

# Contract Issues: Force Majeure & The Coronavirus

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Sugarman Law Firm has conducted general research regarding force majeure clauses. We were interested in whether the COVID-19 situation would satisfy a typical force majeure clause and allow a contractual obligation to be excused or delayed. Under current New York law, the coronavirus will only trigger a force majeure clause if the clause specifically lists an epidemic, pandemic, or similar emergency as a qualifying event. A general or “catch-all” force majeure does not encompass the current COVID-19 situation. In short, whether the coronavirus will satisfy a force majeure clause requires a close read of the contract at issue.

## ANALYSIS

### I. General Information Regarding Force Majeure Clauses

Force majeure refers to a contractual “clause[] excusing nonperformance due to circumstances beyond the control of the parties.”<sup>1</sup> Force majeure is based on the common law doctrine of impossibility of performance. The doctrine of impossibility does not excuse non-performance of a contract where the impossibility is only caused by financial difficulty or economic hardship.<sup>2</sup> Impossibility will only excuse a contractual duty where the means of performance are destroyed by a natural disaster or by law.<sup>3</sup>

Similarly, force majeure clauses only provide a narrow defense to nonperformance under New York law.<sup>4</sup> “Ordinarily, only if the force majeure clause specifically includes [a previously unforeseeable] event that actually prevents a party’s performance will that party be excused.”<sup>5</sup> Thus, a force majeure provision expands on the doctrine of impossibility, by allowing parties to a contract to specify extreme circumstances which may excuse or suspend performance. In order to avoid a contractual obligation, the non-performing party must demonstrate the existence of an enumerated force majeure event which actually prevents it from fulfilling its obligation.<sup>6</sup>

### II. Force Majeure Clauses and COVID-19

A recent New York Law Journal article noted that, due to the increasing number of COVID-19 cases in the U.S., “[I]t is only a matter of time before contract counterparties . . .

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<sup>1</sup> *Kel Kim v. Central Mkts.*, 70 N.Y.2d 900, 902 (1987).

<sup>2</sup> *407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281 (1968) (citations omitted).

<sup>3</sup> *Kolodin v. Valenti*, 115 A.D.3d 197, 200 (1st Dept. 2014).

<sup>4</sup> *Kel Kim*, 70 N.Y.2d at 902.

<sup>5</sup> *Id.* at 902-03; *see also Constellation Energy Servs. of N.Y. v. New Water St.*, 146 A.D.3d 557, 558 (1st Dept. 2017) (“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”) (internal citations, quotation marks, and brackets omitted).

<sup>6</sup> *Phillips Puerto Rico Core, Inc. v. Tradax Petroleum, Ltd.*, 782 F.2d 314, 319 (2d Cir. 1985) (applying New York law).

attempt to argue that their contractual duties should be excused due to coronavirus.”<sup>7</sup> The article provides: “The application of a force majeure to the coronavirus outbreak will depend significantly on the language of the parties’ contracts. Some contracts may include ‘epidemic’ [or ‘pandemic’, ‘quarantine’, ‘public health emergency’, etc.] as an enumerated example of a contractual force majeure event. . . .In those cases, a party’s performance may be excused [or suspended] because ‘the force majeure clause specifically includes the event that actually prevents a party’s performance.’”<sup>8</sup> Thus, if a contract lists “epidemic” or “pandemic” as a force majeure event, a party could convincingly argue that the coronavirus triggers this clause, given that the virus has been declared a pandemic by the World Health Organization.<sup>9</sup>

If there is an applicable force majeure provision which encompasses the coronavirus, the epidemic must have actually prevented the party from performing in order for the clause to be triggered.<sup>10</sup> If factors unrelated to the virus contributed to the party’s nonperformance, a force majeure clause may not apply.<sup>11</sup> Additionally, a party may not be able to enforce a force majeure if it was still objectively possible to perform the contract despite COVID-19.<sup>12</sup> In the event that a properly-worded force majeure clause does excuse performance due to the virus, all affected parties must attempt to mitigate their damages.<sup>13</sup> If contemplated by the clause, written notice should be provided by the party invoking the clause.<sup>14</sup> Depending on the clause’s language, the parties may terminate or simply delay performance of the contract.

If there is an applicable force majeure clause in effect, it is not sufficient for the party enforcing the clause to show that the coronavirus has made contract performance more difficult or costly.<sup>15</sup> Rather, the party must show that it cannot perform the contract due to the virus.<sup>16</sup> Taking precautionary measures or voluntarily stopping performance do not qualify as being unable to perform.<sup>17</sup>

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<sup>7</sup> David B. Saxe & Michael Mix, *Contractual Force Majeure Provis Spreading Coronavirus*, The New York Law Journal (March 9, 2020), <https://www.law.com/newyorklawjournal/2020/03/09/contractual-force-majeure-provisions-and-the-spreading-coronavirus/>.

<sup>8</sup> *Id.* (quoting *Kel Kim*, 70 N.Y.2d at 902) (other citations omitted).

<sup>9</sup> Lawrence P. Rochefort & Meghan K. Boland, *The Coronavirus and Force Majeure Clauses in Contracts*, Akerman LLP (March 17, 2020), <https://www.akerman.com/en/perspectives/the-coronavirus-and-force-majeure-clauses-in-contracts.html>.

<sup>10</sup> Jeffrey D. Neuburger & Jordan Horowitz, *The Coronavirus and Force Majeure Clauses*, The National Law Review (March 2, 2020), <https://www.natlawreview.com/article/coronavirus-and-force-majeure-clauses>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Neuburger, *supra*.

<sup>14</sup> Trent Cotney, *Force majeure clauses take center stage in contractor’s coronavirus response*, Construction Dive (March 16, 2020), <https://www.constructiondive.com/news/force-majeure-clauses-take-center-stage-in-contractors-coronavirus-respons/574135/>.

<sup>15</sup> David J. Ball et al, *Contractual Performance In The Age of Coronavirus: Force Majeure, Impossibility And Other Considerations*, Bracewell (March 16, 2020), <https://bracewell.com/insights/contractual-performance-age-coronavirus-force-majeure-impossibility-and-other>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

If a force majeure clause does not explicitly list an “epidemic” or like circumstance that encompasses the coronavirus, it is unlikely that contract performance will be excused, due to New York’s traditionally narrow interpretation of force majeure clauses.<sup>18</sup> A “catch-all” phrase at the end of a force majeure will not allow the clause to be invoked, unless the list enumerates a circumstance similar to a pandemic or epidemic.<sup>19</sup>

As an alternative to force majeure, a party may invoke the doctrine of impossibility, if federal or state governments respond to COVID-19 in a manner which prevents the parties from completing their contractual duties.<sup>20</sup> Such government actions would plausibly include the shut-down of construction sites or a ban on delivery of materials.<sup>21</sup> Note that the impossibility doctrine is not satisfied based on a showing of subjective impossibility or inconvenience.<sup>22</sup>

## CONCLUSION

In response to COVID-19, contracting parties should examine whether their force majeure clauses contain language regarding an “epidemic” or similar event. If the clause expressly lists this sort of public health emergency as an event which could excuse or suspend performance, it is likely that the clause would apply given the present stage of the coronavirus. A non-specific force majeure clause probably will be unsuccessful, as New York courts construe these clauses very narrowly. The applicability of a force majeure to the virus is almost entirely contingent on the language used in the clause at issue. Moving forward, it will be advisable to insist that “epidemic” is listed as an event which triggers a force majeure, which can either suspend or excuse contract performance.

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<sup>18</sup> Saxe, *supra*; Alex Benarroche, *Coronavirus & Construction: Are Delays Covered Under Your Force Majeure Clause?* Levelset.com (March 20, 2020), <https://www.levelset.com/blog/coronavirus-construction-contract-force-majeure/>.

<sup>19</sup> Anton A Ware et al, *What to Do When You Receive a Coronavirus-Related Force Majeure Notice*, Arnold & Porter (March 4, 2020), <https://www.arnoldporter.com/en/perspectives/publications/2020/03/what-to-do-when-you-receive-a-coronavirus>.

<sup>20</sup> Saxe, *supra*.

<sup>21</sup> Suzanne Karbarvz Rovner & Dennis J. Powers, *Coronavirus and construction: Q&A (United States)*, DLA Piper (March 19, 2020), <https://www.dlapiper.com/en/us/insights/publications/2020/03/coronavirus-and-construction-q-and-a/>.

<sup>22</sup> Ball, *supra*.