RBJ BUSINESS JOURNAL
RBJ.NET
VOLUME 36 NUMBER 9 Part of the BridgeTower Media network JUNE 2, 2020

Do not expect relief of most contractual obligations due to COVID-19

VIEWPOINT
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For most business law practitioners, we have had little-to-no need to revisit the concepts of *force majeure*, frustration of purpose, impossibility, and impracticality since completing our final examination in contracts.

This orthodoxy was challenged in March, when large sectors of our economy contracted or shut down altogether by government COVID-19 orders. Businesses and their attorneys began searching for remedies for the problems caused by this once-in-a-century event, many of which ended up in the courts. A slew of new actions prompted by the effect of COVID-19 restrictions are being filed daily; Lex Machina reports that the practice area seeing the most growth in COVID-19 suits is, not surprisingly, contract disputes (followed by insurance, employment, trademark, and securities).

It is too early for the courts to have responded to these filings. Outside of granting requests for compassionate prisoner release, enforcing pre-COVID-19 settlement agreements, and a few sporadic discovery decisions, we have no substantive COVID-19-related rulings to analyze. However, we need not wait for the courts to make their pronouncements: We can say now with relative confidence that the doctrines of *force majeure*, frustration of purpose or impossibility will rarely provide relief to businesses experiencing COVID-19 hardship. Impracticality, by contrast, provides a somewhat better option.

In several instances, plaintiffs have tried to shoehorn a COVID-19-caused impediment into an existing *force majeure* clause (the principle allowing parties to craft contractual clauses that relieve obligations based upon unforeseeable circumstances), whether warranted or not. For example, *D'Amico Dry D.A.C. v. McInnis Cement Inc.* (SDNY, May 14, 2020) arose out of the chartering of a vessel to ferry cement between Quebec and the United States. The cement manufacturer declared *force majeure* citing the "extraordinary and unprecedented conditions due to the COVID-19 currently existing in the Northeastern United States," despite the fact that the charter agreement did not exempt performance based on disease, epidemic, or government order. The manufacturer thus ran afoul of the ancient rule that *force majeure* clauses are narrowly construed and must specifically provide for the circumstance in question. The manufacturer is almost certain to lose on this basis. The shipper was also quick to point out that, prior to the onset of COVID-19, the manufacturer had already fallen behind on the guaranteed minimum number of shipments, possibly because it had chartered other vessels better suited to its needs. While this dispute will ultimately be resolved in arbitration, it provides good reminders to businesses: (1) do not expect that a bald invocation of *force majeure* will relieve a party from its contractual obligations unless expressly provided *and* that condition prevented performance, and (2) do not try to obtain absolution for pre-COVID-19 misconduct on the basis of *force majeure*, for it will be conspicuous and pointed out by savvy opponents.

The tendency for litigating parties to run to *force majeure* (whether warranted or not) seems to have left frustration of purpose (the doctrine allowing termination of a contract when an unforeseen event undermines the principal purpose of that contract) with comparatively less of a following. Indeed, as of the writing of this article, I could find only a few cases where a party alleged that COVID-19 caused a frustration of purpose (even though some of the *force majeure* cases reviewed probably had a slightly better chance as frustration cases).

In one example, *Venus Over Manhattan Art LLC v. 980 Madison Owner LLC* (SDNY, May 18, 2020), a company that leased commercial space for the purpose of "[t]he display and retail sale of fine art, and, as incidental and ancillary use, general executive and administrative offices" sought a declaration that the governor's executive orders (including, but not limited to, No. 202.8 requiring all non-essential employees to stay home) had frustrated the purpose of the lease (which ran until Oct. 21, 2022), permitting the lessee to terminate early. The lessee summarily pronounced that the lease had been "completely frustrated" without explanation. This may well doom the action right out of the gate: Frustration of purpose requires a *total* frustration of the contract's primary purpose. While the governor's orders have undoubtedly prevented businesses from taking advantage of certain contractual rights during the shutdown, the shutdown is a temporary situation. The lessee in *Venus* will be able to reopen its showroom with years left in its leasehold, and we can assume that it continued to occupy the space in some fashion during the shutdown. So, while there is a (marginally) better argument that the lessee's duty to pay should be suspended to some degree during the shutdown, terminating the lease was likely a bridge too far.

The strongest cases for frustration of purpose will be where a contract is tied to a particular event that is cancelled because of the COVID-19 shutdown, or for a specific time period encompassed by the shutdown. (Think about the classic example of renting a room to view a monarch's coronation, which then never happens.) That assumes, of course, that the contract in question does not specifically exclude frustration as a basis to suspend performance (as some do). Also, in the case of leases, lessees must be wary of accelerations clauses: If you invoke frustration of purpose (on a temporary or permanent basis) and are wrong, you may well find the entire lease amount due immediately.

This leaves the doctrine of impossibility (a defense when a change in circumstances, the nonoccurrence of which was an underlying assumption of the contract, makes performance of the contract literally impossible), which as of the writing of this article, has been invoked only twice in connection with COVID-19's effect on contractual obligations. Once was in *Venus*, and the other was in *In re Pier 1 Imports, Inc.* (E.D.Va. Feb. 20, 2020), a bankruptcy case where Pier 1 sought an indefinite suspension of its rent obligations on the basis of impossibility.

In neither instance did the party asking for relief provide sufficient detail indicating that a plausible impossibility argument could be made out. Impossibility is only available as a defense to a breach of contract claim when performance is rendered objectively impossible by an unanticipated event that could have been foreseen or guarded against in the contract. In practice, this means the defense is limited to the destruction of the means of performance by an act of God or by law; it is not enough that performance will cause financial difficulty or hardship, even to the point of bankruptcy or insolvency. Under these criteria, it strains the imagination to posit a contractual scenario where COVID-19 results in objectively impossible performance.

I could find no case where a party claimed COVID-19 rendered its contractual performance commercially impracticable (excusing non-performance or delay if an unforeseeable event materially changes the contractual obligation). This was somewhat surprising, since the effects of COVID-19 are more likely to meet the requirements of this doctrine. The Uniform Commercial Code will relieve a party from obligations in a goods contract where an unforeseeable event, the risk of which was not allocated to either party, makes performance an extreme and unreasonable hardship. Increased costs and market fluctuations are not enough to make an obligation impracticable, but a severe shortage in raw materials may be. We are seeing this in certain markets already. The parties' relative reasonableness, and the availability of alternative options for performance, will determine whether a party can be relieved of its obligations, whether in whole or in part, and whether temporarily or permanently.

As the short, medium, and long-term effects of COVID-19 ripple through the economy, businesses that are suffering will continue to look for relief wherever it is found. Given the narrow application of *force majeure*, frustration of purposes, and impossibility required by New York law, few COVID-19 situations will meet the necessary doctrinal requirements. Impracticality provides a slightly better option, but has limited applicability in its own right. These plain facts should further motivate contracting parties to reach negotiated, practical solutions to COVID-19-caused hardship. Ultimately, collaboration is far more likely to yield effective results than is a court-administered refresher course in obscure contract law.

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