COVID-19 Construction Law Update: Force Majeure and Related Issues

Client Advisories

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Before COVID-19, *force majeure* provisions were often afterthoughts in construction contracts. However, COVID-19 has put these types of clauses in the forefront as the construction industry begins to feel the effects of the global pandemic.

Force majeure clauses, whether in construction contracts or other types of contracts, are meant to address events that could not reasonably have been foreseen. Such clauses typically allow a party to postpone or terminate performance when events occur that are beyond either party's control, causing contract performance to be impractical or impossible. *Force majeure* events typically involve things such as war, famine, riots, extreme weather and government orders. These examples are not, however, an inclusive list. Therefore, one needs to review how a particular contract defines *force majeure* events. Here we will discuss a few examples of the application of *force majeure* and other contract avoidance principles to construction matters. Each case will depend on its own set of facts, however.

When a contract does contain a *force majeure* clause, the main issue will be identifying the events enumerated in the clause and determining whether COVID-19 classifies as a triggering event. A common *force majeure* clause in the construction context is contained in Section 8.3.1 of AIA Document A201-2017:

- If the Contractor is delayed at any time in the commencement or progress of the Work by (i) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (ii) by changes ordered in the Work; (iii) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control; (iv) by delay authorized by the Owner pending mediation and binding dispute resolution; or (v) by other causes that the Contractor asserts, and the Architect determines, justified delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.

This clause, like many other versions of *force majeure* clauses, does not specifically list "epidemic" or what specific events that might be considered "other causes beyond the Contractor's control." While a contractor could argue

that COVID-19 falls within "other causes beyond the Contractor's control," an owner may argue otherwise, particularly since "epidemics" is not one of the listed *force majeure* events in A201-2017. *Force majeure* language is generally narrowly interpreted as including only events specifically enumerated, or of the same general nature. Abeles v. Adams Engin., 64 N.J. Super. 167, 176 (App. Div.), modified, 35 N.J. 411 (1961); Seitz v. Mark-O-Lite Sign Contractors, Inc., 210 N.J. Super. 646 (Law Div. 1986.).

Another common *force majeure* clause in the construction context is contained at 48 C.F.R. 52.249-14, which governs federal contracts. It provides as follows:

- Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without default or negligence of the Contractor. Examples of these causes are (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargos and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without default or negligence of the Contract. Default includes failure to make progress in the work so as to endanger performance.

It is noteworthy that this regulation specifically identifies "epidemics" as a *force majeure* event in subsection (5).

New Jersey courts recognize a *force majeure* defense where an unforeseen event affects the performance of the contract. Facto v. Pantagis, 390 N.J. Super. 227, 232 (App. Div. 2007) (citing 8 Corbin on Contracts §31.4). Courts construe such clauses by looking to the contract's terms, the surrounding circumstances, and the purpose of the contract. *Id.*

Under Pennsylvania law, "a party generally assumes the risk of its own inability to perform its contractual duties." Luber v. Luber, 418 Pa. Super. 542, 549 (1992). "In order to use a *force majeure* clause as an excuse for non-performance, the event alleged as an excuse must have been beyond the party's control and not due to any fault or negligence by the non-performing party." Martin v. Com. Dep't of Environmental Resources, 120 Pa. Cmwlth. 269, 273 (1988). "Furthermore, the non-performing party has the burden of proof as well as a duty to show what action was taken to perform the contract, regardless of the occurrence of the excuse." Id.

Delaware cases addressing concepts of contract avoidance are few, and most federal cases applying Delaware law instead turn to alternative sources such as the Restatement of Contracts for guidance. See, e.g., Freidco of Wilmington v. Farmers Bank of State of Delaware, 529 F. Supp. 822, 825 (D. Del. 1981). Delaware courts do not appear to have specific rules applicable to *force majeure* provisions and instead interpret them like any other contractual term. See Stroud v. Forrest Gate Development Corp., 2004 WL 1087373, *5, n.25 (Del. Ch. May 5, 2004) (beginning its discussion of whether a *force majeure* provision excused performance by quoting Twin City Fire Ins. Co. v. Delaware Racing Association, 840 A.2d 624, 628 (Del. 2003) for the proposition that "a court must determine the intent of the parties from the language of the contract.")

New York law provides "once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome." Kel Kim Corp. v. Central Markets, Inc., 524 N.Y.S.2d 384, 385 (1986). Under New York law, a *force majeure* defense is a narrow one,

excusing a party generally only where a party cannot perform due to an event specifically included in the clause. Id. If a clause contains a catch-all term, a court interprets that term narrowly. Id.

If a contractor believes it faces a delay subject to a *force majeure* provision, it needs to be sure to comply with all contractual notice provisions to preserve its rights.

Impossibility, Impracticability and Frustration of Purpose

In the absence of a *force majeure* clause in a contract, a party seeking to avoid contract obligations may still be able to rely on common law defenses such as impossibility, impracticability or frustration of purpose.

A party who argues a defense to non-performance based on a *force majeure* clause does not lose other contract defenses. As the court in Seitz v. Mark-O-Lite Sign Contractors, Inc., 210 N.J. Super. 646, 650 (Law Div. 1986) noted, "it does not necessarily follow, however, that defendant is bereft of the defense of impossibility and performance "just because the *force majeure* defense did not apply. The court relied on "a more modern formulation of the [impossibility] doctrine" found at sections 261 and 262 of the Restatement (Second) of Contracts which speak in terms of "impracticability" rather than "impossibility". Id. at 651. The impracticability defense arises when "a party's performance under a contract is rendered impracticable by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made." M.J. Paquet, Inc. v. New Jersey Department of Transportation, 171 N.J. 378, 291 (2002) (finding new OSHA regulations affecting bridge painting, which required party to "expend substantial, unanticipated costs to complete its performance" allowed State to delete bridge painting work from contract under doctrine of impracticability.)

A defense based on impracticability can also arise from a government regulation or order. For instance, in Directions, Inc. v. New Prince Concrete Construction Co., Inc., the Department of Transportation order prevented civilian flagmen from directing traffic in Union County. 200 N.J. Super. 639, 641 (App. Div. 1985). There, defendant's "contract required [it] to provide traffic directors to maintain a safe flow of traffic around the construction site." Id. Under those facts, the Appellate Division found the trial court erred in granting summary judgment to plaintiffs since defendant, in retaining off-duty police officers at a higher price than that for which it contracted with plaintiff, "complied with what was apparently a valid order." Id. at 642-44.

Under Pennsylvania law, "acts of a third party making performance impossible or causing a delay resulting in a substantial increase in expense to the contracting party did not excuse failure to perform if such acts were foreseeable because it was the duty of the contracting party to provide for that situation in his contract." Luria Engineering Co. v. Aetna Cas. & Sur. Co., 206 Pa. Super. 333 (Super. Ct. 1965). Thus, in Luria, defendant was not excused for its failure to construct a roof under the doctrine of impossibility after its employees went to strike, causing costly delay, because "in a job involving the construction of a building of some magnitude, a labor dispute or strike is certainly foreseeable." Id. at 336-39.

In Hart v. Arnold, the Superior Court of Pennsylvania addressed the defense of impracticability. 885 A.2d. 316 (Pa. Super. Ct. 2005). There, the court found that performance of plaintiffs' contract to create a lake by constructing a dam on defendant's property could have been excused on impracticability grounds because "performance was made impracticable by having to comply with a governmental regulation, the non-occurrence

of which was a basic assumption on which the contract was made." Id at 337. In that case, the contract was "specifically contingent on [the Army Corps of Engineers'] approval and [plaintiffs'] ability to obtain the proper permits for the dam and the impoundment." Id. Although this constituted a valid defense, plaintiffs were nonetheless liable for damages because "[plaintiffs] proceeded under the parties' original contract, despite the impracticability that would have otherwise justified their non-performance, and were unable to perform as previously agreed." Id. (noting "once impracticability of performance or frustration of purpose occurs, it is up to the parties to waive the difficulties or seek to terminate the agreement") (quoting Ellwood City Forge Corp. v. Fort Worth Heat Treating Co., Inc., 636 A.2d. 219, 223 (Pa. Super. Ct. 1994)). This case seems to converge the defenses of frustration of purpose and impracticability without discussing the distinction between the two. See, id. at 334 ("Pennsylvania law recognizes the doctrine of frustration of contractual purpose or 'impracticability of performance' as a valid defense to performance under a contract.")

Under Delaware law, simple inconvenience or a substantial increase in the cost of performing a contractual obligation – even "though they might make compliance a hardship" does not discharge a party's performance obligation. Hudson v. D&V Mason Contractors, Inc., 252 A.2d. 166, 169 (Del. Sup. Ct. 1969) (quoting Safe Harbor Fishing Club v. Safe Harbor Realty Co., 107 A.2d. 635 (Del. 1953). Thus, in Hudson, the court found increases in interest on construction financing, points required to be paid by the builder – seller in connection with an FHA mortgage, and construction costs did not excuse defendant from its obligation to construct a house at a specific price under the theory of impossibility. Id. at 168. The court likewise rejected defendant's argument that a change in the availability of labor rendered performance impossible, since "an allegation of scarcity of labor in the homebuilding industry, generally, falls fall short of a showing that defendant itself is particularly and substantially affected and thus unable to complete performance." Id. at 169.

Under New York law, the defense of 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." Comprehensive Bldg. Contractors, Inc. v. Pollard Excavating, Inc., 674 N.Y.S. 2d 869, 871 (3rd Dep't 1998). Moreover, "the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract." Id. (rejecting impossibility defense where defendant knew a possibility of soil and sewer problems and "discussed subsurface soils and depth of digging prior to entering into contract").

Under the related doctrine of frustration of purpose, performance remains possible, but a "supervening event fundamentally has changed the nature of the parties' overall bargain." Tilcon New York, Inc. v. Morris County Co-Op Pricing Council, 2014 WL 839122, *17 (N.J. App. Div. March 5, 2014) (quoting JB Pool Management, LLC v. Four Seasons at Smithville Homeowners' Association, 431 N.J. Super. 233 (App. Div. 2013). Rises in the prices of goods that result in financial losses "does not suffice as frustration of purpose." See, id. at *18 (finding "the rise in the price of asphalt cement did not frustrate the purpose of the contract, which was to sell asphalt products and services to MCCPC-members at a fixed price during a specific time period").

Under New York law, the doctrine of frustration of purpose is likewise unavailable if "the event preventing performance was foreseeable." Gelita, LLC v. 133 Second Ave., LLC, 984 N.Y.S. 2d. 631 (Super. Ct. 2014) (rejecting frustration of purpose defense where defendant allegedly "fraudulently induced [plaintiffs] to sign the Lease

because it knew that it was impossible to legally build out the Premises in accordance with the Lease's specifications" because "the alleged frustration was reasonably foreseeable").

Temporary Relaxation of New Jersey Uniform Construction Code Regulatory Provisions

The New Jersey Department of Community Affairs has, on an emergency basis, temporarily relaxed the Uniform Construction Code regulatory provisions concerning Minor work (N.J.A.C. 5:23-2.17A), Inspections (N.J.A.C. 5:23-2.18), and Certificate requirements (N.J.A.C. 5:23-2.23). The Department has also issued new guidance for construction offices on State and local plan review and inspections. Please review the notice of emergency rule adoption and guidance document at:

Notice of Rule Waiver/Modification/Suspension

Ongoing Constructions Projects and Covid-19 Memo

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