The Force Majeure Awakens

By **Anthony Michael Sabino**

Force majeure, oft times colloquially expressed as an "act of God," is a comparatively straightforward principle of contract law. Clauses bearing the same moniker lawfully excuse a party from its contractual obligations when an uncontrollable event intervenes, typically a natural disaster, war or political upheaval. Nevertheless, which calamities trigger the protective umbrella of any given force majeure proviso is a matter strictly determined by the paragraph's plain text.

That maxim was driven home most recently by the U.S. Court of Appeals for the Second Circuit in *JN Contemporary Art v. Phillips Auctioneers*, ___ F.3d ___ (No. 21-32-cv) (2d Cir. March 23, 2022), where that federal bench effectively melded together a number of controlling axioms which regulate the enforcement of force majeure accords. For that very reason, we commence the instant writing with a brief summary of *JN*'s most relevant antecedents.

Force Majeure and the U.C.C.

Force majeure, rooted in the antiquity of commercial law, excuses merchants in particular from performing under an otherwise binding contract wherever circumstances beyond anyone's control render performance impossible. French in origin, in modern law it is defined as a "superior or irresistible force," *see Black's Law Dictionary* (5th ed. 1979) at 581, and often equated with an "Act of God....occasioned exclusively by violence of nature... without the intervention of man." *See Black's at* 31.

The doctrine most closely correlates with §2-609 of the Uniform Commercial Code, which codifies the right to demand "adequate assurance" when one party is skeptical of the counterparty's ability to perform. See N.Y.U.C.C. §2-609. Given this linkage, small wonder that force majeure and adequate assurance are regarded by some as opposite sides of the same coin.

Landmarks

When called upon to elucidate force majeure agreements, the better reasoned cases have consistently held that the borders of such clauses are demarcated by the precise text of the parties' accords, and not broader principles. See *PPG Industries v. Shell Oil Co.*, 919 F.2d 17, 18 (5th Cir. 1990) (force majeure is determined "by the *terms of the contracts* rather than the *dictates of the law*") (emphasis in the original). See also *Sabine v. ONG Western*, 725 F. Supp. 1157 (W.D. Oklahoma 1989) (no force majeure where the parties failed to list a collapse in market prices as a qualifying event).

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The federal courts within the ambit of the vaunted Second Circuit have held likewise. A cogent exemplar is *PT Kaltim Prima Coal v. AES Barbers Point*, 180 F. Supp. 2d 475 (S.D.N.Y. 2001), where the cessation of labor strife at the plaintiff/seller's facilities negated the buyer/defendant's assertion of a continuing force majeure. There District Judge Alvin Hellerstein notably reaffirmed the propositions that parties are free to tailor force majeure clauses to their individual needs, may widen or constrict the scope of such provisos as they will, and, in turn, can rely upon the courts to enforce the signatories' chosen text, without alteration or embellishment.

Yet the landmark most germane to today's discussion is *Kel Kim v. Central Markets*, 70 N.Y.2d 900 (1987), where New York's highest state tribunal robustly decreed that force majeure agreements constitute but a "narrow defense" to nonperformance. A party may shelter under such a paragraph, ruled the Court of Appeals, only when the clause's text "specifically includes the event that actually prevents a party's performance."

Kel Kim is further noteworthy for its invocation of ejusdem generis, a postulation which dictates that when generic terms follow precise listings, the former are delimited to the same items as referenced by the latter. Applying that maxim of construction to force majeure accords, the state's high bench proclaimed that generalizations within such provisos "are not to be given expansive meaning; they are confined to things of the same kind or nature as the particular matters" already catalogued within the text of the agreement.

The necessary background now set, our focus shifts to center stage, and the Second Circuit's newest perspective on the reach of force majeure clauses.

'JN' and 'Catchall' Force Majeure Clauses

A mere three factoids amply describe the controversy at the bar. First, art dealer JN, owner of a certain rare painting, contracted with Phillips, a purveyor of fine art, to auction said objet d'art at the latter's annual contemporary art gala, then scheduled for May 2020. Notably, JN was guaranteed a minimum of $5 million from the sale of the painting.

Second, the parties' accord contained a force majeure clause, the details of which follow. Third, when intervening government edicts forbade nonessential public gatherings, Phillips notified JN that the auction was postponed, it was declaring force majeure, and the auctioneer was terminating their arrangement. The instant litigation followed.

In quoting the contested force majeure agreement in its entirety, the Second Circuit revealed an exquisite counterpoise

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within the proviso's text. Although the paragraph succinctly catalogued specific force majeure events, precisely enumerating natural disaster, fire, flood, war, terrorist attack and even nuclear or chemical contamination as qualifying mishaps, that particular segment constituted only the intermediate portion of the clause.

Indeed, the force majeure section opened with the far more generic declaration that performance would be excused by "circumstances beyond our or your reasonable control," then proclaimed immediately thereafter that the scope of the accord was "without limitation."

Narrow Construction

Having illuminated the controlling text, the appellate panel then turned to the well-established law germane to the case at bar. First, and unsurprisingly consistent with the *Eire* doctrine, the tribunal remonstrated that contract interpretation is a matter to be conducted pursuant to principles of state law, not federal. Second, the circuit bench reiterated the longstanding precept that if an agreement is complete, clear, and unambiguous on its face, then a court must enforce it according to the plain meaning of its terms. See *Eternity Global Master Fund Limited v. Morgan Guaranty Trust Co. of New York*, 375 F.3d 168 (2d Cir. 2004).

New York's highest federal court then turned to its own jurisprudence regarding force majeure agreements. Harking to precedent nearly four decades old, Circuit Judge Rosemary Pooler reaffirmed the notion that the basic purpose of a force majeure clause is, in general, to relieve a party from its contractual duties when that party's performance has been prevented by a force beyond its control or when the objective of the contract has been frustrated. See *Phillips Puerto Rico Core v. Tradax Petroleum*, 782 F.2d 314 (2d Cir. 1985) (burden of demonstrating a force majeure condition falls squarely upon the party which begs excusal from its obligations).

Next, and with a deft pivot to local law, the *JN* panel cited the aforementioned *Kel Kim* decision with complete approval. Like its state brethren, the Second Circuit decreed that force majeure clauses are to be construed narrowly. Moreover, opined Judge Pooler, that same constrained mode of interpretation must be applied to catchall phrases, thereby "cabining [their] meaning" to whatever catastrophes the contracting parties had already particularized. And proceeding in lockstep with New York's highest state court, the federal tribunal also relied upon *ejusdem generis* as the foundation for its rationale.

To be sure, the Second Circuit keenly disregarded the plaintiff's key contention that the parties' force majeure proviso confined the meaning of "natural disasters" to natural processes of the earth, in essence, geological calamities, which the painting's owner urged are recognizable as being geographically contained and relatively short in duration. "We need not address these arguments," wrote Judge Pooler, specifically declining to opine if the recent health crisis itself qualified as a "natural disaster," as that term was employed in the parties' accord.

Taking a distinctively different tack, the federal bench declared that the-then health crisis, "coupled with the state government's orders restricting...nonessential businesses," constituted the very "circumstances beyond our or your reasonable control" specified by the parties in their force majeure clause.

The circuit bench ruled that the misfortunes underlying the instant controversy were of the same variety as the calamities denominated by the parties in their accord. Moreover, the impediments to performance catalogued by the parties were bound together by a common thread; each encompassed large-scale societal disruptions, were beyond any party's control, and could not be ascribed to the fault or negligence of any one person.

Lastly, the Second Circuit rejected JN's proffered interpretation because it "would render meaningless" both the generic catchall phrase and the non-exhaustive list of catastrophes which followed it. To adopt the plaintiff's argument, wrote Judge Pooler, would violate the fundamental rule that courts must avoid interpreting a portion of a contact in a manner which would render superfluous another aspect of the same agreement. With that, the august tribunal imparted its latest wisdom on the interpretation and application of force majeure clauses.

Conclusion

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The Second Circuit's newest postulations in *JN* memorialize the longstanding tenets of force majeure jurisprudence, as initially postulated by the New York state courts. These axioms include the principles that force majeure provisos are to be construed narrowly, their scope is entirely dependent upon the precise wording agreed to by the signatories, and that even supposedly far sweeping catchall language is firmly tethered to the parties' more precise listings of calamitous events. At the end of the day, *JN* remains steadfast to the basic maxim that a force majeure clause is only as efficacious as its exact text.