

Drafting for a Pandemic

The COVID-19 crisis has caused a major interruption of business across the globe. As a result, many attorneys have been asked to review existing contracts to determine if the agreements address the parties' obligations to perform after the occurrence of a pandemic or government mandated shutdown. In addition, many attorneys and clients are considering how to address the occurrence of a similar situation in the future for contracts they are entering into now or in the future.

Finding example language for contract clauses that anticipate a global pandemic has proven difficult. A search of contracts that use the term "pandemic" on the SEC's EDGAR database of public company filings reveals a few relevant examples. This article includes excerpts from these agreements to show how attorneys have previously contemplated the occurrence of a pandemic in contracts.

Master Purchase Agreement "Force Majeure" clause

This clause was taken from a Master Purchase Agreement from 2014 where the definition of "Force Majeure Event" included "an outbreak of a pandemic disease."

Force Majeure. Neither party will be considered in default of performance under this Agreement to the extent that performance of such obligation is delayed or prevented by fire, flood, earthquake or similar natural disasters, riot, war, terrorism, civil strife, labor disputes or disturbances, industry-wide material shortages outside Supplier's reasonable control, *an outbreak of a pandemic disease*, governmental regulations, communication or utility failures (a "Force Majeure Event"). Following the Force Majeure Event, Supplier will resume performance under this Agreement within the time to recover objective defined in its BCP.

Management Services Agreement "Force Majeure" clause

This clause was taken from a Management Services Agreement from 2012 where the definition of "Force Majeure Event" included the term "pandemic" and "requirement of any governmental authority."

Force Majeure. If any Party is prevented from or delayed in complying, either totally or in part, with any of the terms or provisions of this Agreement, excluding any obligation to make payments hereunder, by reason of fire, flood, storm, strike, walkout, lockout or other labor trouble or shortage, delays by unaffiliated suppliers or carriers, shortages of fuel, power, raw materials or components, equipment failure, any law, order, proclamation, regulation, ordinance, demand, seizure or *requirement of any governmental authority*, riot, civil commotion, war, rebellion, act of terrorism, nuclear or other accident, explosion, casualty, *pandemic*, or act of God, or act, omission or delay in acting by any governmental or military authority or Third Party or any other cause, whether or not of a class or kind listed in this sentence, beyond the reasonable control and without the fault of

the otherwise defaulting Party (each, a “Force Majeure Event”), then upon notice to the other Parties, the affected provisions and/or other requirements of this Agreement shall be suspended during the period of such Force Majeure Event and, unless otherwise set forth herein to the contrary, the Party affected by the Force Majeure Event shall have no liability to the other Parties, its Affiliates or any other Person in connection therewith. Upon becoming aware of a Force Majeure Event, the Party affected by the Force Majeure Event shall promptly notify the other Parties in writing of the existence of such Force Majeure Event and the anticipated duration of the Force Majeure Event. Each Party shall use commercially reasonable efforts to mitigate or overcome the effects of such Force Majeure Event as soon as possible

Equipment Purchase Agreement “Force Majeure” clause

This clause was taken from an Equipment Purchase Agreement from 2017 where the definition of an “Event of Force Majeure” included the term “pandemic insurrections.”

Force Majeure. Seller’s duty to perform under this Agreement and the Equipment prices are contingent upon the non- occurrence of an Event of Force Majeure. An “Event of Force Majeure” shall mean any cause or event beyond the control of Seller. Without limiting the foregoing, “Event of Force Majeure” includes: acts of God; acts of terrorism, war or the public enemy; flood; earthquake; tornado; storm; fire; civil disobedience; *pandemic insurrections*; riots; labor/labour disputes; labor/labour or material shortages; sabotage; restraint by court order or public authority (whether valid or invalid); and action or non-action by or inability to obtain or keep in force the necessary governmental authorizations, permits, licenses, certificates or approvals if not caused by Seller; and the requirements of any applicable government in any manner that diverts either the material or the finished product to the direct or indirect benefit of the government. If the Seller shall be unable to carry out any material obligation under this Agreement due to an Event of Force Majeure, this Agreement shall at Seller’s election (i) remain in effect but Seller’s obligations shall be suspended until the uncontrollable event terminates or (ii) be terminated upon 10 days’ notice to Buyer, in which event Buyer shall pay Seller for all parts of the Work furnished to the date of termination.

Oracle Cloud Service Agreement “Force Majeure” clause

This clause was taken from an Oracle Cloud Service Agreement from 2014 where the Force Majeure clause included the occurrence of a “pandemic” as an event that relieved both parties from liability for non-performance.

Force Majeure. Neither of us shall be responsible for failure or delay of performance if caused by: an act of war, hostility, or sabotage; act of God; *pandemic*; electrical, internet, or telecommunication outage that is not caused by the obligated party; government restrictions (including the denial or cancelation of any export, import or other license); or other event outside the reasonable control of the obligated party. We both will use reasonable efforts to mitigate the effect of a force majeure event. If such event continues for more than 30 days, either of us may cancel unperformed Services and affected orders upon written notice. This Section does not excuse either party’s obligation to take reasonable steps to follow its normal disaster recovery procedures or Your obligation to pay for the Services.

License Agreement “Force Majeure” clause

This clause was taken from a License Agreement from 2018 where the Force Majeure clause included the occurrence of a “pandemic flu” as an event that relieved both parties from liability for non-performance.

Force Majeure. Each Party shall be excused from liability for the failure or delay in performance of any obligation under this Agreement (other than failure to make payment when due) by reason of any event beyond such Party’s reasonable control including but not limited to acts of god, fire, flood, explosion, earthquake, *pandemic flu*, or other natural forces, war, civil unrest, acts of terrorism, accident, destruction or other casualty, any lack or failure of transportation facilities, any lack or failure of supply of raw materials, or any other event similar to those enumerated above. Such excuse from liability shall be effective only to the extent and duration of the events causing the failure or delay in performance and provided that the Party has not caused such events to occur. Notice of a Party’s failure or delay in performance due to force majeure must be given to the other Party within ten (10) days after its occurrence. All delivery dates under this Agreement that have been affected by force majeure will be tolled for the duration of such force majeure. In no event shall any Party be required to prevent or settle any labor disturbance or dispute.

Office Lease “Force Majeure” clause & Pandemic Preparedness and Response Plan

This clause was taken from an Office Lease from 2016 where the definition of “Force Majeure” included the term “Pandemic”, which was also defined in the agreement along with a schedule that outlined a Pandemic Preparedness and Response Plan. Whoever drafted this agreement looks like a genius today.

Force Majeure. No party shall be liable for any default or delay in the performance of its obligations under this Lease (i) if and to the extent such default or delay is caused, directly or indirectly, by a *Pandemic* or any other cause beyond the reasonable control of such party (each a “Force Majeure”), (ii) provided the non-performing party is without fault in causing such default or delay, and such default or delay could not have been prevented by reasonable precautions and could not be circumvented in a commercially reasonable manner by the non-performing party through the use of alternate sources, workaround plans or other means. Notwithstanding the foregoing, the lack of funds shall not be considered a Force Majeure. In the case of the occurrence of a Force Majeure, the non-performing party shall be excused from further performance or observance of the obligations so affected for as long as such circumstances prevail and such party continues to use commercially reasonable efforts to recommence performance or observance without delay. Any party so delayed in its performance shall immediately provide Notice to the party to whom performance is due and describe at a reasonable level of detail the circumstances causing such delay.

“**Pandemic**” means any disaster of any form as reasonably determined by Landlord, whether it have an overriding effect on the general public or its effect be limited to the Building, including without limitation, a mass influenza outbreak or any other illness or health issue, fire, flood, earthquake, elements of nature or acts of God, riots, civil disorders, rebellions, revolutions or acts of terrorism in any country, and any event or situation that a Governmental Authority has labelled a pandemic.

“Pandemic Preparedness and Response Plan” means the plan developed by Landlord and attached as Appendix A to Schedule 9, which may be modified from time to time at the sole discretion of Landlord, setting out its plan with respect to preparing for a potential Pandemic and its response to the occurrence of a Pandemic.

SCHEDULE 9 PANDEMIC PREPAREDNESS AND RESPONSE.

- 1) Tenant shall at all times comply with the Pandemic Preparedness and Response Plan, whether or not a Pandemic shall be in existence. Landlord shall have the sole discretion to declare the existence of a Pandemic and, notwithstanding any notice requirements pursuant to this Lease, Tenant shall be deemed to have been notified of such Pandemic’s existence upon Landlord providing notice thereof in accordance with this Schedule 9.
- 2) Landlord shall have the right to make any revisions or modifications to the Pandemic Preparedness and Response Plan that it considers necessary or prudent, in its sole discretion, for the safe and efficient operation of the Building. Upon Landlord providing Notice of such revisions and modifications in accordance with the notice provisions of this Lease, or in the event that Landlord has determined a Pandemic to exist, in accordance with the notice provision contained in Section 4 of this Schedule 9, Tenant shall be deemed to have had Notice of such revision and modifications and shall be obligated to comply therewith.
- 3) Landlord shall have the full and unfettered right to do all matters and take all actions it shall deem, at its sole discretion, necessary in order to implement the Pandemic Preparedness and Response Plan. As part of implementing Pandemic Preparedness and Response Plan, Landlord shall be entitled to change, without notice in the event of a Pandemic, the Operating Standards and the Building’s general procedures with respect to the daily operation thereof, including, but not limited to:
 - (a) limiting the operating hours of the Building;
 - (b) limiting or restricting access couriers may have to the Building;
 - (c) providing services which are generally provided on-site from off-site locations;
 - (d) limiting or restricting access to the Building by Tenant, its employees and its invitees;
 - (e) restricting public gatherings in the building;
 - (f) requiring Tenant and its employees and invitees to sign in upon entering the Building and indicate whether or not they have been experiencing influenza symptoms;
 - (g) removing from the Building Tenant, if Tenant is an individual, and any employee or invitee of Tenant exhibiting, or known to Landlord to have recently suffered from, influenza symptoms, as determined by Landlord in its sole discretion, and forcibly removing any such persons who do not vacate the Building on their own accord; and

- (h) closing all or any part of the Building if it determines that, as a result of a Pandemic or the impact of a Pandemic on staff or personnel of Landlord, it is not safe to continue to operate the Building or certain parts of the Building.
- 4) In the event of a Pandemic, as determined by Landlord, Landlord shall implement a bulletin board or website notice system providing tenants with notice of actions taken, or scheduled to be taken, in accordance with the Pandemic Preparedness and Response Plan. Any notice whatsoever placed on such bulletin board or website shall be deemed adequately and sufficiently given to Tenant notwithstanding any of the other notice provisions under this Lease. Landlord shall have no obligation to make any postings on such bulletin board or website and no failure to notify Tenant in accordance with such bulletin board or website system shall be deemed negligence on the part of Landlord. Landlord shall have no liability whatsoever for any losses, costs, expenses, claims or damages suffered by Tenant as a result of Landlord's failure to post information on the bulletin board or website notice system.
- 5) Tenant shall prepare, and at all times comply with, its own pandemic preparedness and response plan to coincide with and operate alongside the Pandemic Preparedness and Response Plan. Such plan shall be approved by Landlord, acting reasonably, and shall require Tenant to:
 - (a) send all employees home who exhibit flu like symptoms during a Pandemic;
 - (b) stockpile supplies that are critical to the operation of Tenant's business from the Premises as well as infection control supplies to be used in the event of Pandemic; and
 - (c) at all times provide Landlord with an up-to-date list of its key personnel and representatives as well as their emergency phone numbers. Tenant's pandemic preparedness and response plan shall be modified in accordance with any reasonable direction by Landlord.
- 6) In the event of a Pandemic, Landlord may share any confidential information with respect to Tenant or its employees or invitees that it obtains in order to protect and preserve the health of other tenants and their employees and invitees within the Building.
- 7) Tenant shall provide immediate notice to Landlord during a Pandemic of any employee or invitee exhibiting influenza symptoms during a Pandemic.
- 8) Landlord shall have the right during a Pandemic to require Tenant to decontaminate all or any part of the Premises, failing which Landlord shall be entitled to enter the Premises and do so at Tenant's expense. Any steps that Landlord may choose to take are in its sole and unfettered discretion and nothing herein shall obligate Landlord to effect any such decontamination.
- 9) Landlord has no obligation whatsoever to test and update the Pandemic Preparedness and Response Plan. However, Tenant shall co-operate with any efforts of Landlord to perform such testing and participate in any such testing that Landlord reasonably requests. Landlord shall not be liable in any manner for any interruption to the business of Tenant or the access to the Premises by Tenant, its employees or its invitees, so long as it performs its testing during evening or weekend hours. Tenant shall attend or send a representative with the

appropriate level of responsibility for implementing the requirements of the Pandemic Preparedness and Response Plan on behalf of Tenant, to attend all training sessions with respect to the Pandemic Preparedness and Response Plan.

- 10) Notwithstanding anything to the contrary contained within this Lease, Tenant shall have no right to abatement of Rent whatsoever if the Building shall be closed or if access to the Premises shall be restricted in accordance with the Pandemic Preparedness and Response Plan.
- 11) Tenant hereby agrees to indemnify and hold harmless Landlord for any losses, costs, claims, expenses and damages whatsoever suffered as a result of the implementation or operation by Landlord of the Pandemic Preparedness and Response Plan. Landlord shall have no responsibility to Tenant whatsoever for any negligence, including gross negligence of Landlord in the preparation, implementation or operation of the Pandemic Preparedness and Response Plan or with respect to any inadequacies in respect thereto.
- 12) Tenant hereby agrees to indemnify and hold harmless Landlord from any losses, costs, claims, expenses and damages whatsoever related to the sufferance by Tenant or any of its employees or invitees of any influenza symptoms or other similar illnesses as a result of the spread of a Pandemic within the Building.
- 13) Tenant shall be liable for any losses, costs, claims, expenses and damages suffered by Landlord as a result of Tenant not complying with the Pandemic Preparedness and Response Plan, this Schedule 9 or any directions given by Landlord in accordance with the Pandemic Preparedness and Response Plan.

Performance-Based Cash Incentive Award Agreement – definition of “Adjusted EBITDA”

This clause was taken from a Performance-Based Cash Incentive Award Agreement from 2018 where the incentive bonus to the executive was based on a sliding scale percentage of “Adjusted EBITDA” and the definition of “Adjusted EBITDA” had a carve out for charges due to an “industry-wide food borne illness outbreak or pandemic.” Specifically, “Adjusted EBITDA” was defined as follows:

“Adjusted EBITDA” means earnings before interest, taxes, depreciation and amortization, as adjusted to disregard the impact of (i) charges from accounting rules adopted or which become effective after the end of the Company’s Fiscal Year ___; (ii) charges related to the high-level strategic direction of the Company as recorded in accordance with U.S. generally accepted accounting principles, as follows: executive terminations or retirements; divestiture guarantees; penalties from early retirements of debt; termination, including settlement charges, of any of the Company’s three defined benefit pension plans; any Change in Control; and the Chief Executive Officer transition process, including recruiting and relocation fees, duplicate salary costs, bonus accruals for guarantees in excess of bonus levels otherwise earned; (iii) *charges due to external events beyond the control of the Company, as follows: terrorist attacks; natural disasters; federal health care legislation; industry-wide food borne illness outbreak or pandemic; and hostile shareholder activism*; (iv) savings generated from spending less than ___ percent (___%) (\$___) of the advertising budget of \$___; and (v) the reclassification of brokerage fees from other restaurant operating costs to interest expense; all as determined by the Committee for Fiscal Year ___.

Takeaway

While most of the uses of “pandemic” related to Force Majeure clauses in commercial contracts, the term “pandemic” was also expanded on in the office lease above to include a “Pandemic Preparedness and Response Plan” and was used in the context of determining “Adjusted EBITDA” for purposes of calculating an executive’s bonus. The term “pandemic” is sure to show up in a lot more contracts and in different contexts in the future.