What Businesses Need to Know About Potential Contractual and Non-Contractual Remedies

COVID-19 and Commercial Contracts

by Marc Esterman & Pat Naples
Introduction

The COVID-19 outbreak has taken a devastating toll on global health and the global economy. Many businesses are struggling to satisfy their contractual obligations. In the weeks following government orders of increasing severity in response to the COVID-19 pandemic, reality has set in and many businesses are left wondering how the resulting business downturn might affect the enforcement of their commercial contracts.

Businesses may be able to leverage the legal doctrine of force majeure, or perhaps other non-contract remedies, as a means of suspending their contractual obligations and/or terminating the subject contract. However, as summarized below, these doctrines are narrowly construed and must be analyzed carefully in order to determine their effectiveness for the given facts and circumstances. Finally, in certain very limited instances, companies may be able to make claims under their business interruption insurance policies, subject to their terms of coverage.

While most of the analysis presented in this article has widespread jurisdictional application, this article focuses on Connecticut and New York law; accordingly, interested parties should check the laws of their local jurisdiction for definitive guidance.
A force majeure clause in a contract is intended to excuse performance due to an event beyond the non-performing party’s control that has interfered with performance.1 When determining the applicability of force majeure clauses in contracts, in general, courts look to the language of the contract to resolve the following questions: does the triggering event fall within the scope of force majeure events listed in the clause (e.g., “national disaster,” “act of terrorism,” “pandemic,” “governmental order,” etc.)2; was the likelihood of non-performance foreseeable and capable of mitigation (a party cannot claim force majeure where the non-performance was foreseeable and could have been mitigated but was not)3; and is the level of interference sufficient to warrant relief (mere financial difficulty will not typically suffice)4.

Several other conditions also govern the application of force majeure. First, in most jurisdictions, including New York, force majeure is inherently a contractual remedy and may be invoked only if it is in the contract.5 Although Connecticut courts have not expressly addressed the issue of whether force majeure may be invoked as a non-contractual remedy, courts in New York have made clear that there is no common law force majeure doctrine.6 Second, a force majeure clause is enforceable only to the extent provided by the contract, i.e., courts typically construe force majeure clauses narrowly,7 and thus the language of the clause is important. The scope of the force majeure remedy – who may invoke it (either party?)8; what remedy may be sought (suspension of performance or termination of contract?)9; whether notice is required10; and under what circumstances it may be invoked (does it only excuse certain types of non-performance?)11 – will be defined by the force majeure clause’s express language. For example, if the clause only allows temporary suspension of performance, rather than termination, then a court would only allow the temporary suspension of performance.12 For another example, if the clause expressly includes intervening government orders, contract parties may be able to claim force majeure if such an order is promulgated after execution of the contract; but if the clause does not include government orders, parties may not be able to claim force majeure in that circumstance.13 Third, parties are not excused from performance under force majeure clauses when they create their own inability to perform.14

Notably, both New York and Connecticut courts have found that force majeure clauses may excuse payment, even when the other party stands ready, willing, and able to perform under the contract, albeit under narrow, fact-dependent circumstances.15 For example, in Constellation Energy Services of New York, Inc., the plaintiff, an electricity provider, entered into a contract with the defendant, a purchaser of electricity. Under the contract, the fixed-rate price could be upwardly adjusted if the defendant failed to meet a certain quantity baseline. The Court permitted the defendant to use force majeure as a defense to the plaintiff’s price-adjustment claim, on the grounds that Hurricane Sandy could be a force majeure event that operated to prevent achievement of the contractual baseline. In short, if a force majeure event interferes with the payor’s ability to pay in a substantial and unforeseeable way, the force majeure clause may excuse payment.16

All things considered, for the purposes of force majeure, the language of the contract will control. Accordingly, businesses should consult with their counsel when analyzing the breadth and scope of their contracts’ force majeure clauses.
Relief Beyond Force Majeure Clauses

By contrast, impossibility and impracticability are common law doctrines that may provide relief separate and apart from the contract. These doctrines generally require an unanticipated, intervening event that has rendered performance impossible or impracticable. These doctrines are strict, requiring that the event be truly unforeseeable and the performance truly impossible or impracticable. For long-standing contracts, this may not be much of a hurdle; however, for recently entered contracts, the party seeking to enforce the contract could argue that the disruptions wrought by COVID-19 were foreseeable.

In New York, there is no doctrine of impracticability—performance is only excused if performance is truly impossible, i.e., the contract could not be performed at any cost. Accordingly, it is exceedingly rare for performance to be excused on the grounds of impossibility; however, in 1994, the U.S. Court of Appeals for the Second Circuit affirmed the dismissal of a breach of contract action by bank account holders against their banks for failing to wire certain funds on the ground of impossibility. Due to an intervening government order that seized the electronic fund transfers, the Second Circuit held, it was impossible for the banks to perform under the contract.

In Connecticut, performance may be excused if performance is impracticable, i.e., could only be completed at excessive costs; but even then, the cost must be truly excessive — it is not enough that the contract is no longer profitable. For example, in one 2010 Connecticut Superior Court decision, a trial judge permitted a commercial real estate plaintiff to survive a motion to strike while attempting to successfully rescind its obligations under a $205 million purchase agreement, including a $22.5 million deposit, under the doctrine of impracticability. In short, the Court held that the 2008 financial crisis and, specifically, the decline in the availability of credit resulting therefrom, could have made it commercially impracticable for the plaintiff to perform under the contract, justifying rescission.

Frustration of purpose, like impossibility/impracticability, is a common-law doctrine that generally permits parties to avoid contract obligations when an unforeseeable event for which neither party is at fault substantially frustrates the principle purpose of the contract (as opposed to making a party’s performance more difficult). The hurdle here is in defining the “principal purpose” of the contract: parties will not be able to invoke the doctrine simply by claiming that the purpose of the contract was to make a profit and that COVID-19 has frustrated the purpose of making a profit.

In New York, courts have almost never applied the frustration of purpose doctrine; that said, in 1987, a district court in Nassau County refused to enforce a home improvement contract because the contractor substantially frustrated the purpose of the contract by failing to adhere to the city’s building code.

In Connecticut, frustration of purpose is more flexible than in New York but still rare; that said, in 2014, a Connecticut trial court ruled in favor of a defendant (a homeowner) on the defense of frustration of purpose after the plaintiff (a pool company) had repeatedly failed to satisfy the underlying letter of intent despite the defendant’s best efforts to contact the plaintiff, when the plaintiff attempted to then enforce the letter of intent years’ later.

Ultimately, impossibility, impracticability, and frustration of purpose are common law doctrines and, thus, subject to revision and application by the courts. Whether the courts will interpret these doctrines more liberally in the wake of the COVID-19 crisis remains to be seen, but it is likely that any such review will be filtered by a precedent of narrow application.
Business interruption insurance typically covers losses arising from interruptions to operations caused by physical property damage (e.g., fire). Post-SARS outbreak, most insurers have excluded infectious diseases from coverage. And, interestingly, the New York State Department of Financial Services notes, on its website, “It is unlikely that a current business interruption policy has contemplated the coronavirus specifically...business interruption insurance requires a related property damage. Fear of COVID-19 alone is unlikely to trigger business interruption insurance coverage.”

It would be the rare policy to find insurance coverage that would include an epidemic; so, while insureds should certainly review their policy, they should do so with tempered enthusiasm.

Conclusion

The ways in which each of the above doctrines will apply will be fact-specific, so this article is meant only for general guidance, not an assessment of any particular circumstances. Businesses should consider ways to mitigate operating risk and closely analyze their commercial contracts – both existing ones that they are living with and template forms for future use – in light of the COVID-19 pandemic. We are happy to assist in connection with any particular contracts issues your business may be experiencing.

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Endnotes


6 See id.

7 See Kel Kim Corp., 70 N.Y.2d at 902.


20 See Urban Archaeology Ltd. v. 207 E. 57th St. LLC, 68 A.D.3d 562, 563, 891 N.Y.S.2d 63 (N.Y. App. Div. 2009); Dills, 210 Conn. at 718.


22 See Organizacion JD Ltda. v. U.S. Dep’t of Justice, 18 F.3d 91, 95 (2d Cir. 1994).

23 See id.

24 See Dills, 210 Conn. at 718.


26 See id.


31 See “Business disruption insurance: can it help with coronavirus?,” Financial Times (online, on April, 6, 2020, at https://www.ft.com/content/1d359ef3-9104-4441-a039-82c6b9683ad2).

32 See New York State Department of State, online on April 6, 2020, at https://www.dfs.ny.gov/consumers/coronavirus/business INTERRUPTION INSURANCE FAQS.
1. Force Majeure

A Force Majeure Event is defined as one or more of the following causes which renders performance impossible, impractical or unsafe: death, illness of or injury to Artist or a member of Artists immediate family, any of Artists musicians or any of the Company’s key personnel; theft, loss, destruction or breakdown of instruments or equipment owned or leased by Company or Artist; fire, threats or acts of terrorism; riots or other forms of civil disorder in, around or near the Performance venue; strike, lockout or other forms of labor difficulties; any act, order, rule or regulation of any court, government agency or public authority; act of God; absence of power or other essential services; failure of technical facilities; failure or delay of transportation not within Company or Artists reasonable control; inclement weather; pandemic or other widespread medical alert; and/or any similar or dissimilar cause beyond Company or Presenters reasonable control.

2. Cancellation and Rescheduling of Performances

a. Cancellation for Force Majeure: Either party may cancel or reschedule a Performance due to a force majeure event. The parties will promptly notify each other if they are unable to perform any obligation under this Agreement as a result of a force majeure event and may, by mutual agreement, cancel the Performances or reschedule the Performances for a subsequent date and time. In the event of such cancellation:

   i. The parties respective obligations hereunder will be excused fully, without any additional obligation subject to the provisions in section ii below and each party shall bear its own cost incurred in connection with this Agreement

   ii. Notwithstanding the foregoing, if artist is present, ready, and willing to perform Purchaser will pay Artist the full amount of the guarantee set forth in this agreement.

   iii. If Artist is not present and the event is not able to be rescheduled, Artist will return all deposit money received.

b. Cancellation for Breach of Contract: Either party may cancel the Event if the other party materially breaches this Agreement and fails to cure said breach within a reasonable time after written notice of breach.

   i. If Presenter breaches, or fails to perform fully in accordance with the terms and conditions of this agreement, then artist shall have the option to terminate this agreement. In the event of such termination, artist shall have the right to retain all amounts paid to Artists hereunder and Presenter shall immediately pay to Artist all other amounts that would have been payable to Artists hereunder had this Agreement remained in full force and effect.

   ii. If Artist is in breach of contract, all monies paid by Presenter will be returned and any damages as a result of such default shall be limited to such amounts already paid to Artist.

c. Other Cancellations:

   i. If Presenter cancels the Event for a reason other than for Artist's breach or an Event of Force Majeure and the Artist is present to perform, Presenter's total liability to Artist shall not exceed the Amount of Fee Payment stated in this signed agreement. Notwithstanding any term or condition of this Agreement to the contrary, in no event shall Presenter be liable for any indirect, consequential, incidental, lost profits, or like expectancy damages arising out of this Agreement.
ii. During the Term, Artist shall timely and fully comply and cooperate with Presenter’s good-faith pre-Event preparation and information requests. Any Artist failure so to comply and cooperate shall constitute a material breach of this Agreement and, notwithstanding any term or condition hereof to the contrary, shall entitle Presenter to cancel the Event and/or terminate this Agreement without liability to Artist.

iii. In the event that this Agreement concerns a support artist performance and the headline artist of such engagement does not perform for any reason, if supporting artist is present, ready, and willing to perform the services set forth herein, supporting artist will be entitled to receive the full, agreed upon compensation set forth in this agreement.
**Artist Agreement Addendum/Change Notice**

This addendum (issued **DATE HERE**) hereby becomes an integral part of the Artist Agreement between **ARTIST NAME HERE** (ARTIST) and Moraine Valley Community College, Fine & Performing Arts Center/Dorothy Menker Theater (PRESENTER) for the original performance date of **ORIGINAL DATE OF PERFORMANCE HERE**.

ARTIST and PRESENTER have agreed to the following changes:

**POSTPONEMENT OF DATE:** Due to an unanticipated issue with COVID-19 (coronavirus) restrictions, ARTIST and PRESENTER have mutually agreed to postpone the performance until **NEW DATE OF PERFORMANCE/RESIDENCY HERE**.

**FORCE MAJEURE:** The Parties acknowledge that the following Force Majeure clause hereby supersedes and replaces in its entirety the Force Majeure clause(s) in any contract or rider for this engagement heretofore.

Both parties acknowledge and agree that the occurrence of Pandemic, including but not limited to COVID19, the H1N1 virus, or swine flu in an area in close proximity to the performance venue in and of itself is not deemed a Force Majeure occurrence, unless the state or local government, or US Department of Health and Human Services declares an outbreak of the virus in the area in which the performance is scheduled to take place.

If Performance becomes impossible or impracticable and is not within a party's control due to Act of God, or “act of government” – any act or regulation of public spaces by any public authority or bureau, civil tumult, strike, pandemic (as defined above), epidemic, interruption or travel bans, delay of transportation services, war conditions, emergencies, where an order by a government or a government agency in a country or state has prevented performance or invoked capacity restrictions on gatherings and businesses are imposed – it is understood and agreed by the parties that there shall be no claim for damages by either party against the other and each party's obligations hereunder shall be deemed waived with the following terms.

In the event of non-performance for any of the above-stated reasons, if ARTIST has already arrived in town or at the venue and is ready, willing and able to perform or if the performance has commenced when the force majeure occurs, PRESENTER shall pay full compensation hereunder.

If ARTIST has not arrived prior to the force majeure, it is understood and agreed by both parties that the performance will be rescheduled, without financial penalty, to a mutually acceptable date within the following 18 months.

In the event that both parties agree that no replacement date can be found, it is understood that there shall be no claim for damages by either party and that ARTIST'S obligation to perform shall be deemed waived and that PRESENTER’S deposit (minus any pre-production costs already forwarded with written approval of PRESENTER by ARTIST or AGENT OF ARTIST) shall be returned.
TERMS OF ACCEPTANCE: Upon full execution of this addendum, all other aspects of the original agreement not already altered by this addendum will remain unaltered and intact with the exception of the due date of deposits and/or final payments, which will now be due as follows:

NEW DATE AND AMOUNT OF DEPOSIT HERE

NEW DATE OF FINAL PAYMENT HERE.
Sellersville Theatre
Terms are predicated on standard room capacity & seating layout; however, if social distancing or equivalent measures must be maintained causing a cap decrease, then a proportionate adjustment to guarantee will be required.

Bergen PAC
Confirmed terms are predicated on legal capacity & seating layout. If social distancing or equivalent measures must be maintained during this event causing a decrease in theater capacity, then Artist understands that this will equal a force majeure and renegotiation of the deal.
For Contracts in 2020: Artist Guarantee (incl. all artist reimbursables) shall not exceed 100% of the adjusted gross sales. If the adjusted gross is lower than the established guarantee then the guarantee will be reduced to meet the adjusted gross. Adjusted gross defined as gross after facility fees and any applicable ticketing fees.”
All ticket sales income must be applied to gross sales to help cover artist fee. No charity lifts, album bundles, or VIP bundle upgrades unless added

KU Presents – Kutztown University
FORCE MAJEURE: If either party is prevented from or is materially delayed or materially interrupted in the performance of his or her obligations hereunder including state of emergency due to weather; illness, death or incapacitation of a key member of the ARTIST or death or life threatening illness of an immediate family member of a key member of the ARTIST; any or future statute, laws, ordinance, regulation, order, judgment, or degree; act of God; earthquake; flood; fire; epidemic; accident; explosion; casualty; lockout, boycott, strike or labor controversy (including, but not limited to, threat of lockout, boycott or strike); riot, apocalypse, civil disturbance, war or armed conflict (whether or not there has been an official declaration of war or official statement as to the existence of a state of war), invasion, occupation, intervention of military forces, act of public enemy, embargo, or act or threat of terrorism; delay of a common carrier; disruption of air traffic; or any other cause beyond the control of ARTIST or KU, neither party shall be liable to the other, and either party may terminate this contract without liability to the other. All attempts will be made at continuing to present a performance during inclement weather. While it is not always possible, notification of any cancellation or postponement due to severe weather conditions will be given as soon as the determination is made. Only in the event where ARTIST arrives at venue prior to a cancellation notification and the performance services covered under this contract cannot take place due to severe weather conditions (as determined by KU in consultation with local authorities), KU will only be liable for verifiable out-of-pocket travel related expenses. It is further understood and agreed that there shall be no other claim for damages or fees by either party to this contract. ARTIST’s obligation as to such performance shall be deemed waived, and both parties shall attempt to arrive at a mutually agreeable make-up date for the performance (current or future season) on the same terms and conditions within two (2) years following the original performance date
AEG Presents One-Off Terms for All Shows in 2020.

This document is an outline for how AEG Presents will be moving forward with all of our one-off shows in our regional offices and partner shows. This addresses clubs, theatres, & ballrooms as well as the Greeks, Forest Hills, & one-off arenas shows. It does not include national tours which will be handled by the appropriate team at AEGP Global Touring, Concerts West or Messina Touring Group.

Terms applied to all Shows/Deals:
1. Stop Loss Provision = Artist Guarantee (incl. all talent and artist reimbursables) shall not exceed 100% of the adjusted gross. If the adjusted gross is lower than the established guarantee then the guarantee will be reduced to meet the adjusted gross. Adjusted gross defined as gross after facility fees and any applicable taxes.
2. Governmental Reduction in Capacity will equal a Force Majeure situation or renegotiation of deal.
3. AEG will not move forward with any room where the ticket receipts cannot be secured by venue or ticketing vendor. Many rooms have been using advance ticket receipts to operate their business and may be in financial trouble. If AEG can’t secure the ticket gross then we can’t pay the band.
4. Support & Artist reimbursable expenses are included in guarantee when factoring a reduced offer. We are looking at the deal as “all in”
5. All deals in 2020 will be renegotiated regardless if they went on sale before the start of the crisis
6. No Album Bundles for shows not on sale, we will renegotiate shows with existing album bundles

Category of Shows:
1. A Shows. Defined as 90% sold, to sold out
   a. Show moves to mutually agreeable date
   b. Original guarantee stays intact
   c. Refunded tickets not resold will be deducted from Artist backend, or guarantee

2. B Shows. Defined as close to or at breakeven, not in percentage.
   a. Show moves to mutually agreeable date
   b. Guarantee to be renegotiated reducing guarantee 25% to 50% of original all-in guarantee based on sales before postponement, secondary market exposure, and potential sales forecast.

3. C Shows. Defined as not great when show went on sale, we all know what a bad show looks like.
   a. Preference is to cancel these shows. 2020 is not the time to play them.
   b. If an artist needs the date for routing, we will proceed on a $0 vs. 95% of net door deal after expenses, or some kind of modified door deal.
   c. Show moves to a mutually agreeable date

Refunds:
1. Refunds will be offered starting May 1 for postponed shows with a new date. No refunds will be available until there is a new date announced.
2. Refunds requests will be offered for 30 days from the time the new date is announced.
3. For shows postponed prior to May 1 with a rescheduled date announced, ticket holders will receive an e mail starting 5/1 and will have 30 days to request a refund from the time the e mail is sent.
4. Patrons will have the options of getting a full refund or donating their money to a charity. There will be one charity option, TBD (Likely MusicCares)