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New York Contract Law Remedies in the Face of Disruption Caused by COVID-19

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The rapidly evolving public health crisis caused by the novel coronavirus, also known as COVID-19, has dominated recent headlines. Since first being identified in China in late 2019, the virus has spread rapidly throughout the globe, infecting over 100,000 individuals worldwide, with cases in over 100 countries and territories as of March 9, 2020. Governments have taken increasingly aggressive responsive measures in an effort to contain outbreaks of the coronavirus, including implementing travel restrictions, quarantine measures, closing schools and businesses, and canceling large-scale events. These responsive measures, in turn, have caused serious disruptions to business relationships and introduced significant uncertainty about risk allocation in pre-existing commercial contracts. New York law concepts such as force majeure, impossibility, and frustration of purpose have traditionally been employed when large-scale, unforeseeable events disrupt parties' expectations about or ability to perform commercial contracts. We address those doctrines, and their potential relevance in the context of the COVID-19 crisis, below.

Force Majeure

The doctrine of force majeure – a French phrase which translates to "superior force" – refers to contractual terms that excuse a party from performance should extraordinary events occur that are beyond either party's control. Contracts often specify that such events include wars, riots, famine, travel bans, floods, strikes, earthquakes, or government requisitions.

Importantly, under New York law, force majeure generally cannot be asserted as a defense to a breach of contract claim unless a force majeure clause is expressly included in the contract, which would provide that a party is not liable if it is unable to perform its contractual obligations as a result of a force majeure event.[1] Even if a contract does include such a clause, New York courts generally interpret it narrowly.[2] For example, if the clause includes a list of specific qualifying events, New York courts will only excuse performance if one of those specific events has occurred.[3] If the clause includes an open-ended list of qualifying events, such as examples of what would qualify, New York courts will confine application of the clause to events "of the same kind or nature" as the ones expressly mentioned.[4] In addition, even if a qualifying event has occurred under a force majeure clause, the party invoking the clause will bear the burden of proving the event caused its inability to perform under the contract, and that the party made reasonable efforts to avoid non-performance, but failed. Some courts have also required the invoking party to prove that the event was unforeseeable at the time the contract was entered.[5]

Accordingly, whether a party affected by the COVID-19 outbreak can successfully invoke force majeure will depend on whether the contract contains a force majeure clause, and whether the scope of the clause includes a relevant qualifying event or events. For instance, clauses explicitly including events such as "epidemic," "quarantine," or "travel bans" may provide an avenue for a successful force majeure defense. In addition, affected parties should consider whether they can prove that the failure to perform was caused by the event, and whether they have exhausted reasonable alternatives to non-performance. Whether the outbreak was foreseeable when the contract was signed may also be a factor in the analysis. If, for example, the contract was executed after COVID-19 was a known risk, the force majeure defense may be

[1] *Gen. Elec. Co. v. Metals Res. Grp. Ltd.*, 293 A.D.2d 417, 418 (1st Dep't 2002).
[2] *Reade v. Stoneybrook Realty, LLC*, 882 N.Y.S.2d 8, 9 (2nd Dep't 2009).
[3] *Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 902–03 (1987).
[4] *Id.* at 903.
[5] *E.g., In re Cablevision Consumer Litig.*, 864 F. Supp. 2d 258 (E.D.N.Y. 2012).

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more difficult to establish. That is especially true if, by that time, the coronavirus outbreak had already exacerbated into a public health crisis on a global scale.

Impossibility

Even in the absence of a force majeure clause, New York law recognizes the common law doctrine of impossibility as an avenue to excuse performance when there have been extraordinary intervening events. However, the standard to establish impossibility is high. It is not enough to show that an event has rendered performance prohibitively expensive or impractical. Rather, the party invoking the doctrine must prove that the subject matter of the contract or the means of performance have been "destroyed," such that performance is "objectively impossible."[6] In addition, "the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract."[7]

New York courts have reserved application of this doctrine to highly extreme or unusual circumstances. Examples include where the September 11 terrorist attacks resulted in communication disruptions that precluded a party from timely canceling travel reservations, and where a family court order barred two parties to a contract for personal services from ever contacting each other.[8] In the context of the coronavirus outbreak, impossibility may provide grounds for excusing performance if, for example, government responsive measures such as travel bans or quarantines entirely preclude a party from performing its contractual obligations. However, even then, the party invoking the doctrine must show that the measures were unforeseeable and the risk associated with them could not have been built into the contract.

Frustration of Purpose

New York also recognizes the doctrine of frustration of purpose when an unforeseen event renders the contract "virtually worthless" to the affected party.[9] Like impossibility, frustration of purpose is not satisfied by showing that the event renders performance more expensive or burdensome, and the affected party must show that the event was "wholly unforeseeable."[10] Unlike impossibility, performance need not be rendered impossible to invoke frustration of purpose; the affected party must instead show that the frustrated purpose was the sole reason for entering the contract. New York courts have applied this doctrine sparingly. For instance, one trial court applied frustration of purpose where a party agreed to purchase "an interest in an operating business" that was then "for all practical purposes. . . destroyed by [a] fire."[11] Similarly, an appellate court affirmed application of the doctrine to a party that was contractually required to seek recovery of expert witness fees under the fee-shifting provisions of a federal law, where an intervening Supreme Court decision held such fees were not recoverable.[12] Frustration of purpose is most likely to be applicable in the context of COVID-19 where there is a clear, specific purpose for the contract that has been defeated; for instance, where a contract has been made to provide services for a specific event that must be canceled as a result of the outbreak. Again, even under those circumstances, proving unforeseeability will be key, and could be an uphill battle, especially depending on when the contract at issue was signed.

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[6] *Kel Kim Corp*., 70 N.Y.2d at 902.
[7] *Id.*
[8] *See Bush v. Protravel International, Inc*., 746 N.Y.S.2d 790 (Civ. Ct., Richmond County 2002) (holding that performance of a travel contract has been rendered impossible for a period of time immediately following the 9/11 attack where New York City was in virtual lockdown); *see also Kolodin v. Valenti,* 979 N.Y.S.2d 587, 589 (1st Dep't 2014) (management and recording contract between two parties was rendered objectively impossible by subsequent court order precluding all contact between them).
[9] *PPF Safeguard, LLC v. BCR Safeguard Holding, LLC*, 85 A.D.3d 506, 508 (1st Dep't 2011).
[10] *A + E Television Networks, LLC v. Wish Factory Inc*., 2016 WL 8136110, at *12 (S.D.N.Y. 2016).
[11] *Matter of Fontana D'Oro Foods, Inc.*, 472 N.Y.S.2d 528, 532 (Sup. Ct. 1983).
[12] *Arons v. Charpentier*, 828 N.Y.S.2d 482, 483 (2nd Dep't 2007) (noting that "the ultimate recovery of the fees was so completely the basis of the contract that ... without it, the transaction would have made little sense") (internal quotation marks omitted).

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Conclusion

As news of additional outbreaks and transmission paths continue, responsive measures to COVID-19 are likely to continue to escalate, creating broader and more severe economic ramifications. Affected parties to contracts governed by New York law may be able to use the doctrines of force majeure, impossibility, or frustration of purpose to exit contracts or protect themselves from liability for non-performance. However, whether those doctrines apply in these circumstances is a question that will depend on a fact-specific analysis of the underlying circumstances of each case and specific contract in question.

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