New York Force Majeure in Art Contracts

By: Megan Noh

New York has long been recognized as a "hub" for art transactions, and has a high concentration of auction house salerooms, private galleries, and fine art storage/shipping facilities. Traditionally, prospective purchasers have often inspected artworks in person, including for qualities that may not translate well through photographic reproduction (such as impasto, sheen, or ultraviolet fluorescence); high-value artwork is also subject to careful logistical arrangements (typically culminating in collection by or delivery to the purchaser as part of a "closing").

As the COVID-19 crisis continues to unfold, the unavailability of physical access to works of fine art has stymied these long-established practices, in turn creating obstacles to the performance of contractual obligations. In particular, the executive order issued by the Governor of New York on March 20, 2020 required non-essential businesses—including auction houses and galleries—to "close in-office personnel functions" as of March 22, after which date those businesses were no longer able to make artwork available to clients on their premises. This executive order categorizes mailing/shipping services as "essential" services, not subject to its in-person restrictions. However, most prominent storage/shipping vendors have (understandably) prioritized the health and safety of their staff and temporarily shuttered their New York operations, leaving some in-progress art transactions in limbo, with the contracted-for works unable to be accessed for inspection or transferred between locations.

It is no surprise that as a result of these abrupt closures, parties transacting art have increasingly turned to the existing force majeure provisions in their contracts—or sought to introduce new such provisions into in-progress deals—to provide relief from the impact of, or build in flexibility around, the dynamic circumstances posed by the ongoing pandemic. A force majeure provision relieves a contractual party of the duty to perform upon the occurrence of an unforeseeable event outside of the party's control. The question of whether a party's non-performance may be excused by a force majeure event depends in large part on the specific language of the contractual provision at issue.

New York courts narrowly construe the scope of force majeure provisions, looking only to explicitly enumerated triggers (or, in cases where the relevant provision includes a "catch-

all" clause such as "or other circumstances beyond the control of the parties," applying the principle of *ejusdem generis* to recognize as triggers only events sufficiently similar to the enumerated items). Language referencing "epidemics, pandemics, viral outbreaks, or other public health emergencies" would largely be considered to encompass COVID-19 from an earlier point in time than a clause referencing only "pandemics" (which arguably would not have been triggered until the March 11, 2020 categorization of COVID-19 as such by the World Health Organization).

In evaluating applicability of a force majeure clause, New York courts also consider (1) whether the alleged trigger event was foreseeable; (2) whether it was the actual cause of the party's non-performance; and (3) whether it truly rendered impossible the performance at issue.

With respect to **foreseeability,** New York courts have taken a mixed position where parties expressly enumerate a potential force majeure event, in some cases disregarding the unforeseeability requirement (*see generally Starke v. UPS, Inc.*, 513 Fed. Appx. 87 (2d Cir. 2013)), and in other cases seemingly conflating it with the requirement that the occurrence of an enumerated force majeure event not have been within the non-performing party's *control* (*see Goldstein v. Orensanz Events LLC, et al.*, 146 A.D.3d 492 (N.Y. 1st App. Dept. 2017)). New York art industry businesses who introduced more robust force majeure provisions (inclusive of specific references to "pandemics" and similar triggers) in response to the spread of the virus in other parts of the world—but prior to the spread of the virus or introduction of related restrictions in New York—may face challenges from counter-parties arguing that at the time of the formation of such contracts, COVID-19 was not only *foreseeable*, but had in fact been foreseen.

Where a contract *lacks* specifically-enumerated language on point and a non-performing party seeks to rely on "catch-all" language to encompass the impact of COVID-19, it may also face a challenge, as disease/viral outbreaks are not unlike adverse weather conditions, in that they are inevitable, albeit impossible to predict the timing of with certainty. Accordingly, the failure of a force majeure provision to reference such events may lead to the provision being interpreted to have intentionally omitted a "known unknown," *i.e.*, a foreseeable trigger. *See generally Team Marketing USA Corp. v. Power Pact, LLC*, 41 A.D.3d 939 (N.Y. 3rd App. Dept. 2007) (citing *Kel Kim Corp. v. Central Mkts.*, 70 N.Y.2d 900 (N.Y. 1987)).

While a global pandemic may have been inevitable, the scale of COVID-19's impacts is unprecedented, and it remains to be seen how New York courts will address the foreseeability analysis in its wake.

With respect to **causation**, a party seeking to excuse non-performance on the basis of COVID-19 would not likely have been able to, for example, cancel a February 2020 public auction in New York even under contractual language broadly contemplating "viral outbreak" as a force majeure event. Despite the fact that the outbreak of COVID-19 was advanced in other parts of the world by February (including in Wuhan, which was placed under quarantine on January 23), the art market *in New York* was still operating on a "business as usual" basis in New York throughout that month (indeed, this was the case largely through early March, culminating in the prestigious The Armory Show held from March 4-8 and attended widely by international galleries and collectors).

With respect to **impossibility**, neither mere economic disadvantage or impracticability will satisfy this standard, and a non-performing party may be required to demonstrate reasonable, good-faith efforts to perform despite the obstacle presented by the force majeure event. The determination of impossibility will thus vary widely in the context of artwork transactions:

- it may indeed be impossible to hold a public auction of consigned artwork property in a New York saleroom on a contracted-for date while the city's ban on public gathering remains in effect, but the auctioneer would likely be obligated to re-offer the artwork at a subsequent sale (unless the governing consignment contract specifically provided for the auctioneer's right to elect cancellation instead of postponement);

- it may be impossible to deliver a purchased artwork by a contracted-for date, but the seller would almost certainly be obligated to deliver as soon as logistical disruptions are resolved; and

- it may be impossible for a private broker to show its principal's artwork to prospective buyers in person during a contracted-for consignment period which happens to overlap the period of COVID-19 crisis, but the broker would likely be obligated to continue to attempt to facilitate a sale, for example, by offering the work "in situ" (*i.e.*, from photographs/information only, without physical inspection by the prospective purchaser).

Unlike transactions involving fungible, commercially-manufactured goods—for which, for example, a seller could mitigate by sourcing goods from a different supplier—most high-value art market transactions involve goods that are by their very nature, unique. Accordingly, the economic impact of an attempt to mitigate performance in an art transactional context can also vary widely, and a sophisticated force majeure provision will contemplate elections on the part of the party who is *not* seeking to excuse non-performance. For example, in the auction consignment example above, the consignor might not wish to include the work in a subsequently-scheduled sale, given the potential for changed market conditions. In the private sale broker example, the owner-principal might not wish to proceed with an "in situ" sale, given the prospect that a sale under such circumstances might result in a less-than-optimal sales price, and/or the likelihood that purchase agreement resulting from a transaction conducted under such circumstances would be contingent on a subsequent physical inspection.

Common Law Doctrines of Impossibility and Frustration of Purpose

Where a contract lacks a force majeure clause, its parties may seek to rely on common law doctrines for alternative relief from performance obligations.

The common law doctrine of **impossibility** excuses performance by a party upon the occurrence of an extraordinary intervening event, *i.e.*, one which the parties assumed would not occur and which has made performance "objectively" impossible, either because the means of performance were destroyed, because of the passage of a law rendering performance illegal, or because of a dramatic change in circumstances that would result in performance being against public policy. As with New York law on force majeure provisions, the event must actually cause the non-performance; moreover, the event must not have been foreseeable at the time of the formation of the contract. There is some New York precedent involving city-wide "lockdown"; in a case involving contractual non-performance post 9/11, a New York court found that government restrictions imposed as a result of the terrorist attack might have resulted in impossibility (*see Bush v. ProTravel Int'l, Inc.*, 746 N.Y.S.2d 790 (Civ. Ct. 2002)).

The common law doctrine of **frustration of purpose** excuses performance by a party when an extraordinarily intervening event, the absence of which was a basic assumption of the contract, "makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract" (*PF Safeguard, LLC v. BCR Safeguard Holding, LLC*, 85 A.D.3d 506 (N.Y. 2011)). The frustration must be so "substantial" that it goes to the core

of the contract, *i.e.*, negates the reason the other party entered into the agreement. As with the doctrine of impossibility, the frustrating event must have been unforeseeable (*Gander Mountain Co. v. Islip U-Slip LLC*, 923 F. Supp. 2d 351 (N.D.N.Y. 2013); however, the doctrine of frustration of purpose can apply where performance would actually be possible, if such performance would simply make no sense in the context of the parties' original intentions.

New York courts apply both common law doctrines narrowly, and on a highly fact-specific basis. Disputes about seemingly similar contractual duties under similar agreements may produce dissimilar results.

Application of the Uniform Commercial Code to Contracts for Sales of Goods

In New York, contracts for the sale of goods (including fine art) excuse "[d]elay in delivery or non-delivery in whole or in part by a seller" when such performance "has been made impracticable by the occurrence of a contingency, the non-occurrence of which was a basic assumption on which the contract was made," or "by compliance in good faith with any applicable foreign or domestic governmental regulation or order" (N.Y. U.C.C. § 2-615). Such a seller must give notice to the buyer, and must ultimately show that (1) a contingent event has occurred, (2) the impracticability of performance has resulted from such occurrence, and (3) that the nonoccurrence of the contingent event was a basic assumption of the contract (*see Dell's Maraschino Cherries Co., Inc. v. Shoreline Fruit Growers, Inc.*, 887 F. Supp. 2d 459 (E.D.N.Y. 2012).)

Critically, the standard of **commercial impracticability** is lower than that imposed by the common law doctrine of actual impossibility, and prohibitive expense or other substantial adverse economic impact may be sufficient. However, a New York seller still has an obligation to mitigate the effects of the contingent event; imagine, for example, a contract governing the sale of *multiple* artworks, the "closing" for which contemplates delivery of all such works. If most of the works have already been delivered, but one is delayed in transit or unable to be shipped due to COVID-related logistical disruptions, the seller may not unilaterally cancel the sale as to the already-delivered works; under Section 2-616, the buyer has 30 days to elect a resolution, such as agreeing to delayed delivery, cancelling the purchase of the delayed work, or, if the delayed/outstanding work "impairs the value of the whole contract" (in the case of an installment contract), terminating entirely.

Note that a gallery or auction *consignment* contract—whereby a broker or intermediary provides *services* to the owner of an artwork by seeking to find a buyer or offering for sale on the owner's behalf—would ordinarily not be subject to these Uniform Commercial Code provisions, and in the absence of a force majeure clause, would still be subject to the common law impossibility or frustration of purpose doctrines.

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The above article represents an analysis of U.S. considerations authored by Megan Noh. Separate companion pieces were authored detailing considerations for the U.K., penned by Noor Kadhim, and considerations for Italy and France, penned by Leonardo Carpentieri. The original publication of this article was combined with its companion articles to form a single piece on the Gardner Leader website.

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