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UCLA v. Under Armour: Invoking the Force Majeure Clause

BY [REID ZANK](#)/ ON OCTOBER 19, 2020



Photo by Steve Cheng from Flickr

Under Armour was hoping its logo would quietly disappear from the players' uniforms and the athletic facilities at the University of California, Los Angeles ("UCLA"), after informing UCLA this past June that they were discontinuing their partnership with the school.¹ However, UCLA is not taking this lying down. On August 26, 2020, UCLA filed a lawsuit against Under Armour in a California federal court for attempting to end its 15-year, record-setting sponsorship deal valued at \$280 million after only 3 years.²

In May 2016, UCLA and Under Armour signed the largest college sponsorship deal in the history of American college sports, posing a challenge to Adidas's and Nike's dominance of college athletics.³ Under the terms of the agreement, Under Armour was to exclusively design and supply apparel, footwear, and equipment for UCLA's twenty-five men's and women's sports teams.⁴ The agreement, which went into effect in July 2017, included a \$15 million signing bonus, as well as \$112.85 million in Under Armour products over the contract's life, \$15 million in marketing support, \$2 million in rebranding, \$135 million total rights fees, and \$150,000 to upgrade and re-brand UCLA's bookstore.⁵ In exchange, UCLA's student-athletes and personnel agreed to exclusively wear and use Under Armour supplied products during practice, UCLA's intercollegiate athletic program, and other UCLA sponsored events, as well as making UCLA's athletic staff available for appearances, in addition to other perks.⁶

The complaint, filed by UCLA, states that Under Armour provided three reasons for terminating the sponsorship agreement. First, Under Armour claims that the pandemic and the suspension of certain athletic events invoke the contract's "force majeure" clause, relieving both parties from liability under the agreement.⁷ Second, Under Armour claims that a clause in the contract allows it to cancel if UCLA fails to field one of its "Core Teams" (defined in the agreement as UCLA's football, men's and women's basketball, and baseball) or, if one of those Core Teams fails to complete a regular season and misses at least fifty percent of its scheduled games.⁸ Third, Under Armour claims UCLA's failure to take appropriate actions after the arrest and indictment of a former UCLA soccer coach involved in "Operation Varsity Blues," a college admissions bribery scandal uncovered last year, allows it to terminate the agreement.⁹

A force majeure clause is a contractual provision intended to protect the parties in the event that the contract can't be performed due to forces outside the parties' control or that they could not have anticipated.¹⁰ This rarely invoked clause has become the center of attention in contracts due to the COVID-19 pandemic. The agreement between UCLA and Under Armour contains a force majeure clause which defines a "Force Majeure Event" as a "cause or event" meeting at least two criteria: (1) it is beyond the commercially reasonable control of either party and (2) the performance of the agreement by the affected party is rendered either impossible or impracticable.¹¹ The agreement lists examples of what constitutes such "causes or events," including a flood, earthquake, work stoppages, national emergencies, acts of God, and "acts of any regulatory, governmental body and/or agency, having jurisdiction over the affected [p]arty, including without limitation any [l]aws, orders, ordinances, acts, or mandates which prohibit, restrict, or regulate the affected [p]arty's performance of its obligations under [the] [a]greement."¹² If a qualified "Force Majeure Event" continues for more than 100 days, either Under Armour or UCLA can terminate the agreement effective immediately by providing written notice.¹³ President Trump declared a national emergency in response to the COVID-19 pandemic on March 13, 2020.¹⁴ Additionally, the NCAA cancelled all college sports for the spring,¹⁵ and the playing of college sports became impracticable, if not impossible. Therefore, both a qualified "Force Majeure Event" and exhaustion of the 100-day requirement

contained in the agreement arguably had been met by the end of June when Under Armour informed UCLA it was terminating the agreement. Under Armour claims the cancellation of games put them in the situation of “paying for marketing benefits that [they] [had] not received for an extended period of time,” affording them the right to terminate the agreement.¹⁶

California Civil Code section 3526 states that “[n]o man is responsible for that which no man can control.”¹⁷ Further, section 3531 states that “[t]he law never requires impossibilities.”¹⁸ However, UCLA states that per the terms of the agreement, “a ‘Force Majeure Event’ exists as to a party only when there is an event which ‘renders the performance of [the] [a]greement by the affected [p]arty either impossible or impracticable.’”¹⁹ UCLA states that Under Armour had no basis to claim cover under the force majeure clause as “the affected party.”²⁰ UCLA claims that “[n]othing about COVID-19 made it ‘impossible or impracticable’ for Under Armour to meet its obligations.”²¹ Under Armour’s obligations consist of providing financial support and products and they could and can meet these obligations regardless of COVID-19,²² nor has COVID-19 prevented UCLA from meeting their obligations to Under Armour.²³

UCLA claims that Under Armour is using the COVID-19 pandemic as a pretext to terminate an agreement it now finds too expensive. Under Armour has been struggling financially and is the subject of an SEC investigation alleging it has been inflating its financial condition to appear healthier than it actually is.²⁴ The California Supreme Court has been clear that even in the case of a force majeure clause in a contract, a greater than anticipated expense does not by itself excuse the obligation, unless there exists “extreme and unreasonable difficulty, expense, injury, or loss involved.”²⁵ As Mary Osako, vice chancellor of strategic communications at UCLA, stated “[i]t is unfortunate that Under Armour is opportunistically using the global pandemic to try to walk away from a binding agreement it made in 2016 but no longer likes.”²⁶ The fact that Under Armour has continued to meet its obligations to other similarly-situated schools, even publicly announcing a four-year extension of its sponsorship deal with Texas Tech University on June 25, 2020,²⁷ provides further evidence that it is capable of meeting its obligations to UCLA but chooses not to because of the expense. Moreover, on September 24, 2020, the Pac-12 Conference, of which UCLA is a member, announced the resumption of fall sports.²⁸ Under Armour has twelve years remaining in the agreement to reap the benefits they bargained for.

Under Armour’s second reason for terminating the agreement is also disputable. UCLA has continued to field all of its Core Teams and has continued to play in all of its “scheduled” games.²⁹ Additionally, even if UCLA had failed to participate in fifty percent of scheduled baseball games, as claimed by Under Armour, the failure would have resulted from a “Force Majeure Event” which the parties had agreed would relieve the team from having to fulfill that requirement.³⁰ Finally, with respect to Under Armour’s third reason, its claim that UCLA failed to take reasonably appropriate action with respect to the involvement of UCLA’s soccer coach

in the admissions fraud bribery scandal, UCLA put the coach on leave the same day he was arrested and accepted his resignation several days later.³¹ Under Armour has no basis for terminating for this reason since they never suggested these actions were insufficient, nor did they demand any additional actions be taken.

There is a lot of uncertainty and confusion involving the impact of COVID-19 on contract performance obligations. Unfortunately, there has not been a California decision that has confronted the issue of a pandemic in relation to an agreement such as this one. The result will be dictated by the unique factual circumstances of the case, along with the language contained in the agreement. One thing is certain. College teams which benefit from lucrative apparel contracts will be closely watching to see how the UCLA and Under Armour dispute is resolved.

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2. Ben Bolch, *UCLA sues Under Armour for more than \$200 million, citing breach of contract*, L.A. TIMES (Aug. 26, 2020, 8:17 PM), <https://www.latimes.com/sports/ucla/story/2020-08-26/ucla-sues-under-armour-for-more-than-200-million-breach-of-contract>. The case was subsequently moved to a superior court in L.A. on September 2, 2020. Complaint, Regents of the Univ. of Cal. v. Under Armour, No. 20SMCV01205 (Cal. Super. Ct. Sept. 2, 2020).
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4. Michelle R. Martinelli, *Why Under Armour is trying to end its record \$280 million apparel deal with UCLA*, USA TODAY (June 27, 2020, 6:37 PM), <https://ftw.usatoday.com/2020/06/under-armour-ucla-apparel-deal-terms-end-explain>.
5. Complaint, *supra* note 2, at *5.
6. *Id.* at *6-7.
7. *Id.* at *12.
8. *Id.* at *13-14. Under Armour points to the fact that UCLA's baseball team did not complete its regular season and played only sixteen of its fifty-seven games before the NCAA cancelled the season. *Id.*
9. *Id.* at *16.
10. Force-Majeure Clause, BLACK'S LAW DICTIONARY (11th ed. 2019).
11. Complaint, *supra* note 2, at *8.
12. *Id.*
13. *Id.*

14. Charlie Savage, Trump Declared an Emergency Over Coronavirus. Here's What It Can Do., N.Y. TIMES (Mar. 13, 2020), <https://www.nytimes.com/2020/03/13/us/politics/coronavirus-national-emergency.html>.
15. Tom Brew, Breaking: NCAA Cancels All College Sports Through End of School Year, SPORTS ILLUSTRATED (Mar. 12, 2020), <https://www.si.com/college/indiana/basketball/ncaa-cancels-basketball-tournaments-spring-sports>.
16. Bolch, supra note 1.
17. Cal. Civ. Code § 3526 (Deering 2020).
18. Cal. Civ. Code § 3531 (Deering 2020).
19. Complaint, supra note 2, at *12 (emphasis added).
20. Id. (emphasis added).
21. Id.
22. Id.
23. Id. at *13. UCLA has continued wearing Under Armour products as they attend team meetings, voluntary workouts, and prepare for future games. Id.
24. Bolch, supra note 2.
25. Butler v. Nepple, 354 P.2d 239, 245 (Cal. 1960).
26. Bolch, supra note 2.
27. Complaint, supra note 2, at *13.
28. Jenna West, Pac-12 Votes to Start Football Season on Nov. 6, SPORTS ILLUSTRATED (Sept. 24, 2020), <https://www.si.com/college/2020/09/24/pac-12-fall-football-season-returning-schedule>.
29. Complaint, supra note 2, at *14.
30. Id. at *15.
31. Id. at *16.