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Peer to Peer Session 6

MAY THE FORCE MAJEURE BE WITH YOU: DRAFTERS' V. LITIGATORS' PERSPECTIVES IN FORCE MAJEURE PROVISIONS

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Introduction:

Force Majeure clauses have gone from boilerplate to critical provisions of leases and purchase and sale agreements during the COVID pandemic. This peer-to-peer session will use hypotheticals to delve into drafting considerations and litigation strategy in the recent application of Force Majeure provisions to excuse rent payment and contractual performance delay as a result of the pandemic.

This peer-to-peer session will use two hypotheticals to analyze the various legal arguments from both the landlord's and tenant's perspectives and explore how drafting clearer force majeure provisions may have avoided litigation.

Force Majeure and other excuses for contractual nonperformance:

Black's Law Dictionary defines Force Majeure as: "In the law of insurance, superior or irresistible force. Such clause is common in construction contracts to protect the parties in the event that a part of the contract cannot be performed due to causes which are outside the control of the parties and could not be avoided by exercise of due care." Force Majeure, "superior force" in Latin, dates back to Roman times, and was codified into French civil law in the Napoleonic era. It had been incorporated into English Common Law as the doctrine of impossibility in regard to contractual performance. More recently, Force Majeure is a common contractual provision used to excuse nonperformance or delay of contractual obligations for events outside of the contracting parties' control. As always, the interpretation and application of a Force Majeure provision will depend on the text of the provision itself.

It is common to invoke Force Majeure for so-called "acts of God". Black's Law Dictionary defines an Act of God as: "An act occasioned exclusively by violence of nature without the interference of any human agency. A natural necessity proceeding from physical causes alone without the intervention of man. It is an accident which could not have been occasioned by human agency but proceeded from physical causes alone. "However, while an Act of God usually refers to a natural disaster or unforeseen weather event, the concept of Force Majeure is broader – Force Majeure clauses usually include acts of man such as labor strikes or civil unrest as well.

Force Majeure is often codified by state or international law. In the absence of a Force Majeure provision in a contract, the parties may seek to apply traditional common law excuses for contractual performance such as impossibility, frustration of purpose, or impracticability. Generally, these extra-contractual doctrines can only be invoked if there is no applicable contractual provision.

The impossibility defense has been recognized since the mid-1800s. Generally, it applies to an event that makes performance by one of the contracting parties physically or literally impossible. *See Restatement (Second) of Contracts Section 263*. For example, if the acts of performance have been made illegal, the impossibility doctrine would excuse performance. Other examples are the complete physical destruction of the leased premises or the death of one of the parties to a personal services contract. The parties must weigh objective impossibility ("the thing cannot be done" due to a government mandate) and subjective impossibility ("I cannot do it"). Courts may relieve the parties' contractual obligations based on the former but not the latter.

Also, the general remedy for impossibility is repudiation or rescission of the entire contract. Rescission is usually not the desired result in a lease dispute, but it could be, depending on the situation.

There have been some examples of the impossibility doctrine being applied to the COVID crisis. In In re Cinemex USA Real Estate Holdings, Inc., 2021 Bankr. LEXIS 200 at 1, 16 (Bankr. S.D. Fla. 2021), the Bankruptcy Court held that the tenant was not obligated to pay rent because it was impossible for the tenant to operate due to government shutdown orders. Subsequent cases have viewed this holding as something of an outlier, and it has been criticized by many because the performance that was excused was tenant's payment of rent—which was not the obligation that was addressed by the government orders. For example, the impossibility doctrine would be much more likely to apply to a landlord's claim that a tenant breached a continuous operation covenant. Many other courts have held the impossibility doctrine doesn't apply to the payment of rent because it was not impossible for the tenant to pay rent. Some courts have also held the impossibility defense is unavailable if the contract contains an applicable force majeure provision addressing the situation.

Frustration of purpose is another defense to contractual performance rooted in the common law. This doctrine applies where the performance is still technically possible, but an unforeseen even undercuts the primary purpose of the agreement. To prove frustration of purpose, the party invoking it must show the event giving rise to the claim was not reasonably foreseeable at the time the parties entered the agreement, the risk of the event must not have been provided for in the contract, and the value of the performance to be excused was frustrated or rendered commercially impracticable. *See Restatement (Second) of Contracts Section 265*. Clearly, frustration of purpose is similar to impossibility but it is interpreted less strictly, as there are more situations where contractual performance would be considered frustrated but not impossible. A frustration of purpose may also be temporary in nature. *See Restatement (Second) of Contracts*, *Section 269*.

Impracticability is the newest common law excuse for performance and can be invoked when an unforeseen event that occurred after the contract was entered into makes performance impracticable. *See Restatement (Second) of Contracts Section 261.* Impracticability can apply when contractual performance becomes unreasonably burdensome or expensive in a manner that was not reasonably foreseeable to the parties at the time the agreement was entered. The common law of some states has held that frustration of purpose and impracticability are the same doctrine; other states view them as slightly different.

Some parties have tried to apply other methods or legal theories to excuse contractual performance resulting from COVID-related restrictions with little success. For example, tenants have argued that COVID-19 and related government orders trigger the casualty provisions of the lease. Such arguments will depend strictly on the text of the lease. Other tenants have argued that government restrictions during the pandemic amounted to an inverse condemnation—that the government-mandated shutdown or restriction is a "taking." This argument has not been well received. In addition, some tenants have also invoked claims that restrictions amounted to a breach of quiet enjoyment or constructive eviction. However, because Landlords are not the party responsible of the restrictions, claims concerning quiet enjoyment have generally been held inapplicable. See, e.g., W. Stock Ctr., Inc. v. Sevit, Inc., 195 Colo. 372, 379 (1978).

For all the doctrines discussed so far, the starting point will always be the language of the contract itself. The court will look at the Force Majeure provisions in the contract to determine whether the parties agreed in advance on how to allocate the risk of the unexpected interruption in performance. If a lease or contract has force majeure language that on its face applies to the situation, it is likely the court will not even consider common law defenses. Instead, the court would view a relevant Force Majeure provision as representing the parties' agreement on the issue.

That said, landlords and tenants often disagree the meaning of the Force Majeure clause. For example, most Force Majeure clauses are about delay; they do not generally excuse performance entirely. Force Majeure clauses may also overlap with other provisions of a lease or contract, such as those related to casualty. For example, many leases will provide remedies to a tenant if the leased premises are damaged by fire, while the Force Majeure provision may specifically list fire as a grounds for delaying a party's obligation to perform. And the words "Force Majeure" may not even appear in the Force Majeure clause at itself. Regardless of how the provision is described, courts will look to the language of the parties' agreement to determine how they intended to allocate the risk of an unforeseen event.

"The lease is the lease." Sophisticated parties can, and should, craft lease language that clearly addresses the parties' contractual performance obligations for both foreseen *and* unforeseen events, whether caused by third parties, governmental regulations, or forces of nature. Further, sophisticated parties should not expect common law doctrines to come to their rescue of the Force Majeure provision is poorly drafted.

The real estate business tends to be reactionary. Whereas many tenants argued in the wake of COVID-19 that the risks of a pandemic were unforeseeable at the time their leases were entered, such that common law defenses should be allowed, it will be much harder to make those arguments for leases entered after the pandemic, now that the real estate industry has collectively experienced and evaluated those types of risks. What was once unforeseeable is now obvious. Going forward, it will be even more incumbent on parties to be explicit about the allocation of risks in their agreements, even those that are remote and unpredictable.

<u>Hypothetical #1- Return of the Landlord</u>

Tenant operates a retail clothing establishment on 5th Avenue in Midtown Manhattan called Forever 51. It opened in 2010, occupied 25,000 square feet and was considered Forever 51's "flagship" store. Forever 51's rent commenced in 2009 and has a 20-year term. It shut down in March 2020 pursuant to state and local closure orders.[1] Forever 51 stopped paying rent in April 2020. Because Forever 51 is a clothing retailer, it was considered a "non-essential" retailer. The timeline of state and local closure orders is as follows:

March 15, 2020	All Forever 51 locations close nationwide
April 1, 2020	All "non-essential" retailers closed by state and local order
June 1, 2020	All "non-essential" retailers allowed to re-open for curbside delivery
July 1, 2020	All "non-essential" retailers allowed to re-open at 50% capacity and subject to mandatory mask-wearing
August 1, 2021	All "non-essential" retailers allowed to re-open at 100% capacity but subject to "vaccine passport" requirement and mandatory mask-wearing
March 2, 2022	All "non-essential" retailers allowed to re-open without any restrictions

Tenant's Landlord, Empire Realty, defaulted Tenant for failure to pay rent in June 2020. Tenant reopened for business (subject to the government restrictions in place) in July 2020. However, Tenant decided to stop operating in September 2020 due to low sales and staffing issues. Landlord and Tenant attempted to negotiate an agreement regarding rent payment but were unable to do so. Landlord's patience wore out in October 2020 and it filed a lawsuit seeking eviction and lease termination in Nov. 2020.

Landlord and Tenant's lease had the following Force Majeure provision:

> **<u>Force Majeure</u>**. As used in this lease, the term "Force Majeure" means delay resulting from the following causes beyond a party's reasonable control" acts of God such as fire, windstorm, flood, hurricane, tornado or earthquake; industry wide inability to obtain materials or merchandise; war; riot or civil commotion; governmental laws or regulations, including a building moratorium (hereinafter "governmental matters"), provided that "governmental matters" shall exclude planning and building permits, governmental inspections, permanent or temporary certificates of occupancy (or their equivalent in the applicable local jurisdiction) and similar governmental approvals. The party obliged to perform shall give notice to the other as soon as reasonably possible after the onset of such delay stating the

[1] These hypotheticals will reference governmental actions such as shutdown of non-essential businesses. The governmental actions are fictitious for purposes of this peer-to-peer session and are not represented to be the actual governmental actions taken in New York City or Los Angeles County.

> cause and an estimate of the duration thereof. If, as a result of an event of Force Majeure, either party shall be delayed or hindered or prevented from the performance of any act required hereunder (other than the making of payments) within the time period set forth herein, the performance of such act shall be excused for the period of delay not to exceed sixty (60) days, and the period of performance of such act shall be extended for a period equivalent to the period of such delay, not to exceed sixty (60) days, unless a provision of this Lease expressly states that Force Majeure is not applicable. Financial inability to perform shall not constitute an event of Force Majeure.

Landlord alleged breach of lease and argued the Force Majeure provision clearly does not excuse payment of rent. Tenant raised several defenses in the lawsuit, including impossibility, impracticability, frustration of purpose, rescission based upon lack of consideration, and sought to avoid its obligation to pay rent by relying on several provisions of the lease such as the casualty, condemnation, and quiet enjoyment provisions.

The parties each moved for summary judgment. There are no disputed facts. How would your table rule on the parties' motions and why?

How could the Force Majeure provision be improved upon?

<u>Hypothetical #2- The Tenant Strikes Back</u>

Tenant operates a restaurant in downtown Los Angeles called the Starkiller Café. It opened in 2019, occupied 10,000 square feet, and has lease term until 2029. The Cafe was only to operate as a Star Wars themed café and not for any other purpose. The Café was filled with Star Wars-related memorabilia and played Star Wars- related movies and cartoons on a wall. Its business model was to have Star Wars fans enjoy gourmet coffee, beverages, and snacks while enjoying the Star Wars ambiance. The Café currently seats 100 customers. The timeline of state and local closure orders is as follows:

April 1, 2020	All "non-essential" retailers, including bars and restaurants, closed by state and local order
May 1, 2020	All restaurants allowed to reopen for carryout and delivery service only
July 1, 2020	All restaurants allowed to re-open at 25% capacity and subject to mandatory mask-wearing
August 1, 2021	All restaurants allowed to re-open at 100% capacity but subject to "vaccine passport" requirement and mandatory mask-wearing
May 1, 2022	All restaurants allowed to re-open without any restrictions

Tenant's Landlord, coincidentally also Empire Realty, defaulted Tenant for failure to pay rent in June 2020. Tenant reopened for business (subject to the government restrictions in place) in July 2020 and continues to operate. Tenant started paying partial (25%) rent in July 2020 and full rent after all state and local restrictions were dropped (May 1, 2022). Tenant's monthly sales exceeded pre-pandemic sales in January 2022 and have been steadily increasing since.

Landlord and Tenant attempted to negotiate an agreement regarding rent payment but were unable to do so. Landlord filed an eviction action in January 2021 but the matter has been languishing in court since then. However, the Court just issued an order requiring the parties to brief and file their motions for summary judgment immediately.

There was no Force Majeure provision in the lease.

Landlord alleged breach of lease and argued there is no entitlement to rent relief because tenant could operate since May 1, 2020 in some capacity. Tenant raised several defenses in the lawsuit, including impossibility, impracticability, frustration of purpose, rescission based upon lack of consideration, constructive eviction, and sought to avoid its obligation to pay rent by relying on several provisions of the lease such as the casualty, condemnation, and quiet enjoyment provisions.

The parties each moved for summary judgment. There are no disputed facts. How would your table rule on the parties' motions and why?

How would you draft a Force Majeure provision from scratch that is far to both parties? Or is it better not to have a Force Majeure provision at all?

Sample Force Majeure Clauses:

> **UNAVOIDABLE DELAYS.** In the event that either party shall be delayed or hindered in or prevented from the performance of any act required hereunder by reason of strikes, lockouts, labor troubles, inability to procure labor or materials, failure of power, restrictive governmental laws or regulations, riots, insurrection, war, fire or other casualty or other reason of a similar or dissimilar nature beyond the reasonable control of the party delayed in performing work or doing acts required under the terms of this Lease (collectively, "Unavoidable Delays" and each an "Unavoidable Delay"), then performance of such act shall be excused for the period of an Unavoidable Delay and the period for the performance of any such act shall be extended for a period equivalent to the period of an Unavoidable Delay. The party rendered unable to fulfill any obligation by reason of an Unavoidable Delay shall take all commercially reasonable action necessary to remove such inability with all due speed and diligence. The nonperforming party will be prompt and diligent in attempting to remove the cause of its failure to perform, and nothing herein shall be construed as permitting that party to continue to fail to perform after said cause has been removed. The provisions of this Section shall not operate to excuse Tenant from prompt payment of Rent or any other payments required by the terms of this Lease and shall not extend the Term. Delays or failures to perform resulting from lack of funds shall not be deemed delays beyond the reasonable control of a party.
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> **Force Majeure**. As used in this lease, the term "Force Majeure" means delay resulting from the following causes beyond a party's reasonable control" acts of God such as fire, windstorm, flood, hurricane, tornado or earthquake; industry wide inability to obtain materials or merchandise; war; riot or civil commotion; governmental laws or regulations, including a building moratorium (hereinafter "governmental matters"), provided that "governmental matters" shall exclude planning and building permits, governmental inspections, permanent or temporary certificates of occupancy (or their equivalent in the applicable local jurisdiction) and similar governmental approvals. The party obliged to perform shall give notice to the other as soon as reasonably possible after the onset of such delay stating the cause and an estimate of the duration thereof. If, as a result of an event of Force Majeure, either party shall be delayed or hindered or prevented from the performance of any act required hereunder (other than the making of payments) within the time period set forth herein, the performance of such act shall be excused for the period of delay not to exceed sixty (60) days, and the period of performance of such act shall be extended for a period equivalent to the period of such delay, not to exceed sixty (60) days, unless a provision of this Lease expressly states that Force Majeure is not applicable. Financial inability to perform shall not constitute an event of Force Majeure.
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> **FORCE MAJEURE.** Neither party hereto will be liable for any failure to comply or delay in complying with its obligations hereunder if such failure or delay is, including but not limited to, due to acts of God, inability to obtain labor, strikes, lockouts, lack of materials, governmental restrictions, enemy actions, civil commotion, fire, unavoidable casualty or other similar causes beyond such party's reasonable control (all of which events are herein referred to as "Force Majeure Events"). It is expressly agreed that neither party will be obliged to settle any strike to avoid a Force Majeure Event from continuing.

Cases:

Palm Springs Mills Assocs. v. Kirkland's Stores, Inc., 2020 U.S. Dist. LEXIS 163880 (S.D. Fla. 2020) was an early COVID Force Majeure case. Tenant Kirkland's sought to excuse its payment of rent beginning in April 2020, as it alleged COVID-related shutdowns and restrictions was a Force Majeure event. The parties' Force Majeure clause stated: " Whenever a period of time is prescribed in the Lease for action to be taken by either party, such party will not be liable or responsible for, and there will be excluded from the computation of any such period of time, any delays due to strikes, riots, acts of God, shortage of labor or materials, war, governmental laws, regulations, or restrictions *(emphasis added)* or any other cause of any kind whatsoever which are beyond the reasonable control of such party. "The Court agreed that the COVID-related restrictions were a Force Majeure event, but rejected Kirkland's argument that its obligation to pay rent was relieved because the Force Majeure event did not affect its ability to pay rent.

640 Tenth LP v. Newsom, 78 Cal. App. 5th 840 (2022) (May 13, 2022)- The California Court of Appeal affirmed the dismissal of an attempted class action lawsuit brought by businesses closed by the State of California's COVID regulations. The Court held the orders were temporary and therefore not takings requiring just compensation. In affirming the trial court's ruling, the Court of Appeal analyzed the COVID shutdown in light of the Penn Central factors for governmental takings as set forth by the United States Supreme Court. The first factor is the regulations' economic impact, which must be severe. The Court found this factor weighed against the business owners, as they were not so severe as to completely deprive the business owners of the value of their property. The second factor is the interference with the business owners' reasonable expectations. The Court found this factor weighed in favor of the business owners because such regulations were not foreseeable, as other sorts of regulations might be. The third factor is the character of the actions. The Court found this factor weighed against the business owners because the regulations were temporary and enacted to prevent serious harm to the public. Since the regulations were temporary and also because there was no actual physical taking, the Court of Appeal determined such inverse condemnation claims were not actionable in California.

Fitness Int'l v. Ddrm Hill Top Plaza L.P., (C.D. Cal.), 2021 U.S. Dist. LEXIS 193266 (February 25, 2021)- Tenant operating a LA Fitness in a shopping center owned by Landlord. Tenant alleged it notified Landlord that it was excused from paying rent during the time it was closed by government mandate. Landlord replied by demanding tenant continue to pay rent even though it could not operate or could only do so at very limited capacity. Tenant responded by paying rent for March 2020, October 2020, and November 2020. Tenant then filed a lawsuit seeking reimbursement for the rent it paid alleging breach of lease, and argued the Force Majeure provision applied and landlord violated that provision by failing to refund the rent tenant paid. Landlord filed a motion to dismiss, which the Court granted. Force Majeure only excuses performance of acts required by the lease. Therefore, refusing to abate rent or refund rent payments previously made cannot form the basis for a valid breach of lease claim because the landlord is not obligated to do so by the lease.

55 Oak Street LLC v. RDR Enterprises, Inc., (S. Ct. Maine 2022, 2022 WL1634229) (May 24, 2022) – The Supreme Judicial Court of Maine reversed the lower courts' ruling that a restaurant tenant was partially excused from paying rent. The governor of Maine issued an executive order closing indoor dining from March 18, 2020 until May 31, 2020. On June 1, 2020, indoor dining was allowed so long as capacity and social distancing guidelines were followed. The restaurant decided not to reopen for indoor dining for financial reasons. The lower courts partially excused the restaurant from paying rent during the time it could partially re-open, following the rationale of In re Hitz Restaurant Group, 616 B. R. 374, 378-9 (Bankr. N.D. Ill. 2020). Specifically, the lower courts discounted the restaurant's rent by 60% because it could only operate at 40% capacity.

The Maine Supreme Court found the force majeure language of the lease unambiguous and therefore reviewed the lower courts' decision *de novo*. The Court determined the Force Majeure clause in the lease was valid and did not provide for partial performance- it was an "all or nothing" provision. Moreover, the Supreme Court the restaurant could have partially reopened but chose not to for admittedly economic reasons. Accordingly, the Force Majeure clause was inapplicable because the clause's language plainly didn't grant relief for economic decisions. The Supreme Court then remanded the case for entry of a judgment awarding a writ of possession.

Umnv 205-207 Newbury, LLC v. Caffe Nero, Americas, Inc., (2021 Mass. Super. LEXIS 12)(Feb. 8, 2021)- According to the use clause of its lease, Caffe Nero operated "as a Caffe Nero-themed café under Tenant's Trade Name and for no other purpose." The lease also required to serve food and beverages "of first-class quality" and could only offer take-out from its regular sit-down restaurant menu. On March 24, 2020, the Massachusetts governor entered an order barring restaurants from allowing on-premises consumption of food and beverages. However, restaurants could still sell food and beverages for takeout or delivery. Caffe Nero did not pay rent in April 2020 and May 2020. Landlord defaulted Caffe Nero for failure to pay rent and informed Caffe Nero it was terminating the lease on May 19, 2020. In early June, 2020, restaurants will allowed to offer outdoor table service. On June 22, 2020, restaurants were allowed to reopen for indoor on-premises service in a limited capacity. Caffe Nero offered takeout and delivery services until June 22, 2020, as well as outdoor table service when allowed. It reopened for indoor service on or about June 22, 2020. Caffe Nero alleges it tried to negotiate with landlord after it reopened, but landlord rejected its offers. Landlord filed an eviction action on June 29, 2020 and a damages action on July 7, 2020. Caffe Nero was unable to reach an agreement with landlord, and vacated the premises on October 29, 2020. Caffe Nero paid no rent from April 2020 through October 2020, when it moved out.

The lease had a Force Majeure clause which stated: "Neither the Landlord nor the Tenant shall be liable for failure to perform any obligation under this Lease, except for the payment of money, in the event it is prevented from so performing by …order or regulation of or by any governmental authority… or for any other cause beyond its reasonable control, but financial inability shall never be deemed to be a cause beyond a party's reasonable control…, and in no event shall either party be excused or delayed in the payment of any money due under this Lease by reason of any of the foregoing."

Landlord argued the Force Majeure clause was clear that it did not excuse Caffe Nero's failure the pay rent. The Superior Court agreed that the Force Majeure clause was unambiguous. However, it held that the frustration of purpose doctrine applied because the events causing Caffe Nero to be unable to fully utilize the leased premises as contemplated by the use provision of the Lease were not anticipated by either party and not provided for by the Force Majeure clause. The Court therefore excused Caffe Nero from being obligated to pay rent from March 24, 2020 until June 22, 2020.

<u>Gap Inc. v. Ponte Gadea N.Y. LLC, 524 F. Sup.. 3d 224</u> (March 8, 2021)- Gap operated large Gap and Banana Republic ("Gap") stores at 59th St. and Lexington Ave. in midtown Manhattan. It sued the landlord, Ponte Gadea, seeking to terminate its leases or, alternatively, seeking relief from its obligations to pay rent. On March 20, 2020, the state of New York ordered all "non-essential" businesses to close (which included Gap and Banana Republic). On March 17, 2020, Gap closed all of its stores nationwide and determined it would stop paying rent for an indefinite period of time. On June 8, 2020, landlord served Gap with a notice of termination based upon Gap's failure to pay rent. Gradually, in June 2020, New York began to allow non-essential businesses to re-open. On June 12, 2020, Gap began to offer curbside pickup at Banana Republic. Gap also filed this lawsuit on June 12, 2020. Later on August 27, 2020, Gap re-opened for curbside pickup. However, Gap stopped operating in Sept. 2020 with intent to vacate the premises in October 2020.

Gap sought relief based upon six causes of action- (1) Landlord breached the lease by insisting upon the payment of rent; (2) a declaratory judgment seeking termination, rescission, or reformation of the lease effective March 2020; (3) Rescission of the Lease based upon frustration of purpose, illegality, impossibility, impracticability, and failure of consideration; (4) reformation of the Lease to address its obligations to pay rent while deprived of its use of the Premises; and (5) and (6), money had and received and unjust enrichment for rent paid after March 19, 2020. Landlord filed a counterclaim alleging breach of Lease and a declaration that the lease was terminated due to Gap's default for not paying rent. The parties then filed opposing motions for summary judgment.

The Court ruled for Landlord and disposed of Gap's various arguments in turn. First, Gap asserted the pandemic and consequent lockdowns were a "casualty". The Court quickly dismissed that claim, as Gap's desired interpretation of the casualty provision is contrary to established case law and also the plain meaning of the term, which requires some physical damage to the leased premises. Second, Gap argued the frustration of purpose doctrine relieved it of its obligation to pay rent. The Court held that the frustration doctrine requires the event that frustrated performance must be wholly unforeseeable. Here, however, the Force Majeure clause included certain government actions. Therefore, Gap cannot argue the pandemic and government shutdowns were wholly unforeseeable because the Force Majeure clause included certain government actions, so government shutdowns were foreseeable. Also, the frustration of purpose doctrine requires the event causes the purpose of the transaction (the Lease) to be so completely frustrated that the transaction would make little sense. However, the store closure was very limited in time, and curbside delivery was allowed after a few weeks. The Court found Gap made a business decision not to operate but economic decision-making does not rise to the level of complete frustration of purpose. A four-month limitation of in-person operations does not frustrate the purpose of a five-year lease.

Next, Gap claimed that the pandemic and resultant government closures made its performance impossible or impractical. The Court held that Gap's impossibility defense failed because impossibility requires a total lack of foreseeability and the condition that led to Gap's alleged impossible performance was foreseeable because it was mentioned in the Lease. Because such government action was addressed the Force Majeure clause, the parties had already addressed how they were going to allocate risk for such an event. Hence, the Lease controlled, and common law doctrines such as impossibility and impracticability were not implicated. Gap also argued for rescission of the lease for failure of consideration. The Court did not agree. Gap had always received the consideration it bargained for from the landlord- a retail premises from which to operate its business. The fact that it could not do so was the result of government action, not anything the landlord did. Moreover, any such failure of consideration was partial and temporary- only a few months of a multiyear lease were impacted. Last, Gap claimed mutual mistake in that the parties failed to foresee the pandemic. Thus, had Gap known that a pandemic would strike and the resultant government restriction would have made it impossible and impractical to operate, it never would have entered into the lease in the first place. However, the Court ruled that mutual mistaken assumptions about future events that had not yet occurred did not warrant application of the mutual mistake doctrine. The court then granted summary judgment for the landlord as to liability on its two counterclaims, finding the lease was terminated effective June 15, 2020 and ordered Gap to pay unpaid rent from April 2020 as well as holdover rent from June 15, 2020.

AGW Sono Partners, LLC v. Downtown Soho, LLC, et al., 2022 WL 1482458 (Conn. S. Ct. 2022) (May 10, 2022) - Downtown Soho, LLC operated a restaurant called Blackstones Bistro in premises it leased from AGW Soho Partners, LLC. Landlord defaulted tenant for not making full rent payments in January 2020 and February 2020, which tenant cured by making the full payments. Landlord defaulted tenant again in March 2020 for not paying rent but this time, tenant didn't cure. On March 10, 2020, the Connecticut governor issued an order closing bars and restaurants to in person business. This ban was in effect until June 16, 2020, after which time restaurants were allowed to resume offering indoor dining at 50% capacity. On May 20, 2020, restaurants were allowed to offer outdoor dining. Restaurants were not prohibited from offering carryout and delivery dining the entire time. Tenant stayed completely closed between March 11, 2020 and May 27, 2020. Tenant did not offer carryout or delivery dining because it claimed it was not profitable to do so. Tenant reopened for outdoor dining on May 28, 2020 and eventually reopened for indoor dining later that summer. However, capacity restrictions limited indoor customers to about 25 people indoors when the usual capacity was about 140 people. Tenant made no rental payments after February 2020. Landlord defaulted tenant and served a notice to quit in June 2020. Tenant eventually closed and vacated the premises on Sept. 11, 2020. Landlord sued tenant for money damages. The trial court found that tenant violated the lease by not paying rent and further found that the government closures did not render the tenant's performance under the lease impossible, impractical or illegal, nor did they frustrate the purpose of the lease. The court ruled the pandemic was an unforeseen event but the lease allocated the risk to the tenant. It could still operate as a bar and restaurant selling food for takeout and delivery. While this may not be profitable, nothing about the government restrictions made performance illegal or impossible. The trial court then awarded damages to landlord, but only through December 2020, as a new tenant took occupancy (at lower rent than tenant was paying) in January 2021. Tenant appealed the trial court's ruling on liability and landlord cross-appealed the trial court's ruling on damages for failing to take into account the lower rent the new tenant was paying.

On appeal, the trial court's ruling as to liability was affirmed. First, the appellate court addressed tenant's argument regarding impossibility and impracticability. The court found impossibility or impracticability did not apply because using the premises to sell food was not made impossible or impractical because food for carryout or delivery could still be served. The pandemic-related restrictions may have made the cost of performance higher, and thus not profitable, but that does not make performance impossible or impractical. Also, the court found the lease did not have a Force Majeure clause that was applicable to this situation. The only applicable language was "unavoidable delay" language that excused only landlord's obligations. Last, the court found the lease contained language that clearly allocated the risk of complying with government rules and regulations to the tenant. Second, the court dismissed tenant's argument that the purpose of the lease was frustrated. It cited case law that held the application of the frustration of purpose doctrine was very narrow and because carryout and delivery services were allowed, the purpose of the lease was not frustrated. The Court distinguished the *Caffe Nero* case based upon the use clause in tenant's lease, which was broader than the Caffe Nero lease. The Court then reversed the trial court on its damages finding. The court found that the burden of proving the landlord mitigated its damages falls on the breaching party, not the nonbreaching party.

55 Jackson Acquisition LLC, v. Roti Restaurants, LLC, 2022 IL. App. (1st) 210138 (March 18, 2022)- Landlord 55 Jackson Acquisition LLC leased premises to tenant Roti Restaurants LLC for tenant to operate a restaurant selling food for on- and off-premises consumption. The lease did not have a Force Majeure clause *per se*. The phrase "force majeure" was mentioned in one section of the lease which provided for a landlord termination right if tenant abandoned the premises for over 90 days. This termination right was not viable if tenant was remodeling, or was not operating due to casualty, condemnation, or force majeure. The lease also provided for rent abatement but only if tenant could not operate due to landlord's negligence or willful misconduct.

Tenant failed to pay rent since March 2020. Landlord defaulted tenant in July 2020 and filed an eviction lawsuit in August 2020. Roti closed on March 18, 2020 based upon a government public health order. Roti also cited civil unrest as a reason it could not operate, claiming looting and rioting started on May 28, 2020, and Roti had its windows broken and premises damaged on May 30, 2020 and August 9, 2020. The parties filed opposing motions for summary judgment, and the trial court ruled for Roti. Landlord then appealed. First, the Court disposed of tenant's argument the pandemic was a casualty under the lease. It held physical damage of the premises is required to be considered a casualty. The Court then addressed the force majeure language which provided one of the ways tenant could avoid landlord's termination right for failure to operate. The Court agreed with tenant's argument that this language was only limited to landlord's termination right was not a force majeure provision "in the broader sense" but only one "of sorts". After dismissing the force majeure reference in the lease, the Court agreed with the trial court that there was no genuine dispute of material fact that the COVID-19 pandemic and resultant public health orders were not reasonably foreseeable when the lease was negotiated. Accordingly, the doctrines of impossibility, impracticability, and frustration were applicable. The court did find that there was a genuine issue of fact as to whether it was impossible to operate a restaurant (as other restaurants in the neighborhood were operating) so it reversed the trial court on that issue and remanded the case back to the trial court for further proceedings.

Drafting Tips: A New Hope

In a Force Majeure clause, is more better? It's a conundrum. Adding more specific examples of Force Majeure events such as pandemics, epidemics, or government closures may be counterproductive. Force Majeure is supposed to be for unforeseeable events. However, the more examples there are in the Force Majeure language, the more foreseeable the events are. Indeed, how can anyone today claim, with a straight face, that a future pandemic is unforeseeable?

However, is this paralysis by analysis? The more specific the language is, the more it's like any other section of the lease, such as the casualty provision. It will be interpreted solely on its own terms without reference to the history of Force Majeure provisions or the common law doctrines the Force Majeure clause is supposed to replace. Force Majeure provisions provide an allocation of risks, just like many other contractual provisions.

An argument can be made that a party seeking to excuse contractual performance is better off not having a Force Majeure provision at all. The contract's Force Majeure silence is the clearest path to invoking the common law doctrines that excuse contractual performance. At its core, a Force Majeure clause is simply about allocation of risk, giving the parties a way to think about and agree in advance on how those risks should be shared. It is best to steer away from vague legal doctrines and theories and instead negotiate a clearly drafted, mutually beneficial provision that addresses the situations that could materially impact the parties' ability to comply with their obligations. The worst thing the drafter of a contract can do is to copy and paste a Force Majeure provision from a template without giving any thought to how it rebalances the parties' obligations.