Force Majeure under New York Law

Will New York courts consider the COVID-19 pandemic, or the governmental actions taken in response, equivalent to a force majeure event for purposes of nonperformance or termination of a contract?

- Force Majeure Under New York Law
  - In common law jurisdictions such as New York, "force majeure" refers to a specific clause which the parties may include in their contract.
  - The concept of force majeure excuses a party's contractual performance when under certain circumstances it is unable to perform based on an event beyond its control.
  - If the alleged event is covered by the force majeure clause, New York courts may excuse the party's performance,[1] provided that the party also attempted to mitigate any damages and complied with the remainder of the contract's provisions prior to the force majeure event.
  - New York courts construe force majeure clauses narrowly, according to the wording and requirements of each clause.[2]
    - Only events specifically listed in the force majeure clause will excuse a party's performance.[3] A New York court would likely not consider an event which is not enumerated in the clause to fall within its scope.
    - Force majeure clauses may also contain a "catch-all" provision. This provision can be broad, such as "or other similar or dissimilar event or circumstances."[4] The catch-all could also be narrow, such

[1] *Kel Kim Corp. v. Cent. Mkts.*, 70 N.Y.2d 900, 902-903 (1987).

[2] *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, 931 N.Y.S.2d 436, 438 (3d Dep't 2011) ("[W]hen the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure") (internal citation omitted).

[3] *Kel Kim Corp.*, 70 N.Y.2d at 902-903 ("Ordinarily, only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused.").

[4] *Castor Petroleum Ltd. v. Petroterminal De Panama, S.A.*, 968 N.Y.S.2d 435 (1st Dep't 2013). The parties' force majeure clause included, among other things, a "government embargo or other interventions." *Id.* at 436. The court held that the catch-all provision in the clause – "or other similar or dissimilar event or circumstances" – was "relatively broad," such that the attachment of the plaintiff's oil by a Panamanian court as a result of lawsuits against the plaintiff in Panama fell within the provision, relieving defendant of its obligations. *Id.*

as "or other similar causes beyond the control of such party."[5] Courts will construe the clause according to the principle of *ejusdem generis*: only events of the same nature as those specifically enumerated in the clause will be deemed to be included in its scope.[6]

- Mere financial hardship is not sufficient to invoke a force majeure clause.[7]

- Force majeure cannot be invoked if (1) the event was foreseeable at the time of signing;[8] (2) the fact that the event would not occur was a "basic assumption ... on which the contract was made;"[9] or (3) the party did not reasonably attempt to exhaust alternatives to nonperformance.[10]

- A party must also demonstrate a causal nexus between the alleged force majeure event and its failure to meet its contractual obligations.[11]

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[5] *Kel Kim Corp.*, 70 N.Y.2d at 902.

[6] *Id.* at 903 ("[G]eneral words are not to be given expansive meaning; they are confined to things of the same kind or nature as the particular matters mentioned").

[7] *See Macalloy Corp. v. Metallurg, Inc.*, 728 N.Y.S.2d 14, 14-15 (1st Dep't 2001) ("[F]inancial hardship is not grounds for avoiding performance under a contract"); *Phibro Energy, Inc. v. Empresa de Polimeros de Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. 1989) ("Mere impracticality or unanticipated difficulty is not enough to excuse performance."); *407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 282 (1968) ("[T]he applicable rules do not permit a party to abrogate a contract, unilaterally, merely upon a showing that it would be financially disadvantageous to perform it; were the rules otherwise, they would place in jeopardy all commercial contracts.")

[8] *See, e.g., Korea Life Ins. Co., Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 269 F. Supp. 2d 424, 437-38 (S.D.N.Y. 2003) (devaluation of foreign currency required for transaction was a foreseeable risk).

[9] N.Y. U.C.C. § 2-615(a).

[10] *See Rochester Gas & Elec. Corp. v. Delta Star, Inc.*, No. 06-CV-6155-CJS-MWP, 2009 U.S. Dist. LEXIS 11489, at *18 (W.D.N.Y. Feb. 13, 2009) ("The burden of demonstrating force majeure is on the party seeking to have its performance excused . . . the nonperforming party must demonstrate its efforts to perform its contractual duties despite the occurrence of the event that it claims constituted force majeure.") (internal citation omitted).

[11] *Constellation Energy Servs. of N.Y., Inc. v. New Water St. Corp.*, 46 N.Y.S. 3d 25, 28 (1st Dep't 2017) (rejecting building owner's force majeure claim that Hurricane Sandy prevented the building owner from meeting baseline energy usage because the owner "[had] not established as a matter of law that its failure to meet the baseline was an unavoidable result of the storm,

- Other contractual provisions can also affect the scope and interpretation of the force majeure clause, such as clauses which transfer risk from the shipper to the buyer.[12]

➢ If force majeure cannot be invoked, what common law concepts may be implicated in this situation?

- If the contract does not contain a force majeure clause, a party can attempt to assert the defense of **impossibility** or **frustration of purpose**.[13]

- New York courts tend to apply these doctrines narrowly. This conservative approach conforms with the idea that parties to a contract have chosen to allocate risks among themselves, and that contractual obligations should be enforced other than in the most extreme of circumstances.

- **Impossibility**

  - A party may be able to claim impossibility, which "excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible."[14]

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including whether or not the tenants could have been restored to their space sooner, and whether the failure to do so was beyond its control.").

[12] *See Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd.*, 782 F.2d 314, 319-20 (2d Cir. 1985) (holding that the contract's cost-and-freight provision transferred both title and risk of loss to the buyer after the product was loaded onto the buyer's vessel).

[13] *See Gen. Elec. Co. v. Metals Res. Grp. Ltd.*, 741 N.Y.S.2d 218, 220 (1st Dep't 2002) ("The parties' integrated agreement contained no force majeure provision, much less one specifying the occurrence that defendant would now have treated as a force majeure, and, accordingly, there is no basis for a force majeure defense.") (internal citation omitted).

[14] *Kel Kim Corp.*, 70 N.Y.2d at 902 (holding that the plaintiff's difficulty fulfilling the contract was "not within the embrace of the doctrine of impossibility" because it was foreseeable at the time the agreement was made). *Cf. Metpath, Inc. v. Birmingham Fire Ins. Co.*, 449 N.Y.S.2d 986, 990 (1st Dep't 1982) (holding that the defendant insurer was not liable for extra expenses incurred by the insured plaintiff where the policy covered losses only after seven days had elapsed after a strike or slowdown commenced, and where the President of the United States rendered it impossible for the insurer to perform by terminating the strike "by fiat" four days before the insurance coverage would begin).

- The requirements for an impossibility claim are (1) the occurrence of an unforeseeable[15] event that (2) the parties assumed would not occur when making the agreement which (3) renders contractual performance impossible.[16]

- **Frustration of Purpose**

  - Frustration of purpose occurs when performance is possible, but when it would no longer result in the affected party receiving the benefit that had induced it to make the agreement.[17]

  - The relevant analysis is not whether the party is unable to perform, but whether the event at issue has rendered the contract "valueless" to the affected party[18] or otherwise obviated the sole reason for entering into the agreement.[19]

  - The requirements for a frustration of purpose claim are (1) an unforeseeable[20] event that substantially frustrates the purpose of the contract which (2) the parties had assumed would not occur

[15] *Kel Kim Corp.*, 70 N.Y.2d at 902 ("Kel Kim's inability to procure and maintain requisite coverage could have been foreseen and guarded against when it specifically undertook that obligation in the lease, and therefore the obligation cannot be excused on this basis.").

[16] *Metpath, Inc.*, 449 N.Y.S.2d at 989 (noting that "[t]here is ample authority holding that where performance becomes impossible because of action taken by government, performance is excused.").

[17] *United States v. Gen. Douglas MacArthur Senior Vill., Inc.*, 508 F.2d 377, 381 (2d Cir. 1974) (stating that frustration of purpose "focuses on events which materially affect the consideration received by one party for his performance. Both parties can perform but, as a result of unforeseeable events, performance by party X would no longer give party Y what induced him to make the bargain in the first place.").

[18] *Sage Realty Corp. v. Jugobanka, D.D.*, 95 Civ. 0323 (RJW), 1997 U.S. Dist. LEXIS 9301, at *6 (S.D.N.Y. July 2, 1997) ("Application of the commercial frustration doctrine has been limited to instances where a virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party.") (internal citation omitted) (applying New York law).

[19] *Crown IT Servs. v. Koval-Olsen*, 782 N.Y.S.2d 708, 711 (1st Dep't 2004) ("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.")

[20] *See, e.g., Beardslee v. Inflection Energy, LLC*, 904 F. Supp. 2d 213, 221 (N.D.N.Y. 2012), *aff'd*, 798 F.3d 90 (2d Cir. 2015); *Rivas Paniagua, Inc. v. World Airways, Inc.*, 673 F. Supp. 708, 714-15 (S.D.N.Y. 1987) (an airline's suspension of all commercial flights was a business decision and did not excuse its obligations under its agreement with an in-flight magazine publisher).

when drafting or signing the contract;[21] and (3) which was not the fault of the party asserting the defense to nonperformance.[22]

- The bar for asserting this defense is high: the fact that the transaction has become unprofitable,[23] or that a party can no longer take advantage of the contract as expected,[24] may not be sufficient.

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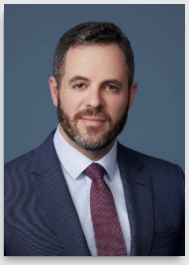

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[21] *United States v. Gen. Douglas MacArthur Senior Vill., Inc.*, 508 F.2d 377, 381 (2d Cir. 1974).

[22] E. ALLAN FARNSWORTH & ZACHARY WOLFE, FARNSWORTH ON CONTRACTS § 9.09 (4th ed. 2019).

[23] *Id.*

[24] *Id.*