



**STATE OF NEW YORK
FORCE MAJEURE LAW
COMPENDIUM
(during COVID-19 pandemic)**

Prepared by
Rivkin Radler LLP
926 RXR Plaza
West Tower
Uniondale, NY 11556
(516) 357-3000
www.rivkinradler.com

2020

A. Introduction

This memorandum will seek to provide a New York exemplar for the USLAW NETWORK Compendium of Law on relevant considerations with respect to invoking “force majeure” clauses in contracts in light of the ongoing COVID-19 crisis.

B. Force Majeure in New York

1. Introduction

The outbreak of the novel Coronavirus (“COVID-19”) pandemic has caused a significant impact on commercial transactions throughout the world. Companies are facing issues with productivity and are left questioning whether they will be liable for costs and damages associated with their inability to perform under preexisting contracts. The answer to that question may begin with a review of the contract’s force majeure clause. Force majeure events are extreme events that occur beyond the control of the impacted party. Typical examples include occurrences such as war, natural disasters and organized labor activities such as strikes and work slow-downs. Force majeure clauses allocate risk among contracting parties by outlining the consequence of non-performance resulting from unforeseeable circumstances. Under New York Law, contracts containing force majeure provisions may excuse or delay performance under the contract and absolve a party for any liability resulting from such failure to perform. As the COVID-19 crisis continues, commercial actors are scrambling to examine their contracts to determine what, if any, relief may be sought using force majeure.

2. Requirements to Obtaining Relief Using Force Majeure

Force majeure provisions are fact specific and there is generally no uniform or standard clause that is used in every contract. The list of “triggering events” differ based on the subject matter of the contract. Furthermore, how courts choose to interpret force majeure provisions varies by state.

In New York, courts have concluded that force majeure clauses should be enforced to limit damages “in cases where the reasonable expectation of the parties and the performance of the contract have been frustrated by circumstances beyond the control of the parties.”¹ As an effort to slow the spread of COVID-19, quarantine measures were implemented and thousands of facilities were forced to close. These measures lead to a massive disruption in business activities across the globe and has made it impossible for many parties to perform under their contracts. However, frustration or impracticability alone, is not enough to invoke a force majeure defense and excuse performance in New York.² Thus, just because a party has been *affected* by the COVID-19 pandemic, or associated restrictions, doesn’t mean they will succeed on invoking a force majeure defense.

¹ United Equities Co. v. First Natl. City Bank, 52 A.D.2d 154, 157 (1st Dept.1976).

² Aukema v. Chesapeake Appalachia, LLC, 904 F. Supp. 2d 199, 210 (N.D.N.Y. 2012)

Courts in New York adhere to general freedom of contract principles, holding that the contours outlined in the agreement are an accurate reflection of the intent of the parties.³ New York courts will not read beyond the language of the contract and have held express language will dictate the application, effect and scope of the force majeure.⁴ As a result, force majeure clauses in New York tend to be construed more narrowly than courts in other jurisdictions.⁵ Therefore, in New York the specific language of a force majeure clause is critically important in determining when nonperformance will be excused.

New York courts focus on whether the force majeure clause clearly identifies the event that the impacted party claims to have prevented performance. Generally, the only events that will excuse or delay a party's performance are those that are explicitly listed.⁶ Moreover, the absence of a force majeure clause in an agreement generally precludes a party from asserting a force majeure defense.⁷ Thus, the first requirement in obtaining relief using force majeure is proving that the force majeure clause includes the specific event claimed to have prevented performance.

Force majeure clauses are aimed to protect parties against unforeseeable events, making it difficult for parties to describe events with a high level of specificity. Because the COVID-19 outbreak was unforeseeable, it won't be explicitly listed in contracts as a triggering event. However, COVID-19 was officially declared by the World Health Organization to be a world-wide pandemic. As a result, parties may be examining their contracts to determine if an "epidemic" or "pandemic" is listed as a qualifying force majeure event. If contracts contain that language, then invocation is more likely to be successful. However, it should be noted that no New York court has yet ruled on a force majeure clause in the context of a pandemic. Therefore, even when a contract expressly provides for epidemics or pandemics, success is not guaranteed, and further analysis is still required.

In New York, the burden of demonstrating force majeure is on the party seeking to have performance excused.⁸ Further, New York courts require the non-performing party to demonstrate that they made a good faith effort to perform its contractual duties despite the occurrence of a force majeure event.⁹ Courts in New York have held that mere impracticality or unanticipated difficulty is not enough to excuse performance.¹⁰ As a result, the non-performing party must show that despite the unanticipated difficulty caused by COVID-19, they still attempted to perform under the contract.

If a contract's force majeure clause does not explicitly list epidemics or pandemics as triggering events, parties are not necessarily out of luck. An additional force majeure event that appears

³ *Belgium v. Mateo Prods., Inc.*, 29 N.Y.S.3d 312, 315 (1st Dep't 2016)

⁴ *Id.*

⁵ *Reade v. Stoneybrook Realty*, 63 A.D.3d 433, 434 (1st Dept. 2009).

⁶ *Phibro Energy, Inc. v Empresa De Polimeros De Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. 1989)

⁷ *Gen. Elec. Co. v. Metals Res. Grp. Ltd.*, 741 N.Y.S.2d 218, 220 (N.Y. App. Div. 2002).

⁸ *Phillips P.R. Core, Inc. v. Tradax Petroleum Ltd.*, 782 F.2d 314, 319 (2d Cir. 1985)

⁹ *Id.*

¹⁰ *Beardslee v. Inflection Energy, LLC*, 904 F. Supp. 2d 213, 220 (N.D.N.Y. 2012) *aff'd*, 798 F.3d 90 (2d Cir. Aug. 19, 2015)

frequently in contracts is “governmental action.” To slow the spread of COVID-19, business closures and lockdowns throughout the United States were instituted by governmental action. Therefore, parties may look to whether required business closures and lockdowns may constitute governmental actions for purposes of a force majeure clause.

No precedent in New York exists on how courts will interpret force majeure provisions where governmental action was necessary to combat a global pandemic. However, in the past New York courts have construed force majeure clauses relating to other governmental actions.¹¹ For example, in *Harriscom Svenska, Ab v. Harris Corporation and R.F. Systems*, the court found that export control qualified as “governmental interference” and warranted invocation of the parties’ force majeure clause.¹² Importantly, parties will not be successful in invoking force majeure clauses to obtain relief if non-performance resulted from their own inaction during a time of government restrictions.¹³ Rather, non-performance must be a direct result of government interference. Accordingly, seeking relief using governmental action as a force majeure event may be an option for those parties suffering business disruptions resulting from governmental restrictions implemented to fight COVID-19.

Furthermore, New York courts have held that financial difficulty or economic hardship will not be enough to excuse performance.¹⁴ The effects of COVID-19 are broad spanning and has left almost no sector unharmed. As a result, many businesses are enduring economic difficulties. However, New York courts have ruled that as a matter of law economic factors will be insufficient to excuse nonperformance.¹⁵ Therefore, parties must go a step beyond just showing adverse economic conditions to succeed in invoking a force majeure defense.

3. Scope of Relief

It is important to understand the scope and duration of relief available pursuant to the contract’s force majeure clause. The scope is largely dictated by the express language of the contract. For example, the language of the contract will control whether a party seeking to excuse performance is permitted to suspend or terminate the contract due to a force majeure event. Moreover, if the contract permits a party to suspend the contract, it’s imperative to have a firm understanding on when the impacted party will be obligated to resume performance.

Force majeure clauses typically allow a party to suspend performance for the duration of the force majeure event, provided however that they resume performance as soon as possible following the force majeure event. As previously noted, the COVID-19 pandemic has resulted in

¹¹ *Castor Petroleum Ltd. v. Petroterminal De Panama, S.A.* 968 N.Y.S.2d 435 (N.Y. App. Div. 2013) (attachment of plaintiff’s oil by a Panamanian court as a result of lawsuits against plaintiff in Panama fell within the meaning of “government interventions”); *Reade v. Stoneybrook Realty*, 63 A.D.3d 433 (N.Y. App. Div. 2009) (holding that a TRO issued by Supreme Court, which prohibited the continuation of construction by landlord, was governmental action).

¹² *Harriscom Svenska, Ab v. Harris Corporation and R.F. Systems*, a Division of R.F. Communications Group of Harris Corporation, 3 F.3d 576 (2d Cir. 1993)

¹³ *See Wyndham Hotel Grp. Int’l, Inc. v. Silver Entm’t LLC*, 2018 WL 1585945, at *11 (S.D.N.Y. Mar. 28, 2018)

¹⁴ *Urban Archaeology Ltd. v. 207 E. 57th St. LLC*, 891 N.Y.S.2d 63, 64 (1st Dep’t 2009)

¹⁵ *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, 931 N.Y.S.2d 436 (App. Div. 2011)

a multitude of restrictions. It is also unlikely that local, state and federal measures will all be lifted simultaneously. The various moving parts and the unprecedented nature of the current state of the world may complicate determining when the force majeure event has ended.

Additionally, it is critical to understand which party's non-performance will be excused by the force majeure clause. For example, in *One World Trade Ctr. LLC v. Cantor Fitzgerald Sec.*, a landlord sued a tenant for unpaid rent after the September 11, 2001 terrorist attacks destroyed a building in which the tenant had a lease. The court ultimately ruled that the landlord failed to carry its burden on other grounds. Interestingly, the tenant counterclaimed for rescission and unjust enrichment, seeking rent-abatement for services that could not be provided due to the destruction of the building. However, the express terms of the force majeure clause excused the landlord from any liability for non-performance resulting from the acts of third parties. Therefore, the court barred tenant's counterclaims for a refund of rent. Thus, even when contracts contain force majeure clauses it is crucial that parties fully understand the scope of those provisions.

4. Other Considerations

Standard form contracts may not contemplate force majeure, and when they do, they likely list a limited number of triggering events followed by broad "catch-all" provisions. A common misconception is that, the broader the provisions span the more protection the parties will be afforded. However, New York courts have held the opposite.

When interpreting the applicability of catch all language, New York courts follow the construction principal of *ejusdem generis*, which means of the same kind. Specifically, courts in New York will not give expansive meanings to catch all provisions to cover unlisted events. Instead, New York courts have confined those words to events of the same kind or nature of the particular matters mentioned.¹⁶ As a result, it may be difficult to find relief for disruptions caused by COVID-19 through broad catch all provisions. So, although parties may intend to have catch all language be as far reaching as possible, New York courts have chosen not to interpret them that way.

Before seeking relief for non-performance based on a force majeure event, parties should familiarize themselves with the necessary notice requirements outlined in their contracts. New York courts have held that failure to adhere to the notice provisions under a force majeure clause can negatively affect the party's success at invoking a force majeure defense.¹⁷ Failure to comply with notice requirements will not automatically prevent a party from successfully asserting a defense. Rather, New York courts examine the intention of the parties to determine whether the provision of notice was intended to be a condition precedent to invoking force majeure.¹⁸

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue

¹⁶ *Kel Kim Corp. v. Cent. Mkts., Inc.*, 524 N.Y.S.2d 384, 385 (1987).

¹⁷ *In re The Containership Co.*, 2016 WL 2341363, at *10 (S.D.N.Y. Apr. 29, 2016)

¹⁸ *Toyomenka Pac. Petroleum, Inc. v. Hess Oil Virgin Islands Corp.*, 771 F. Supp. 63, 67 (S.D.N.Y. 1991)

an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.