Your Contract and Coronavirus: Now What? - New York-Specific Addendum

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As discussed in our News Alert issued on March 27, 2020 (**"Your Contract and Coronavirus: Now What?"**), the applicability of force majeure clauses (as well as similar defenses to contract enforceability such as impossibility and impracticability) in light of the COVID-19 pandemic requires detailed examination and analysis of the particular clause itself, the circumstances at issue, and the case and statutory law in the relevant jurisdiction(s). In this article, certain considerations are examined that should be taken into account when interpreting such provisions contained in contracts governed by New York law. To that end, this News Alert focuses on the same as an augmentation to the March 27, 2020 News Alert.

Force Majeure

Generally, a court applying New York law may interpret force majeure clauses more narrowly than under the laws of many other jurisdictions (for example, those jurisdictions discussed in the March 27, 2020 News Alert). In particular, a court applying New York law may require that **the event be specifically included in the force majeure clause**.[1] If there is a general or catch-all statement in the force majeure clause, a court applying New York law may require that **the event at issue be closely related to those specifically included in the force majeure clause** (the application of the doctrine of *ejusdem generis*).[2] Further, even if it is determined that the event qualifies for the force majeure clause at issue, a court applying New York law may also require a demonstration that the performance is **objectively impossible** or that the event at issue actually prevents a party's performance.[3] Beyond the impossibility standard, a court applying New York law may also require that the event was **unforeseeable** (regardless of whether they type of event is specifically included in the force majeure clause).[4]

Impossibility/Impracticability

Similarly, a court applying New York law may also interpret the contractual defenses of impossibility/impracticability and frustration of purpose more stringently than under the laws of many other jurisdictions (for example, those jurisdictions discussed in the March 27, 2020 News Alert). In particular, as with force majeure provisions, a court applying New York law may require demonstration that the performance is **objectively impossible**.[5] Beyond the requirement of actual impossibility, and again as with force majeure provisions, a court applying New York law may also require that the event was **unforeseeable**.[6]

Conclusion

While a court applying New York law may interpret force majeure clauses (as well as similar defenses to contract enforceability such as impossibility and impracticability) more narrowly than under the laws of many other jurisdictions, it is still crucial that any analysis involve a detailed examination of the particular clause itself and the circumstances at issue. **This News Alert focuses specifically on New York law. For more generalized analysis and conclusions, please see the News Alert published on March 27, 2020 entitled "Your Contract and Coronavirus: Now What?"**

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[1] *See Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 902, 519 N.E.2d 295, 296 (1987) ("Ordinarily, only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused.") (citing *United Equities Co. v. First Natl. City Bank*, 41 N.Y.2d 1032, 395 N.Y.S.2d 640, 363 N.E.2d 1385).

[2] *See Team Mktg. USA Corp. v. Power Pact, LLC*, 41 A.D.3d 939, 942-43, 839 N.Y.S.2d 242, 246 (2007) ("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'") (quoting *Kel Kim Corp. v. Central Mkts.*, 131 A.D.2d 947, 950, 516 N.Y.S.2d 806 (1987), *aff'd.* 70 N.Y.2d 900, 524 N.Y.S.2d 384, 519 N.E.2d 295 (1987)).

[3] *See Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 902, 519 N.E.2d 295, 296 (1987); *See also* § 77:31. Force Majeure clauses, 30 Williston on Contracts § 77:31 (4th ed.) ("An express force majeure clause in a contract must be accompanied by proof that ... in spite of skill, diligence, and good faith on the promisor's part, performance remains impossible or unreasonably expensive.").

[4] *See Goldstein v. Orensanz Events LLC*, 146 A.D.3d 492, 493, 44 N.Y.S.3d 437, 438 (2017) (" . . . the clause must be interpreted as if it included an express requirement of unforeseeability or lack of control.").

[5] *See Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 902, 519 N.E.2d 295, 296 (1987) ("Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible.").

[6] *See Warner v. Kaplan*, 71 A.D.3d 1, 6, 892 N.Y.S.2d 311, 315 (2009) (declining to apply common law doctrines of impossibility or frustration of purpose " . . . where the event which prevented performance was foreseeable and provision could have been made for its occurrence") (quoting *Matter of Rebell v Trask*, 220 AD2d 594, 598, 632 NYS2d 624 (1995), citing *407 E. 61st Garage*, 23 N.Y.2d 275; 244 N.E.2d 37; 296 N.Y.S.2d 338 (1968)); *See also Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 902, 519 N.E.2d 295, 296 (1987) (" . . . the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract."); *See also Tycoons Worldwide Group (Thailand) Pub. Co., Ltd. v. JBL Supply Inc.*, 721 F. Supp. 2d 194, 203 (2010) ("the defenses of impossibility of performance and frustration of purpose are not available 'if the difficulties that frustrate the purpose of contract or make performance impossible reasonably could have been foreseen by the promisor when the parties entered into contract . . . if the event was reasonably foreseeable, the parties should have negotiated contract terms addressing its occurrence . . .'") (citing 30 Williston on Contracts § 77:95 (4th ed.).