

## **New York – Force Majeure Law**

Under New York law, “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.” *Constellation Energy Servs. of New York, Inc. v. New Water St. Corp.*, 146 A.D.3d 557, 558, 46 N.Y.S.3d 25, 27 (1st Dept. 2017) (quoting *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, 88 A.D.3d 1224, 1225, 931 N.Y.S.2d 436 (3d Dept. 2011)).

New York law generally requires force majeure clauses to be interpreted narrowly. Performance is generally excused only where a contract clause excusing nonperformance due to circumstances beyond the control of the parties specifically includes the event that prevents performance. *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 524 N.Y.S.2d 384, 519 N.E.2d 295 (1987). An event not specifically included in a force majeure clause may still be a triggering event if the clause is expansive in scope by its own terms or includes an inclusive catch-all provision. *See, e.g., Constellation Energy Servs.*, 146 A.D.3d at 558, 46 N.Y.S.3d at 27. However, where the clause includes a specific list of included events and a broad catch-all New York courts have held the clause applies only to events “of the same general kind or class as those specifically mentioned.” *See, e.g., Team Mktg. USA Corp. v. Power Pact, LLC*, 41 A.D.3d 939, 942, 839 N.Y.S.2d 242, 246 (3d Dept. 2007) (holding that clause’s use of the phrase “for any reason” did not bring into the purview of the clause events not of the same general kind or class as the specifically-listed “strikes, boycotts, war, Acts of God, labor troubles, riots and restraints of public authority”). New York courts also hold force majeure “clauses are to be interpreted in accord with their purpose, which is to limit damages in a case where the reasonable expectation of the parties and the performance of the contract have been frustrated by circumstances beyond the control of the parties.” *Id.*

Where a contract does not include a force majeure clause or other provision addressing unforeseen circumstances beyond the control of the parties, performance still may be excused under the doctrine of impossibility.

“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. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract.” *Kolodin v. Valenti*, 115 A.D.3d 197, 200, 979 N.Y.S.2d 587, 589 (1st Dept. 2014) (quoting *Kel Kim Corp.*, 70 N.Y.2d at 902).

“The excuse of impossibility is generally ‘limited to the destruction of the means of performance by an act of God, vis major, or by law.’” *Id.* (quoting *407 E. 61st Garage v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281, 296 N.Y.S.2d 338, 244 N.E.2d 37 (1968)). For example, in a seminal 1914 case, the court held that where a contract for the sale of timber contemplated delivery from a specified tract of land, the seller was excused from performing after a fire destroyed the timber on the land through no fault of the seller. *International Paper Co. v. Rockefeller*, 161 A.D. 180, 184, 146 N.Y.S. 371, 374 (3d Dept. 1914). In contrast, “where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused.” *407 E. 61st Garage*, 23 N.Y.2d at 281, 244 N.E.2d at 41.

New York’s “law of impossibility provides that performance of a contract will be excused if such performance is rendered impossible by intervening governmental activities, but only if those activities are unforeseeable.” *A & S Transp. Co. v. Cty. of Nassau*, 154 A.D.2d 456, 459, 546 N.Y.S.2d 109, 111 (2d Dept. 1989). For example, New York courts have held governmental activity excused performance in situations involving a tugboat operator being unable to provide services after the City of New York required the operator to turn boats over to the City during a transportation strike (*City of New York v. Local 333, Marine Div. & Int’l Longshoremen’s Ass’n*, 79 A.D.2d 410, 411, 437 N.Y.S.2d 98, 99 (1st Dept. 1981)), and the impossibility of performing on a party’s insurance contracts after the President of the United States ended an air controllers’ strike by fiat (*Metpath Inc. v. Birmingham Fire Ins. Co. of Pennsylvania*, 86 A.D.2d 407, 411, 449 N.Y.S.2d 986, 989 (1st Dept. 1982)). Such case precedent should support application of the principle of impossibility to impacts linked to government orders relating to the coronavirus pandemic.

The related principle of impracticability is treated similarly under New York law. It applies in circumstances where performance may be physically possible, but it is not feasible. For the principle to apply a party must show that its performance has been made impracticable without that party’s fault “by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made.” *In re Martin Paint Stores*, 199 B.R. 258, 266 (Bankr. S.D.N.Y. 1996), *aff’d sub nom. S. Blvd., Inc. v. Martin Paint Stores*, 207 B.R. 57 (S.D.N.Y. 1997).

The contract principle of frustration of purpose also may excuse performance based on unforeseen events. Frustration of purpose differs from impossibility in that it applies where performance is possible, but due to an unforeseen event performance would no longer give one party substantially all the consideration it bargained for and the event thus “renders the contract valueless to one party.” *United States v. Gen. Douglas MacArthur Senior Vill., Inc.*, 508 F.2d 377, 381 (2d Cir. 1974). For example, in *Alfred Marks Realty Co. v. Hotel Hermitage Co.* the court applied the principle of frustration of purpose to excuse performance under a contract for advertising in a yacht races program after the races were cancelled, through no fault of the parties, because of the war. 170 A.D. 484, 485, 156 N.Y.S. 179, 180 (2d Dept. 1915).