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Force Majeure, Impossibility, Frustration of Purpose

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Appendix II (Force Majeure, Impossibility, Frustration of Purpose)

In an effort to minimize the financial ramifications of the global coronavirus or "COVID-19" pandemic, clients and practitioners alike are turning to contractual provisions and common law doctrines to defer, and even excuse, performance of contractual obligations. The pandemic has led to a reexamination of contractual and legal doctrines to excuse performance of contractual obligations: contractual force majeure clauses and the common law doctrines of impossibility and frustration of purpose. This section of the outline examines these treatment of these issues under Texas, New York, and Delaware law and then provides a step-by-step guide to determine the viability of a force majeure or common law defense and some practical considerations when invoking, or responding to, these legal defenses.[1]

FORCE MAJEURE CLAUSES: THE FIRST LINE OF DEFENSE

Texas law provides that when a contract contains a force majeure clause, the scope and application of such clause is "utterly dependent upon the terms of the contract" in which the force majeure clause appears.[2] The party seeking to excuse its performance under a contractual force majeure clause bears the burden of proof to establish that defense.[3] In Texas, although catch-all phrases such as "and other similar events beyond the parties' control" that follow a listing of specific events may extend the applicability of force majeure clauses, such catch-all phrases do not encompass events that are foreseeable.[4] For example, in *Valero Transmission Co. v. Mitchell Energy Corp*., the court held that a party's failure to continue purchasing natural gas in accordance with the terms of a contract due to an economic downturn was not justified by the catch-all phrase in the contract's force majeure provision, which excused a party's failure to perform "due to causes beyond its reasonable control."[5] According to the court, "an economic downturn in the market for a product is not such an unforeseeable occurrence that would justify application of the force majeure provision, and a contractual obligation cannot be avoided simply because performance has become more economically burdensome than a party anticipated."

New York law construes force majeure clauses narrowly, excusing contractual obligations only if a specifically enumerated event prevents performance or frustrates the purpose of the contract.[6] "When parties have defined the contours of force majeure in their agreement, those contours dictate the application, effect and scope of the force majeure."[7] If the event precluding

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[1] Lauren Neeley, Amy Kearney, Jennifer Ryback, and Melissa Winchester, my colleagues at McGuire, Craddock & Strother, P.C., authored this section of the outline.

[2] *Sun Operating Ltd. P'ship v. Holt*, 984 S.W.2d 277, 283 (Tex. Civ. App.—Corpus Christi, 1998).

[3] *Virginia Power Energy Mktg., Inc. v. Apache Corp.*, 297 S.W.3d 397, 402 (Tex. Civ. App.—Houston [14th Dist.], 2009).

[4] *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 182 (Tex. Civ. App.—Houston [1st Dist.], 2018).

[5] 743 S.W.2d 658 (Tex. Civ. App.—Houston [1st Dist.], 1987).

[6] *Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 902–03 (1987).

[7] *Constellation Energy Servs. of New York, Inc. v. New Water St. Corp.*, 146 A.D.3d 557, 558 (N.Y. App. Div. 2017); *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, 88 A.D.3d 1224, 1225 [3d Dept.2011]).

performance is not expressly mentioned but the force majeure clause contains a catch-all phrase, New York courts generally apply the doctrine of *ejusdem generis*, meaning that only events like those specifically listed are included within the scope of the force majeure clause.[8] Non-performing parties bear the burden of proof and must establish that failure to perform was the unavoidable result of an event beyond their control.[9] Further, "[m]ere impracticality or unanticipated difficulty is not enough to excuse performance."[10] For example, similar to Texas courts, New York courts routinely reject financial hardship or a global economic downturn as grounds for non-performance, reasoning that economic factors, while unpredictable, "are never completely unforeseeable" since they constitute "an inherent part of all sophisticated business transactions."[11]

Delaware law adopts a similar interpretation of force majeure clauses, focusing on the plain meaning of contract language to determine their applicability.[12] Like Texas and New York, a non-performing party must prove that the event thwarting performance was beyond its control and without its fault or negligence.[13] Delaware law also supports the premise that reasonable, unextreme economic hardship alone falls short of a force majeure event.[14] Contracting parties may, however, draft intentionally broad force majeure clauses.[15] In determining the scope and application of these clauses, courts focus on the intent of the drafting parties. In *Stroud v. Forest Gate Dev. Corp.*, for instance, the Chancery Court analyzed the parties' intent and concluded that, given the underlying purpose of the parties' contract, the parties expected the catch-all phrase "any reason whatsoever beyond the control of [non-performing party]," to include "delays" even though only "fire, strikes, and acts God" were listed.[16]

In light of this legal precedent, each COVID-19 force majeure case hinges on a contract's express terms. The devil is truly in the details. A party hoping to use a force majeure clause as a defense must (i) carefully review and analyze the exact language to determine whether the claimed event (here, the COVID-19 outbreak) qualifies as a specified force majeure event, and (ii) establish a

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[8] *See Team Mktg. USA Corp. v. Power Pact, LLC*, 41 A.D.3d 939, 942–43 (2007); *but see Castor Petroleum v. Petroterminal De Panama*, 107 A.D.3d 497 (2013) (holding that the attachment of plaintiff's oil due to lawsuits fell within the contract's "relatively broad" catch-all provision—"or other similar or dissimilar event or circumstances"— and excused defendant's contractual obligations despite the fact that the force majeure clause only listed "government embargo or other interventions" as triggering events).

[9] *Constellation Energy*, 146 A.D.3d at 559; *see also Aukema v. Chesapeake Appalachia*, LLC, 904 F. Supp. 2d 199, 210 (N.D.N.Y. 2012).

[10] *Aukema*, 904 F. Supp. 2d at 210 (citing *Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl*, 720 F.Supp. 312, 318 (S.D.N.Y.1989)).

[11] *Macalloy Corp. v. Metallurg, Inc.*, 284 A.D.2d 227, 227–28 (2001).

[12] *VICI Racing, LLC v. T-Mobile USA, Inc.*, 763 F.3d 273, 287 (3d Cir. 2014); *see also Stroud v. Forest Gate Dev. Corp.*, No. CIV.A. 20063-NC, 2004 WL 1087373, at *5 (Del. Ch. May 5, 2004) (providing that the application of a force majeure provision, as with any other contractual provision, starts with the words chosen by the drafters).

[13] *Gulf Oil Corp. v. F.E.R.C.*, 706 F.2d 444, 452 (3d Cir. 1983).

[14] *VICI Racing*, 763 F.3d at 288 (3d Cir. 2014).

[15] *VICI Racing*, 763 F.3d at 288 (3d Cir. 2014).

[16] *Stroud*, No. CIV.A. 20063-NC, 2004 WL 1087373, at *5 (parenthetical added).

Title search: Lease Triage Strategies During the Pandemic: Force Majeure, Impossibility, Frustration of Purpose

Also available as part of the eCourse
Lease Agreements: Contract Planning and Drafting During COVID-19

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