Force Majeure, Impossibility, and Frustration of Purpose In the Era of COVID-19

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The COVID-19 pandemic presents unprecedented challenges to the conduct of our everyday lives. With the CDC and independent epidemiologists' projections that the virus is only in its nascent stages in the United States, businesses and individuals will likely continue to feel the painful side effects of COVID-19 for the foreseeable future. While necessary and prudent, the recent (and constantly evolving) mandates by federal, state and local governments promoting social distancing and restricting non-essential activities undoubtedly compound the pandemic's economic effect on businesses and individuals alike. When businesses or individuals are unable to perform their contractual duties as a result of COVID-19 and such restrictions, force majeure clauses and the defense of impossibility become paramount.

I. Force Majeure

A. Specific Force Majeure Events.

Force majeure clauses may excuse or defer performance under a contract in the event of circumstances beyond the parties' control -- such as fire, flood, war or acts of God.[2] These provisions' purpose is to allocate risk between or among the parties if an unanticipated event renders the contract's performance impossible or impracticable. Under New York law, courts afford a narrow interpretation of force majeure clauses, so that only the occurrence of events specifically listed in the clause will excuse a party's nonperformance.[3] For example, the First Department recently held that "when the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect and scope of force majeure."[4] A force majeure clause may cover the COVID-19 pandemic if it includes specific language such as "epidemic, serious illness or plagues, disease, or outbreak").

Notably, a recent study utilized artificial intelligence to review 176 commercial contracts involving Chinese entities to determine, among other things, the prevalence of

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2 *Kel Kim Corp. v. Cent. Mkts., Inc.*, 70 N.Y.2d 900, 902 (1987).

3 *Reade v. Stoneybrook Realty, LLC*, 63 A.D.3d 433, 434 (1st Dep't 2009).

4 *Constellation Energy Servs. of NY, Inc. v. New Water St. Corp.*, 146 A.D.3d 557, 558 (1st Dep't 2017).

force majeure provisions that expressly include public health-related events in the force majeure definition.[5] Only 14% of contracts with a force majeure clause included public health-related events in the force majeure definition.[6] In light of the current public health crisis, the possibility that COVID-19 will recur in fall 2020 or winter 2020-2021 (much like the seasonal flu), and the omnipresent risk of future pandemics, public health-related events should be included as a force majeure event in all new contracts (particularly those governed by New York law).

Similarly, a force majeure clause may cover certain effects of the COVID-19 pandemic if it includes "acts of government" as a contingent event. The recent declarations of states of emergency and decisions by the federal government, New York State and New York City to restrict non-essential activities undoubtedly constitute "acts of government." Various businesses (such as retail stores, property management companies, restaurants, construction companies, law firms and financial services firms) have been tasked with interpreting the government's social distancing guidelines and implementing their own policies in a way that is both socially responsible and compliant with those mandates. Even if the government's mandates can be viewed as voluntary or informal, they would likely fall within the definition of an "act of government" for force majeure purposes. For instance, in 2008, in NFL Enterprises, LLC v. EchoStar Satellite, L.L.C., the Supreme Court of the State of New York—New York County, found that the government has the ability to compel compliance by informal means and that letters from members of Congress constituted government intervention for the purposes of a force majeure defense to nonperformance.[7] Accordingly, businesses or individuals who have included "act of government" or similar events in the definition of force majeure, may be able to excuse or defer performance under the applicable contract in light of the recent COVID-19 mandates.

Notably, New York courts have construed force majeure clauses to defer the landlord's obligation to perform certain duties under the lease. Specifically, in 2009, in Reade v. Stoneybrook Realty, LLC, the First Department enlarged the deadline for a landlord to complete construction on the premises because the work was interrupted by a temporary restraining order, which the court deemed a "governmental prohibition" as

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5 Jennifer Tsai, Force Majeure Provisions in Chinese Contracts, Kira, 2-3 (February 2020),https://kirasystems.com/files/guides-studies/KiraSystems-Deal_Points_Force_Majeure_Coronavirus.pdf.

6 Id. at 5.

7 *NFL Enters., LLC v. EchoStar Satellite, L.L.C.*, 2008 NY Slip Op 31377[U] (Sup Ct, NY County 2008); *Harriscom Svenska, AB v. Harris Corp.*, 3 F.3d 576, 580 (2d Cir. 1993)("to have failed to comply would have been unusually foolhardy and recalcitrant, for the government had undoubted power to compel compliance"); *see also Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 994 (5th Cir. 1976) ("There can be little question, then, that the Defense Production Act granted the government authority to seek compliance with its priorities programs by informal means of persuasion whether written or oral.").

defined in the lease's force majeure clause.[8] The Reade holding is readily analogous to presumptive disputes between and among property owners, construction contractors, and subcontractors, arising from delays caused by the COVID-19 pandemic and ensuing government actions. Secondary sources have hinted that, depending on the lease's language, force majeure clauses may excuse a landlord's breach of an exclusive lease or an exclusive use provision in order to ensure the property's revenue stream.[9] Landlords also may protect themselves during a force majeure event by carving out rent payments as an exception to the lease's force majeure clause.[10]

In order to successfully assert a defense based upon force majeure, the party must demonstrate that the contingent event directly caused the failure to perform under the contract. Voluntarily suspending performance due to financial considerations (whether brought about by regulations or otherwise) does not constitute a force majeure event.[11] Notably, adverse economic conditions that make performance more burdensome or unprofitable do not constitute force majeure events and are not grounds for avoiding contract performance.[12] Thus, the party seeking to avoid performance under a force majeure clause due to the COVID-19 pandemic must demonstrate that (a) a public health event or act of government was specifically listed in the clause and (b) the outbreak or ensuing government mandates directly prevented the contract's performance.

B. Catch-All Language.

Force majeure clauses may also contain catchall language. New York courts will only give force majeure effect to events that are of the same general kind or nature as those specifically listed, however.[13] Notwithstanding the courts' default tendency to give effect only to like-kind force majeure events, parties are free to negotiate more all-encompassing catchall terms, such as "for any reason, whether similar or dissimilar to the foregoing."[14] Accordingly, whether a party may deploy catchall language as an antidote to COVID-19-related nonperformance depends significantly upon the scope and specificity of the force majeure language bargained for under the agreement.

II. Impossibility

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8 *Reade v. Stoneybrook Realty, LLC*, 63 A.D.3d 433, 434 (1st Dep't 2009).

9 https://www.jdsupra.com/legalnews/is-the-coronavirus-a-force-majeure-that-97759/.

10 *LIDC I, LLC v. Sunrise Mall, LLC*, 46 Misc 3d 885, 891 (Sup. Ct., Nassau County 2014).

11 *Macalloy Corp. v. Metallurg, Inc.*, 284 A.D.2d 227, 227 (1st Dep't 2001).

12 *Rte. 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, 88 A.D.3d 1224, 1226 (3d Dep't 2011).

13 *Kel Kim Corp. v Cent. Mkts., Inc.*, 70 N.Y.2d 900, 903 (1987); *see also Team Mktg. USA Corp. v Power Pact, LLC*, 41 A.D.3d 939, 943 (3d Dep't 2007).

14 *Constellation Energy Servs. of NY, Inc. v. New Water St. Corp.*, 146 A.D.3d 557, 558 (1st Dep't 2017); *Castor Petroleum Ltd. v. Petroterminal De Panama, S.A.*, 107 A.D.3d 497, 498 (1st Dep't 2013).

The contractual defense of impossibility may be available if the subject contract does not contain a force majeure clause or if the clause does not cover COVID-19. Under New York law, a party to a contract generally "must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome."[15] A party's performance of its contractual obligations may be excused under the doctrine of impossibility "only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract."[16] Government action or a pandemic can render performance impossible, but only if the action or outbreak was unforeseeable at the time the parties entered into the contract.[17] Furthermore, the party asserting the impossibility defense must demonstrate that it "took virtually every action within its powers to perform its duties."[18]

Predictably, the social distancing and self-quarantine guidelines associated with the COVID-19 pandemic are wreaking havoc on the wedding, entertainment and hospitality industries. The cancellation of contracts with wedding venues, bands and caterers (and each party's respective rights) is an emerging issue as the virus coincides with the spring and summer 2020 wedding seasons. When a wedding vendor agreement specifies the date, location and services to be performed, but lacks a force majeure provision, the doctrine of impossibility becomes especially pertinent.

A party who wishes to escape a contract with a wedding band, for example, can expect to be able to establish that the COVID-19 pandemic was unforeseeable at the time the parties entered into the agreement. Moreover, while the wedding venue's closure generally could have been guarded against in the agreement, it is unlikely the parties could have foreseen or guarded against the closure's direct cause (i.e., the severe restrictions on social gatherings that have been instituted by New York State and New York City).[19]

Having likely established the unforeseeability element of an impossibility defense, the proponent must then demonstrate that the venue's closure on the specific date set forth in the agreement destroys the agreement's substance, rendering performance objectively impossible. This issue turns, in part, on the wedding date's objective materiality. While planned wedding dates may carry profound sentimental significance, New York courts may not be receptive to an impossibility defense based on the subjective belief that the wedding must be performed on a specific date.[20]

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15 *Kel Kim Corp. v. Cent. Mkts., Inc.*, 70 N.Y.2d 900, 902 (1987).

16 Id.

17 *A&S Transp. Co. v. County of Nassau*, 154 A.D.2d 456, 459 (2d Dep't 1989).

18 *Kama Rippa Music, Inc. v. Schekeryk*, 510 F.2d 837, 842 (2d Cir. 1975).

19 *Kolodin v. Valenti*, 115 A.D.3d 197, 200 (1st Dep't 2014).

20 *Matter of Reed Found., Inc. v. Franklin D. Roosevelt Four Freedoms Park, LLC*, 108 AD3d 1, 7 (1st Dep't 2013).

In *Matter of Reed Found., Inc. v. Franklin D. Roosevelt Four Freedoms Park, LLC*, the First Department rejected the defendant's impossibility defense because the defendant did not contend that it was unable to complete the agreed-upon engraving: instead, the defendant had chosen not to engrave based on its belief that there should be no engraving on the granite wall at issue.[21] Aside from the wedding date's subjective importance, the substance of a band agreement is performing music; and while the current pandemic may prevent the band from performing on the contractually agreed-upon date, it is unlikely that the band will not be able to perform the agreed-upon services at a later date.

To that end, some New York courts have indicated that temporary impossibility may not be regarded as an excuse for contract performance.[22] In *Leisure Time Travel, Inc. v. Villa Roma Resort & Conference Ctr., Inc.*, the Supreme Court of the State of New York, Queens County, quoted the following American Law Reports analysis:

> When impossibility of performance is contemplated, the condition ordinarily thought of is one of permanent impossibility or at least impossibility which may reasonably be expected to continue for a substantial period of time. Merely temporary supervening impossibility of brief duration may, at least as to some contractual obligations, be regarded as not excusing the promisor from performance when performance subsequently becomes possible.[23]

In that case, the court ultimately applied the impossibility defense because, while the impossibility condition proved to be temporary, it was of long duration; and at the time the contract was rescinded, it was unclear whether the impossibility condition would be removed.[24] Depending on the duration of the COVID-19 pandemic in New York, the impossibility condition caused by the social distancing guidelines may be too fleeting to support an impossibility defense. This would be especially true if one assumes (in the case of a wedding-related agreement) that parties inevitably will hold their wedding once the social distancing guidelines are lifted. However, the court's application of the defense on the basis of the condition's duration and the uncertainty of its removal at the time the contract was rescinded, pose a potential weakness for parties seeking to enforce a contract in the face of COVID-19. At this point, it is hard to ascertain when the social distancing guidelines and other mandates will be lifted or when or whether the suspended events (such as weddings) will take place.

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21 Id.

22 *Leisure Time Travel, Inc. v. Villa Roma Resort & Conference Ctr., Inc.*, 55 Misc. 3d 780 (Sup Ct, Queens County 2017).

23 C.T. Foster, *Modern status of the rules regarding impossibility of performance as defense in action for breach of contract*, 84 ALR2d 12, § 14 [a].

24 *Leisure Time Travel, Inc. v. Villa Roma Resort & Conference Ctr., Inc.*, 55 Misc. 3d 780 (Sup Ct, Queens County 2017).

The party relying on an impossibility defense also must demonstrate that it took every action within its power to perform its duties under the agreement.[25] In the engaged couple/wedding band scenario, the couple might reject the band's offers to reschedule and perform on alternative dates and demand a full refund of any amounts already paid. Given the impossibility defense's narrow application,[26] a New York court might not allow the couple to use the temporary impossibility caused by the pandemic to avoid its contract with the band, only to presumably hire a different band once the pandemic subsides.

III. Frustration of Purpose

As an alternative to impossibility, a party seeking to terminate a contract in light of the COVID-19 pandemic may rely on the defense of "frustration of purpose". While the "frustration of purpose" and "impossibility" elements are similar, they are fundamentally distinct doctrines. Impossibility focuses on the parties' ***inability to perform*** as promised due to intervening events (such as an act of government or destruction of the contract's subject matter). Frustration of purpose, on the other hand, focuses on events that materially affect the consideration received by one party for its performance. The hallmark scenario for a frustration of purpose defense is where both parties can perform but (as a result of unforeseeable events), one party's performance would no longer provide the other party with the benefit of the original bargain. Given that the parties' ability to perform fully undercuts an impossibility defense, parties seeking to rescind or terminate a contract in light of COVID-19 may have greater ability to do so under a "frustration of purpose" theory.

Under New York law, state courts apply the frustration of purpose doctrine narrowly and only when the frustration is "substantial."[27] For example, a court provided that "Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary."[28] In order to invoke this defense, "the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense."[29] However, "the doctrine of frustration of purpose … is not available where the event which prevented performance was foreseeable and provision could have been made for its occurrence."[30] Similarly, New York federal courts have limited the commercial frustration doctrine's application to "instances where a virtually cataclysmic,

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25 *Kama Rippa Music, Inc. v. Schekeryk*, 510 F.2d 837, 842-843 (2d Cir. 1975).

26 *Kel Kim Corp. v. Cent. Mkts., Inc.*, 70 N.Y.2d 900, 902 (1987).

27 *Crown IT Servs. v. Koval-Olsen*, 11 A.D.3d 263, 265 (1st Dep't 2004).

28 Restatement of Contracts (Second) § 261.

29 *Jack Kelly Partners LLC v. Zegelstein*, 140 A.D.3d 79, 85 (1st Dep't 2016).

30 *Warner v. Kaplan*, 71 A.D.3d 1, 6 (1st Dep't 2009); *see 407 E. 61st Garage v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 282, 244 N.E.2d 37, 296 N.Y.S2d 338 (1968).

wholly unforeseeable event renders the contract valueless to one party." [31] If a contingency is reasonably foreseeable and the agreement nonetheless fails to provide protection when the contingency occurs, the commercial frustration defense is unavailable.

Using the wedding band agreement context again, the party seeking to escape the contract must show that (1) the band's performance on the agreed-upon date and at the agreed-upon venue is the complete basis of the contract and (2) the venue's unavailability on the specified date would render the agreement and consideration meaningless. The party asserting the defense also must show that the supervening event that frustrates the contract's purpose was unforeseeable and could not have been provided for at contract execution time. While parties to a wedding agreement could reasonably foresee (and bargain for) provisions covering the venue's unavailability, it is unlikely that either party could have foreseen that such unavailability would have been caused by a global pandemic.

A court's resolution of this issue will likely turn on whether it takes a general or narrow view of the supervening event. For instance, the party seeking to enforce the contract may prevail if the court, applying the defense narrowly, determines that the purpose was frustrated by the venue's general unavailability (which could have been protected against in the contract). Conversely, the party relying on the defense may prevail if the court focuses on the specific reason for the venue's closure: the unanticipated spread of COVID-19 and related restrictions on social gatherings. An issue of fact likely exists as to whether the band's inability to perform on the specified date (or at the specified location) renders the agreement meaningless. As with impossibility, this issue likely turns on the materiality of the date and venue.

In other contexts, New York courts have applied the "frustration of purpose" defense to terminate commercial leases. In those scenarios, a tenant will not be relieved from its lease obligations unless the leased premises could not be used for their intended purpose.[32] For instance, in *Jack Kelly Partners LLC*, a tenant had leased office space pursuant to a lease that stated that "tenant shall use and occupy the demised premises for general offices of an executive recruiting firm."[33] Due to the landlord's failure to obtain a corrected certificate of occupancy permitting such use, the tenant was unable to lawfully use the premises as an office.[34] The court found that without the ability to use the premises as an office, the lease would have made no sense; and the inability to use the premises in that manner constituted a frustration of purpose entitling the tenant to

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31 *United States v. Gen. Douglas MacArthur Senior Vil., Inc.*, 508 F.2d 377, 381 (2d Cir. 1974)

32 *Segal Co. (E. States), Inc. v. 333 W34 SLG Owner LLC*, 2016 N.Y. Slip Op 31006[U], *11 (Sup. Ct., N.Y. County 2016); *Phillips & Huyler Assoc. v. Flynn*, 225 A.D.2d 475, 475 (1st Dep't 1996)).

33 J*ack Kelly Partners LLC v Zegelstein*, 140 AD3d 79, 81 (1st Dept 2016).

34 Id. at 85

terminate the lease.[35] The frustration of purpose doctrine may be particularly helpful to commercial tenants such as bars, restaurants and entertainment venues (which have been forced to close, modify their uses of premises and/or transform the nature of provided services in light of social distancing guidelines). This may be especially true where, for example, the lease states that the demised premises shall be used as a sit-down restaurant, theater or nightclub: the lease's 'use clause' specificity will become very significant.

Conversely, the frustration must be substantial and may not be based on mutual mistake or purely financial reasons.[36] Commercial tenants may not successfully claim frustration of purpose when a lease does not narrowly specify the permitted use (for example, 'medical office' versus 'lasik surgery center') or provides for a range of permitted uses. Restaurants that provide both take-out (and/or delivery) and sit down services may be particular disadvantaged, since reduced revenue streams from sit-down dining business may not form the basis of a frustration of purpose defense where the restaurant remains able to use the premises for other permitted uses (i.e., delivery and/or take-out). Conversely, a use clause that specifies a "white tablecloth service" restaurant would be more favorable to a tenant seeking to avoid the lease for inability to offer sit-own food services.

Notwithstanding the applicability of a defense based upon frustration of purpose, tenants remain liable to pay rent for the time they occupy the premises, even if they are entitled to terminate the lease.

IV. Conclusion

The spread of COVID-19 across the New York metropolitan area, in conjunction with the related government mandates, will continue to have severely negative economic impacts on businesses and individuals. As restrictions on non-essential activities, supply chain complications, financial market turmoil and governmental office closures hamper nearly every industry, it is more important than ever for parties to understand their rights under their contracts as they pertain to the COVID-19 pandemic. A force majeure clause may provide some relief, but only if (1) the clause specifically enumerates a public health-related event or act of government as a force majeure event; and (2) the COVID-19 pandemic or associated government mandates directly prevent performance under the contract. It is less likely that a catchall force majeure clause will operate to excuse non-performance.

Where the contract does not contain a sufficiently specific force majeure clause, the parties may be able to rely on the doctrine of impossibility to excuse their performance under the contract. The impossibility doctrine is narrowly applied and is only available when the destruction of the contract's subject matter or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded

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35 Id.

36 *Segal Co. (E. States), Inc. v. 333 W34 SLG Owner LLC,* 2016 N.Y. Slip Op 31006[U], *10 (Sup. Ct., N.Y. County 2016).

against in the contract. The COVID-19 pandemic and resulting government actions would likely satisfy an impossibility defense's un-foreseeability element. Whether the COVID-19 pandemic-related restrictions destroy an agreement's substance so as to make performance objectively impossible depends on the materiality of the specific aspects of performance that are prevented (such as times and locations or the nature of the service or goods to be provided).

Furthermore, the impossibility defense's applicability depends on the duration of the condition rendering performance impossible. While some decisions contemplate a permanent impossibility, the uncertainty regarding the duration of restrictions resulting from the pandemic may present a weakness for parties seeking to enforce the contract. Finally, the law is clear that a transacting party may not cavalierly disregard its contractual obligations in light of the COVID-19 pandemic; rather, parties are required to take every action within their power to perform under an agreement so long as public health concerns and prevailing government guidelines permit.

As an alternative to impossibility, a party seeking to escape from a contract that has been rendered meaningless by the pandemic-related restrictions may assert a "frustration of purpose" defense. The party asserting the defense must demonstrate that the agreement makes little sense in light of the frustration in question. While this is an inherently fact-dependent inquiry in relation to most commercial agreements, New York courts have been more apt to apply this defense in landlord-tenant disputes where the leased premises could not be used for a specifically-defined purpose due to the unforeseen event's occurrence. While certain tenants whose business operations have been restricted or modified due to the COVID-19 pandemic may be entitled to termination of their respective leases, they remain obligated to pay rent for the time they occupy the premises.