differences is that force majeure clauses apply to contracts concerning a company's ongoing performance and are uncommon in M&A agreements.

"It's a similar concept, but in M&A construct it's probably less likely to be applied than in other commercial contracts," Mark explained.

According to other attorneys from Ropes & Gray LLP, Baker McKenzie and Lynn Pinker Hurst & Schwegmann, it's difficult to apply the concept of force majeure to typical private equity acquisitions, since a buyer can usually perform his or her obligations, with the only limit being required approvals and clearances from regulators and antitrust authorities.

For M&A transactions that do include force majeure clauses, attorneys should not look to those clauses first in order to help their clients get out of a deal, one of the reasons being that force majeure clauses are narrowly interpreted and very specific, thus making them risky.

Since the coronavirus pandemic, many companies have updated the language in their contracts to address pandemics, epidemics, viruses and global outbreaks, as well as quarantines, shelter-in-place orders, government and industrial stoppages and supply chain shortages.

Attorneys looking to apply the force majeure clause to their clients' contracts, believing that it might be relevant because of the coronavirus pandemic, are encouraged to review the language that appears at the bottom of such clauses, which often mention "anything else that's unforeseeable" or makes performance impossible.

Attorneys should also review what other requirements in agreements need to be addressed when applying a force majeure clause and recognize that if their client invokes a force majeure clause, they might face a lawsuit from the other side.

Read, "[Why Force Majeure Isn't a Golden Ticket Out of M&A Deals](#)," in its entirety.

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