Hughes Hubbard & Reed

Force Majeure in the COVID-19 Era

Client Advisories

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March 18, 2020 – In addition to its threat to public health, the COVID-19 pandemic has triggered global economic fall-out that will reverberate for years to come. The cascading economic effects from the outbreak and governmental responses, including travel restrictions, quarantines, operational shutdowns and other regulatory reactions, have already begun to create disruptions in global supply chains.

A wide array of industries, including electronics, commodities, automobiles, consumer products, agriculture, airlines, hotel, retail, and fashion are experiencing delays, rejected shipments, and shutdowns of production facilities as a result of the outbreak. A recent survey by the Institute for Supply Management reports that "nearly 75 percent of companies report supply chain disruptions in some capacity due to coronavirus-related transportation restrictions, and more than 80 percent believe that their organization will experience some impact because of COVID-19 disruptions."

The COVID-19 outbreak presents the greatest disruption to the global supply chain since the March 2011 Tōhoku earthquake and tsunami, and resulting nuclear accident at the Fukushima-Daiichi nuclear power plant. Fukushima is a supply hub for the electronics, automotive, and energy industries. The disaster resulted in supply shortages for component products worldwide. Days after the earthquake, for example, a General Motors plant in Louisiana was forced to temporarily close for lack of Japanese parts. Yet, even in early days, the global scale of the COVID-19 outbreak far eclipses the Fukushima disruptions.

As with the Fukushima events, companies impacted by the COVID-19 disruptions have been considering invoking contractual *force majeure* provisions. *Force majeure* clauses are invoked when some event beyond the parties' control – e.g., natural disasters, sweeping regulatory changes, war, *etc.* – make performance under the contract impossible. As Hughes Hubbard & Reed previously reported, the Chinese government has even begun issuing "certificates" to exporters struggling to perform under their contracts in an effort to avoid liability. As the effects of the outbreak permeate, businesses can expect an increase in *force majeure* disputes by parties attempting to be excused from contractual non-performance.

Hughes Hubbard has recent experience successfully litigating such *force majeure* disputes. The firm represented Tokyo Electric Power (TEPCO) — the biggest owner and operator of nuclear power plants in Japan, including the Fukushima-Daiichi power plant — in a $1 billion international arbitration arising from a uranium supply contract between TEPCO and Canada's largest uranium mining company, Cameco. Cameco initiated the arbitration after TEPCO declared *force majeure* to suspend purchases of uranium following the Japanese government's unprecedented moratorium on nuclear power in the wake of the Fukushima accident. Hughes Hubbard successfully obtained a 96 percent reduction in damages against TEPCO — an outcome with which Cameco told shareholders it was "disappointed."

The Fukushima disaster and the TEPCO arbitration are illustrative of the *force majeure* litigations that will follow the COVID-19 outbreak. Following natural disaster (whether earthquake, tsunami or pandemic) government action may render contract performance impossible. Parties will have to carefully navigate the intersections between the specific provisions and language of their individual contracts and *force majeure* provisions, the law governing the contract, and ultimately, the precise scale and scope of the claimed *force majeure* event itself, especially where government regulations are at issue. Relevant to these disputes are the following:

- **Contractual *force majeure* clauses.** Parties will have to carefully navigate the intersections between the specific provisions and language of their individual contracts and *force majeure* provisions to determine what events of *force majeure* are covered, and what notice is required in the event of *force majeure*
- **Applicable law.** Even where a contract lacks a robust *force majeure* clause, applicable law (including common law, the Uniform Commercial Code and UN Convention on Contracts for the International Sale of Goods) may provide relief through related doctrines of "impossibility," "impracticability," and "frustration of purpose".
- **Impossibility of performance.** Has performance actually been rendered impossible. Performance will typically not be excused where it has merely been rendered more expensive or difficult.
- **Foreseeability.** Could the event of *force majeure* been foreseen and therefore avoided. Most *force majeure* clauses, and applicable law, require that the non-performing party has not contributed to the event of *force majeure*.
- **Mitigation.** Has the non-performing party acted swiftly to address and remove the event of *force majeure*. Even if the *force majeure* was outside of the party's control, resuming performance may not be.
- **Damages.** Even if a *force majeure* clause will not excuse performance, complicated issues concerning the calculation of damages can arise. A contracting party cannot simply sit on its hands and hope to collect damages from a non-performing party. It too has its own duty to mitigate and find means of satisfying its contractual requirements in some other manner.

Hughes Hubbard's world class international arbitration group brings unprecedented experience to *force majeure* disputes and stands ready to assist clients in navigating these difficult issues.

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