

Insights: Alerts

Impact of the COVID-19 Pandemic on Force Majeure Defenses Under New York Law

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Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main [COVID-19 Task Force page](#) and/or your email for updates.

Force majeure is a defense to non-performance of contractual obligations because of an “act of God” event or other event beyond the parties’ control. The COVID-19 pandemic, declarations of emergency, and issuance of shelter-in-place orders by national, state, and local governments across the globe have caused, and will continue to cause, contract breaches. *Force majeure* defenses likely will play a key role in determining whether the non-performance is excused.

We previously wrote about the contract defenses that business may rely on when an epidemic or government orders impairs contractual performance ([here](#) and [here](#)) and recently analyzed the *force majeure* defense under [Georgia](#), [North Carolina](#), and [Texas](#) law.

Here are some considerations when evaluating New York *force majeure* defenses:

- *Force majeure* is a contract-based defense available to a party when the contract includes a clause excusing the non-performance of one or both parties to the contract because of a *force majeure* event. Similar common law defenses of commercial impracticability or frustration of purpose may be asserted even where a contract does not include a *force majeure* clause. This Legal Alert does not address the common law defenses as applied under New York law.
- A “*force majeure* clause in a contract excuses nonperformance when circumstances beyond the control of the parties prevent performance.” *Harrison Svenska, AB v. Harris Corp. et al.*, 3 F.3d 576, 580 (2d Cir. 1993); *see also Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 902 (1987) (“contractual *force majeure* clauses” will “excus[e] nonperformance of the contract due to circumstances beyond the control of the parties.”).
- “*Force majeure* clauses are to be interpreted in accord with their function, which is to relieve a party of liability when the parties’ expectations are frustrated due to an event that is ‘an extreme and unforeseeable occurrence’ that was beyond [the party’s] control and without its fault or negligence.” *Team Marketing USA Corp. v. Power Pact, LLC*, 41 A.D.3d 939, 942, 839 N.Y.S.2d 242, 246 (Third Dep’t. 2007) (citations

omitted). Because the general rule or expectation is that contracts are to be performed, *force majeure* clauses are construed narrowly by New York courts. *Reade v. Stoneybrook Realty, LLC*, 64 A.D.3d 433, 433 (1st Dep't 2009).

- The event triggering the *force majeure* defense does not have to be unforeseeable. *Drummond Coal Sales, Inc. v. Kinder Morgan Operating LP "C"*, Case No.: 2:16-cv-00345-SGC, 2017 WL 3149442, *8 (N.D. Ala. July 25, 2017) (discussing N.Y. law) (citing *Starke v. United Parcel Service, Inc.*, 898 F. Supp. 2d 560, 568-69 (E.D.N.Y. 2012), *aff'd*, 513 Fed. Appx. 87 (2d Cir. 2013). *But see Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl*, 720 F. Supp. 312, 318 n.8 (S.D.N.Y. 1989) (finding law on foreseeability for *force majeure* clauses unsettled).
- In presenting a *force majeure* defense, the non-performing party must explain how the COVID-19 pandemic and/or government orders specifically frustrated or prevented performance. The party invoking the doctrine, defendants carry the burden to establish *force majeure*. *Phillips Puerto Rico Core*, 782 F.2d 314, 319 (2d Cir.1985).
- Many *force majeure* clauses list the events or categories that may excuse performance. Those lists are construed narrowly by New York courts. "Ordinarily, only if the *force majeure* clause specifically includes the event that actually prevents a party's performance will that party be excused." *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 902-03, 524 N.Y.S.2d 384, 385, 519 N.E.2d 295, 296 (1987).
- A *force majeure* clause that expressly includes epidemics or pandemics as an event or that includes government orders, regulations or restrictions as a *force majeure* event are more likely to be interpreted to cover the COVID-19 pandemic than clauses where those events are not listed.
- Even if the *force majeure* clause does not expressly list epidemics or government action as events, the clause may cover the COVID-19 pandemic. Many *force majeure* clauses contain a catchall phrase such as "including" or "without limitation" or "similar events beyond the parties' control." In such circumstances the *force majeure* clause may apply. As one appellate division court explained: "When the event that prevents performance is not enumerated, but the clause contains an expansive catchall phrase in addition to specific events, 'the precept of *ejusdem generis* as a construction guide is appropriate' – that is, 'words constituting general language of excuse are not to be given the most expansive meaning possible, but are held to apply only to the same general kind or class as those specifically mentioned.'" *Team Marketing USA*, 41 A.D.3d at 942-43, 839 N.Y.S.2d at 246 (citations omitted).
- New York courts recognize that government orders and restrictions may constitute a *force majeure* event. Government action giving rise to a *force majeure* event has included restrictions on the sale of goods to Iran (*Harriscom Svenska*, 3 F.3d 576), issuance of an injunction that prevented contract performance (*Reade v. Stoneybrook Realty*, 63 A.D.3d 433, 882 N.Y.S.2d 8), or a failure to issue necessary permits by the contracting government entity (*Trump on Ocean, LLC v. Ash*, 24 Misc.3d 1241(A), 899 N.Y.S.2d 63 (Sup. Ct. Nassau County 2009).
- Economic losses, even severe economic losses, typically do not constitute a *force majeure* event. *Urban Archaeology Ltd. v. 207 East 57th Street, LLC*, 34 Misc.3d 1222(A), 951 N.Y.S.2d 84 (Sup. Ct. New York County 2009).

- For example, New York courts did not find the financial market meltdown in 2008 constituted a *force majeure* event excusing contract performance. *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, 27 Misc.3d 1222(A) (Sup. Ct. Albany Cnty. May 12, 2010) (“There can be no doubt that the ‘worldwide economic meltdown’ ... was an event beyond Ruby Tuesday’s control. However, the critical inquiry under the *force majeure* clause is whether Ruby Tuesday actually was prevented from constructing a restaurant on the Property due to events entirely outside its control and not due to any fault or negligence on its part.”).
- A party relying on a *force majeure* defense must comply with applicable notice provisions in order to preserve the defense. *In re: The Containership Company*, Civ. Action No. 11-12622-JLG, 2016 WL 2341363 (S.D.N.Y. Bankr. Apr. 29, 2016).

Our [COVID-19 Task Force](#) stands ready to help you navigate the unique business challenges posed by the pandemic and shelter-in-place orders. If you are interested in discussing a specific area of interest for your business, we recommend you reach out to your primary Kilpatrick Townsend point of contact. General questions may also be submitted via email to #COVID19TSTaskForce@kilpatricktownsend.com. For New York-specific questions, you may also contact the attorney listed below.

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