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FORCE MAJEURE AND OTHER ISSUES RELATED TO THE CORONAVIRUS (COVID-19) PANDEMIC

FREQUENTLY ASKED QUESTIONS

Table of Contents

A force majeure clause is defined as "a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event or effect that the parties could not have anticipated or controlled." Black's Law Dictionary, 718 (9th ed. 2009).

1. Are force majeure clauses in contracts enforceable?

A: Yes.

Under Florida law, force majeure clauses that include foreseeable events and events that merely frustrate performance (rather than render performance impossible) are permissible. Such events must be provided for in the language of the contract and must not result in an illusory contract. *See In re Mona Lisa at Celebration, LLC*, 436 B.R. 179, 194 (Bankr. M.D. Fla. 2010) (noting that foreseeable events may be covered); *Home Devco/Tivoli Isles LLC v. Silver*, 26 So. 3d 718, 722 (Fla. 4th DCA 2010) (noting that "force majeure clauses broader than the scope of impossibility are enforceable under Florida law, including those allowing foreseeable as well as unforeseeable events to excuse timely performance" as long as the events are outside of the control of the parties to the contract); *In re Flying Cow Ranch HC, LLC*, No. 18-12681-BKC-MAM, 2018 WL 7500475, at *2 (Bankr. S.D. Fla. June 22, 2018).

2. Will COVID-19 come within the definition of force majeure clauses in contracts?

A: Potentially.

The spread of COVID-19 is an event outside of a party's control and is therefore likely to come within the definition of force majeure clauses if the parties have simply provided that force majeure is any event that is outside a party's control or have not defined the term. However, certain force majeure clauses are more limited and pertain to specific events. There is likely to be a controversy as to whether COVID-19 is "an act of God."

Earlier courts have held epidemics to be force majeure events. *E.g., Lakeman v. Pollard*, 43 Me. 463, 466 (1857) (providing that cholera outbreak excused performance under a labor contract); *Coombs v. Nolan*, 6 F. Cas. 468 (S.D.N.Y. 1874) (providing that epidemic among horses excused reasonable delay in shipping); *Sandry v. Brooklyn Sch. Dist.*, 47 N.D. 444, 449 (1921) (providing that influenza epidemic excused school district from paying bus drivers during school closures). Note, there do not appear to be more recent cases discussing this.

If, however, the parties have a limited and closed list then it will depend upon the events specified in the contract. *E.g.*, *Stein v. Paradigm Mirasol, LLC*, 586 F.3d 849, 853, 857-58 (11th Cir. 2009) ("This force majeure clause covers events that may or may not happen, but whether they do is 'beyond the control of the Seller.'"). If the contract includes pandemics, epidemics or quarantine then it will almost certainly be applicable given that the World Health Organization declared COVID-19 a pandemic and several countries have imposed

quarantines in attempts to contain the spread of the virus, and several states within the United States have done the same.

3. What are the consequences of invoking a force majeure clause*?*

A: Common consequences include:

- suspension of contractual obligations;
- non-liability;
- extensions of time to fulfill obligations;
- renegotiation of terms;
- obligation to mitigate losses; and
- the right to terminate the contract.

4. What are the risks of invoking a force majeure clause?

A: If a party declares force majeure but is not contractually entitled to do so, it may find that it is in breach of contract.

Furthermore, if the declaration of force majeure amounts to evidence that the party in question no longer intends to perform the contract, this could amount to a repudiatory breach of contract and the other party may be entitled to claim damages as a result. It is therefore necessary to proceed with caution when relying on a force majeure clause.

5. How are force majeure clauses construed?

A: Force majeure clauses are typically narrowly construed.

See:

ARHC NVWELFL01, LLC v. Chatsworth at Wellington Green, LLC, No. 18-80712, 2019 WL 4694146, at *3 (S.D. Fla. Feb. 5, 2019) ("Force majeure clauses are typically narrowly construed, and will generally only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically identified.") (internal quotation omitted).

Princeton Homes, Inc. v. Virone, 612 F.3d 1324, 1332 (11th Cir. 2010) ("A permissible force majeure clause covers events that may or may not happen, but whether they do is beyond the control of [either party]. This type of clause is not an opt-out provision; it is limited in scope.") (internal citations and quotation marks omitted).

Snavely Siesta Assocs., LLC v. Senker, 34 So. 3d 813, 817–18 (Fla. 2d DCA 2010) ("In support of this position, the Senkers argue that while a developer may include language that excuses failure to perform based on impossibility of performance or frustration of purpose, the language in Snavely's contract excuses nonperformance 'based on circumstances nebulously described as beyond the Seller's control' and that it permits Snavely to delay performance 'for routine problems that include without limitation, delays occasioned by

rain, wind and lightning storms.' This interpretation overlooks the fact that the phrase 'circumstances beyond the Seller's control' and the phrase 'without limitation, delays occasioned by rain, wind and lightning storms' are tethered to the phrase 'such as acts of God, or any other grounds cognizable in Florida contract law as impossibility or frustration of performance.' This language restricts permissible delays to grounds that would be cognizable in Florida contract law as impossibility of performance or frustration of purpose while at the same time providing a nonexhaustive list of possible examples.")

Home Devco/Tivoli Isles, 26 So. 3d at 720–23 ("[T]he contract at issue here, which references acts of God, acts of governmental authority, hurricanes, strikes, labor conditions beyond seller's control, or 'any other similar causes not within Seller's control,' limits exclusions to events beyond the seller's control and does not make the two-year duty subject to the seller's discretion. Furthermore, because the clause 'or any other similar causes not within Seller's control' follows events listed before it—events which provide a recognized defense to a claim for contractual breach under Florida law—the clause can be construed as covering only events which are beyond the seller's control.")

Cartan Tours, Inc. v. ESA Services, Inc., 833 So. 2d 873, 874-75 (Fla. 4th DCA 2003) (reversing judgment on the pleadings "[b]ecause the phrase 'affecting the ability of the Olympic Games to be held' could reasonably mean preventing the games altogether as ESA contends, or simply affecting them as Cartan urges, it is ambiguous," and thus required the court to look to extrinsic evidence where "Olympics were going forward" notwithstanding September 11, 2001, anthrax letters, and the war against terrorism); *id.* at 874 (noting that force majeure clause provided "[i]n the event of material acts, including without limitation, civil disorder, strikes, government actions, terrorism, or other material acts beyond the reasonable control of either party to this Agreement, and affecting the ability of the Olympic Games to be held, the Hotel shall refund to Cartan all RLC payments made by Cartan pursuant hereto").

Taminco NV v. Gulf Power Co., 3:08CV135/RS/EMT, 2008 WL 4661520, at *3 (N.D. Fla. Oct. 21, 2008), *aff'd sub nom. Taminco NV v. Gulf Power Co.*, 322 Fed. Appx. 732 (11th Cir. 2009) ("Article 10 allows for suspension of a party' obligation in the case of a Force Majeure. The article specifically defines a Force Majeure and states that it does not include 'changes in the . . . operations . . . .' The fact that Plaintiff no longer needs thermal energy output from the Defendant is a change in operation. This Agreement takes into consideration the change in Plaintiff's operations and specifically states that the Agreement remains in effect.")

Hartford Acc. & Indem. Co. v. Gulf Ref. Co., 230 F.2d 346, 355 (5th Cir. 1956) ("Black Warrior also relies on the 'Force Majeure' clause in the contract, set out in a footnote below. This clause exculpates the owner from liability for damages resulting from a number of causes, which might or might not stem from the negligence of the owner or his servants, but closes with the words 'or any other cause, whether similar or dissimilar to the foregoing, which is beyond their control.' The trial court characterized the clause as 'but a mishmash of words,' and, while it is our duty to construe it to the best of our ability, it is plain that in order to give it meaning, we must regard the words 'beyond their control' as indicating an exculpation only when 'fire, explosion' and other listed causes occur by the acts of nature

or of third parties. Such was not the case. It is, therefore, not applicable."); *id.* at n.10 (interpreting the provision: "Force Majeure: Neither Owner, Charterer, the tow, her master or owners, nor any other equipment used by Owner, shall be responsible or liable or in any way for any loss or damage, or for any failure or delay in performance hereunder arising or resulting from: Acts of God, Perils of the waters, or of navigation, strikes or stoppage of labor for whatever cause, fire, explosion, neglect, default or barratry of the master or crew, enemies, pirates, assailing thieves, seizures, arrest or restraint of princes, rulers or people riots or civil commotion, compliance with any law, rule, order, regulation, restriction, recommendation or request of any government or agency thereof or any person purporting to act under authority thereof or any other cause, whether similar or dissimilar to the foregoing, which is beyond their control.").

Acosta v. United States Dep't of Agric., 04-22985-CIV, 2006 WL 8433149, at *3 n.3 (S.D. Fla. Feb. 15, 2006), *report and recommendation adopted*, 04-22985-CIV, 2006 WL 8433125 (S.D. Fla. Mar. 15, 2006), *aff'd sub nom. Acosta v. U.S. Dept. of Agric.*, 236 Fed. Appx. 490 (11th Cir. 2007) ("Although not relevant to the pending motions for summary judgment and not argued by the parties, that clause likely excused performance of the lease during the canker eradication efforts, with the lease remaining in effect and performance no longer excused after completion of those efforts."); *id*. (interpreting the provision: "Notwithstanding any provisions of this LEASE to the contrary, the Parties shall not be held liable for any failure or delay in the performance of this LEASE that arises from fires, floods, strikes, embargoes, acts of the public enemy, unusually severe weather, outbreak of war, restraint of Government, riots, civil commotion, force majeure, act of God, or for any other cause of the same character which is unavoidable through the exercise of due care and beyond the control of the Parties. Failure to perform shall be excused during the continuance of such circumstances, but this LEASE shall otherwise remain in effect.").

Hemachandra v. Lake Buena Vista Resort, LLC, 608CV1516ORL35KRS, 2009 WL 10670716, at *3–4 (M.D. Fla. July 1, 2009) ("Finally, Defendant argues that impossibility of contract existed concerning the promised completion date in Plaintiffs' Agreements based on delays in road permitting related to hurricane damage occurring in the Orlando area in 2004 and delays in construction inspection due to a 2004 revision of the building code . . . . [T]he Court finds that the causes of delay argued by Defendant were foreseeable at the time Defendant entered the Agreements in September 2005. As in Harvey, the present record establishes that the building code in question was routinely revised every three years and that the updated version was available in July 2004 . . . . Concerning the delayed road permit, an affidavit from Defendant's own vice president concedes that the hurricane damage complained of occurred in 2004, that the application for the road permit in question was filed on December 1, 2004, and that the permit was issued in July 2005, each occurring prior to Defendant entering the Agreements in September 2005.").

U.S. Commodity Futures Trading Comm'n v. Worth Group Inc., 13-80796-CIV, 2014 WL 12461356, at *5 (S.D. Fla. Apr. 10, 2014) ("Worth also argues that its agreement, which represents that '[y]our transactions with Worth involve delivery within at most 28 days of purchase' . . . does not represent that customers will receive delivery within 28 days. Worth points to a force majeure provision in the agreement that provides that the time for

delivery may be extended in the event of certain 'adverse conditions.' . . . Their argument misses the point. Worth represents to customers that it makes delivery on transactions 'within at most 28 days of the date of purchase,' and that '[a]s a result, [the transactions] are not regulated by the Commodity Futures Trading Commission or the National Futures Association.' . . . This provision tells customers that Worth will deliver within 28 days, regardless of any 'adverse conditions,' because the '28-day exception' on which Worth relies to conduct its business outside of the regulated futures industry does not allow for any extension of time in any circumstance. If the transaction does not result in actual delivery within 28 days, it fails to meet the exception and is subject to the jurisdiction of the CFTC.").

Gulf Power Co. v. Coalsales II, LLC, 522 Fed. Appx. 699, 703–05 (11th Cir. 2013) ("Finally, Coalsales argues in the alternative that the district court should have denied both parties' motions for summary judgment and held a trial to consider "economics and the non-feasibility" of providing coal from other sources. Coalsales hinges its argument on language in the force majeure provision, section 14.02, which it says requires only reasonable mitigation efforts on its part. In other words, Coalsales maintains that a trial on the fact question of reasonability would have shown that mitigating the force majeure by providing coal from other approved sources was not economically reasonable or feasible. *This argument is clearly foreclosed by section 14.03, which provides that 'economic conditions which may adversely affect the anticipated profitability' of mining operations would not be taken into consideration in excusing performance under the force majeure provision.*")

6. If the contract is silent on force majeure, will it be implied into the contract given the exceptional circumstances surrounding COVID-19?

A: No, the concept of force majeure will not be implied into a contract. However, common law doctrines, such as frustration of purpose, can potentially be invoked.

To rely on a right to suspend, delay performance or cancel a contract as a result of an event beyond your reasonable control, an express force majeure clause in the contract (or wording to the same effect) providing these rights is required.

However, without an express force majeure clause, the common law doctrine of frustration of purpose may provide relief. For a contract to be frustrated, COVID-19 must render further performance of the contract illegal, impossible, or make it radically different from that contemplated by the parties. This is a very high hurdle—and it has previously been established that a contract is not frustrated where the contract becomes merely more expensive, or more onerous to perform as a result of the occurrence of the unexpected event.

See BRE Mariner Marco Town Ctr., LLC v. Zoom Tan, Inc., 2:15-CV-284-FTM-29CM, 2016 WL 1704197, at *5 (M.D. Fla. Apr. 28, 2016), *aff'd*, 682 Fed. Appx. 744 (11th Cir. 2017) ("Upon review of the Lease Agreement, the Court notes that there is a 'Force Majeure' clause excusing the Landlord 'for the period of any delay in the performance of any obligations hereunder when prevented from doing so by a cause or causes beyond Landlord's control

which shall include . . . governmental regulations or controls . . . .' There is no equivalent provision for Zoom Tan . . . . Defendant's second affirmative defense of 'events beyond tenant's control' relies upon language contained within Section 21.01, subparts (e) and (f), of the Lease Agreement. Defendant argues that it was excused from: failing to take possession on the possession date, being required to proceed diligently and continuously with its work, completing its initial alterations and equipping of the demised premises, and opening for business on the commencement date because the denial of the permit was an event beyond its control . . . . Plaintiff has based its breach of contract claim, and damages attributable thereto, upon defendant's failure to pay rent—not upon the other events of default discussed within defendant's second affirmative defense. By the terms of the Lease Agreement, the 'events beyond tenant's control' do not excuse defendant's failure to pay rent. Accordingly, summary judgment as to the second affirmative defense is granted in favor of plaintiff.").

7. Can force majeure be waived if not pled as an affirmative defense?

A: Yes.

See Yusem v. Butler, 966 So. 2d 405, 414 (Fla. 4th DCA 2007), *decision quashed on other grounds*, 3 So. 3d 1185 (Fla. 2009) ("Regarding the application of force majeure to excuse the Appellants' lease-up performance that was untimely even based on the erroneously altered timeline, the trial court erred by employing the doctrine because it was not pleaded as an affirmative defense by the Appellants.")

8. Is a force majeure affirmative defense the proper subject of a motion to strike?

A: Usually not.

See Francis v. MSC Cruises, S.A., 18-61463-CIV, 2018 WL 4693526, at *1 (S.D. Fla. Sept. 27, 2018) ("Defendant's Twentieth Defense asserts that '[t]he incident alleged in the Complaint was caused by a force majeure and/or Act of God.' . . . Furthermore, the issue of whether there was a force majeure or Act of God that caused the incident is an issue of fact, which cannot be decided on a motion to strike. *See e.g.*, *Fox v. Trans World Airlines, Inc*., 20 F.R.D. 565, 568 (E.D. Pa. 1957) ('Defendant's pleading of an Act of God as having caused the crash presents an issue of fact which cannot be decided at this time'); *Lopez v. Resort Airlines*, 18 F.R.D. 37, 40 (S.D.N.Y. 1955) ('Whether an act of God actually caused the accident presents an issue of fact which cannot, of course, be decided on a motion to strike'). Accordingly, the Motion to Strike the Twentieth Defense is denied.").

9. Can notice requirements for a force majeure event be waived given general knowledge of the force majeure event?

A: Yes.

See Harris Corp. v. Nat'l Iranian Radio & Television, 691 F.2d 1344, 1356 (11th Cir. 1982) ("Melli points out that the provision requires written notice within ten days of force

majeure in order to terminate the contract and argues that Harris did not attempt to give such notice to NIRT until July 23, 1980, well after the Iranian revolution and NIRT's demand on the guarantee. The facts suggest, however, that Harris initially did not consider the force majeure to constitute anything more than cause for delay under the contract. Apparently, only after Harris learned that NIRT had presented Melli with a written declaration of Harris's default (in June of 1979) did Harris realize that NIRT considered continued operations impossible and determined that force majeure prevented completion of the contract. By that time, of course, NIRT had received notice of force majeure and had apparently acknowledged its existence, see pp. 1347–1348 supra, thus NIRT might be deemed to have waived any further notice required under the contract. This sequence of events sufficiently shows that NIRT's demand on the guarantee letter of credit was made with actual knowledge of the existence of conditions that excused further performance by Harris.").

10. What are the implications of COVID-19 on discovery and related issues during litigation?

A: If electronic discovery owed is destroyed through an unforeseen catastrophic event, sanctions can be avoided if proper and reasonable precautions were taken.

See:

Sosa v. Carnival Corp., 18-20957-CIV, 2019 WL 330865, at *6 (S.D. Fla. Jan. 25, 2019) ("The Notes further explain: 'information the party has preserved may be destroyed by events outside the party's control -- the computer room may be flooded, a "cloud" service may fail, a malign software attack may disrupt a storage system, and so on. Courts may, however, need to assess the extent to which a party knew of and protected against such risks.' . . . This language, in effect, provides a force majeure clause allowing for relief in an act of God scenario." (quoting Fed. R. Civ. P. 37 advisory committee's note to 2015 amendment).

In re Mut. Leasing Corp., 424 F.2d 999, 1000-01 (5th Cir. 1970) ("Second, he urges that the court erroneously found that the Bank was prevented by a 'force majeure' from filing the petition on July 14, 1969. In the third place the Trustee asserts that the Bank should not be allowed to use the fire as an excuse for failure in timely filing because it waited until the last day to file. We reject the Trustee's contentions and affirm . . . . We consider the third contention—that the Bank should not be allowed to use the fire as an excuse for filing late because it waited until the last day to file—to be without serious substance. The Bank was entitled to use the time until the last day to prepare and file its petition. Its counsel had the petition ready to file and sought to file it on Monday, July 14, the last permissible day. We should not require the Bank to have prescient powers and anticipate the unfortunate fire.").

CTI-Container Leasing Corp. v. Uiterwyk Corp., 685 F.2d 1284, 1289 (11th Cir. 1982) ("Uiterwyk argued that the stay of the entire action should be affirmed because: (1) it will be prejudiced in developing its evidence without the presence of IEL and Iran who are necessary for a comprehensive disposition at one time of the rights of the parties to

litigation arising out of the same facts . . . . Uiterwyk also will not be hampered by the third-party defendants' absence in attempting to substantiate its impossibility of performance and force majeure defenses. The historical context of the Iran-United States Agreement has not been disputed and CTI has not questioned the factual basis for these affirmative defenses.").

McDill Columbus Corp. v. Delpiano, 06-14184-CIV, 2008 WL 11332096, at *2 (S.D. Fla. July 31, 2008) (noting that, with respect to seeking relief from a judgment, "where a party's failure to comply [with a deadline] is due to factors beyond his control such as an act of God or sudden debilitating illness, he must seek relief under subsection 6 of Rule 60(b)").

April 6, 2020 Supplement:

Horning v. Resolve Marine Grp., Inc., No. 19-60899-CIV-SCOLA, 2020 WL 1540326, at *1 (S.D. Fla. Mar. 30, 2020) (denying motion to reconsider previous denial of stay of discovery despite the parties' assertion that "there has been a significant change of circumstances due to newly imposed restrictions as a direct result of the COVID-19 pandemic which directly impacts the parties' ability to proceed with discovery in the New Orleans, Louisiana area" because "the deadline to complete all fact discovery passed on February 21, 2020, before the first case of COVID-19 was confirmed in Florida"); *id.* ("[T]he Court does not find a one-size-fits-all, blanket stay or extension of deadlines appropriate for all the cases now before it. Depending on the stage of the litigation, attorneys can still file pleadings and brief legal issues, parties can still exchange quite a bit of discovery, and parties can meet and confer, remotely, to discuss the status of the case, among other activities.").

Kleiman v. Wright, No. 18-CV-80176-BLOOM/REINHART, 2020 WL 1472087, at *1-2 (S.D. Fla. Mar. 25, 2020) (finding good cause to amend scheduling order deadlines over defendant's objections because plaintiff had trouble deposing New York non-parties, noting "the present difficulties of working remotely with limited staff and resources against the COVID-19 backdrop" and "[i]ndeed, a national emergency has been declared by President Trump, the State of New York has been particularly crippled by the outbreak, and courts and other workforces across the nation are stretched thin").

Garbutt v. Ocwen Loan Servicing, LLC, No. 8:20-CV-136-T-36JSS, 2020 WL 1476159, at *2 (M.D. Fla. Mar. 26, 2020) (granting stay of discovery until June 1, 2020, "based on the disruption to business caused by the spread of COVID-19").

United States v. Multiplan Network, No. 8:19-CV-2169-T-60CPT, 2020 WL 1332171, at *1 (M.D. Fla. Mar. 23, 2020) (dismissing case and denying relators' motion for a 120-day extension to secure counsel in light of coronavirus because "the Relators did not make their request for an extension of time to hire an attorney until almost three months after the Court's deadline, demonstrating a willful disregard for this Court's Orders").

C.W. by & through F.W. v. NCL (Bahamas) Ltd., No. 1:19-CV-24441-CMA, 2020 WL 1492904, at *1 (S.D. Fla. Mar. 21, 2020) (denying emergency motion for protective order regarding date of corporate representative deposition because such a matter is not an "emergency,"

but providing that "[g]iven the health and economic crisis we are in, not postponing the deposition scheduled for next week is patently unreasonable" and requiring "defense counsel to prepare the 30(b)(6) witness for a deposition while complying with the social distancing standard" is unreasonable); *id.* at *2 (requiring counsel to appear for future hearing and "explain their behavior in context of the far-more-important issues this Court (and the entire world) is facing").

11. If there is reliance on a force majeure clause, will a showing have to be made that, but for COVID-19, there would have been performance on the contract?

A: It depends on the contract.

This interpretation is contract specific, but it is worth bearing in mind that it is probable that a party seeking to rely on a force majeure clause will need to be able to show that it is ready and willing to perform the contract, but for the unexpected event.

See:

ARHC NVWELFL01, 2019 WL 4694146, at *4 ("The performance required of Defendant under the Lease Agreement was payment of rent, and while I acknowledge that the government's decision to alter the BPCI program was 'not in the reasonable control of either party,' the Lease Agreement only excuses a party's nonperformance if the 'Event of Default resulted from a Force Majeure Event.' . . . Defendant has not shown that its failure to perform 'resulted from' the BPCI program modifications . . . . Without specific information in the record as to the relative role of the BPCI reimbursements in Defendant's revenue stream, this Court cannot determine whether Defendant's failure to pay rent 'resulted from' the program changes, as contemplated by the force majeure clause.") (internal citations omitted).

In re Flying Cow Ranch HC, 2018 WL 7500475, at *3 (rejecting failure to obtain zoning approval as force majeure event where force majeure clause did not reference government action); *id.* ("The Debtor contends that the failure to obtain zoning approvals and permits from the City of Wellington is a force majeure event covered by the Land Sale Contract's Force Majeure Clause. The Court disagrees. The specifically enumerated force majeure events are all wholly outside of the control of either of the parties and are unforeseeable. The Debtor's inability to obtain approvals and permits from the City of Wellington, however, was not wholly outside of the control of the Debtor nor was it unforeseeable . . . . Accordingly, the Court finds that the failure of the Debtor to obtain the desired zoning approvals and permits does not constitute a force majeure event which would excuse performance or delayed performance of the Debtor's obligations under the Land Sale Contract.").

Gulf Power Co. v. Coalsales II, L.L.C., 661 F. Supp. 2d 1270, 1274, 1280 & n. 32 (N.D. Fla. 2009) ("The CSA excuses nonperformance of an obligation when it is the result of an adverse event outside of the party's control. The parties agree that there were adverse conditions at the Galatia mine and that those conditions were not within the control of

Coalsales. However, because other mines were approved and available to Coalsales, the court finds Coalsales failure to meet its obligations to Gulf Power was not the result of the conditions at Galatia Mine. Gulf Power has alleged, and Coalsales has not disputed, that coal was readily available to Coalsales from other approved sources, including Source C, the Wells/Harris Complex, located in West Virginia. Therefore, Coalsales' nonperformance is not excused by the force majeure clause.").

Regions Bank v. Beemer & Associates XLVII, L.L.C., 3:10-CV-576-J-99TJC, 2011 WL 1575379, at *1 (M.D. Fla. Apr. 26, 2011) ("In their First Affirmative Defense, Defendants asserted that Beemer's 'inability to complete the subject development as intended is due [sic] the unforeseen economic collapse which was not contemplated by Plaintiff or any of the Defendants' and, therefore, '[e]quity dictates that the agreements of the Defendants should not be strictly enforced given the economic events which are the equivalent of force majeure.' . . . [On a motion to compel discovery,] although the Court agrees that the recent economic downturn had an adverse effect on many lender/borrower relationships, and the most immediate and apparent result of the downturn was a severe tightening of the credit market, that is not what happened in this case. Here, Plaintiff fully funded the $5,250,000.00 loan. . . . If it is true that Defendants were not able to complete construction of the project, it was not because they suffered from any lack of access to or tightening of credit, whether or not Plaintiff eased back on lending to other borrowers.").

CSX Corp. v. N. River Ins. Co., 308CV00531J25MCR, 2009 WL 10671267, at *5 (M.D. Fla. Sept. 25, 2009) ("The exhibits filed in this case show that Gulf Atlantic's 'performance was prevented or delayed by two events that . . . are force majeure events—hurricane Emily and hurricane Katrina.' . . . Moreover, the complaint filed by CSX Transportation, Inc. against Gulf Atlantic indicates that Gulf Atlantic breached their contract for the twelve-month period ending on December 31, 2005 . . . . In sum, Plaintiffs have not demonstrated that Hurricane Katrina was the sole, or even predominant, cause for the suspension of business.").

Dictiomatic, Inc. v. U.S. Fidelity & Guar. Co., 127 F. Supp. 2d 1239, 1242-43 (S.D. Fla. 1999) ("Dictiomatic failed to prove that but/for the 20 day suspension of operations, it sustained an actual loss of business income which was caused solely by the hurricane and not by other factors.").

Int'l Aerospace Grp., Corp v. Evans Meridians, Ltd., 16-CV-24997, 2018 WL 618435, at *2-3 (S.D. Fla. Jan. 26, 2018), *appeal dismissed sub nom. Int'l Aerospace Group, Corp. v. Evans Meridians Ltd.*, 18-11777-GG, 2018 WL 3648263 (11th Cir. June 26, 2018) ("Pursuant to the force majeure clauses in the Agreements, and because the engines could not be delivered, Defendant cancelled the contracts. Plaintiff did not refund to Defendant any of the moneys Defendant paid for the three engines it was not able to deliver. Instead, Plaintiff kept those engines, and Defendant's funds, and has since re-sold two of the engines for a total of $940,000, and has stripped down and sold off for parts the third (for an undisclosed sum) . . . . As for Defendant's counterclaims for breach of contract against Plaintiff, it is undisputed and Plaintiff admits that it retained the three subject engines and has not refunded

Defendant any of the purchase moneys paid therefore. Accordingly, Defendant is entitled to summary judgment against Plaintiff on Counts I and II of its Counterclaim.").

12. Is a force majeure clause severable if it is construed to make a contract unenforceable?

A: Yes.

See Dubois v. Home Dynamics Murano, LLC, 07-61082-CIV, 2008 WL 11330726, at *1, *4 (S.D. Fla. June 17, 2008) ("In his Motion, Plaintiff further argues that ¶ 7.5 of the Contract also nullifies the exemption from ILSA, because some of the reasons provided for extending the two year obligation to complete construction go beyond what is permissible under Florida contract law as constituting a defense to non-performance. (*See* D.E. 31 at 8 (arguing that weather, labor and material shortages, "any acts of any governmental authority," and the words "without limitation" go beyond what is permissible under Florida law)). For the same reasons that the damages limitation clause is severable from the contract, the Court finds that the offending language in the Contract complained of by Plaintiff in ¶ 7.5 is hereby severed.").

13. Can a force majeure clause in a contract be invoked in a forward looking situation, where a party is due to enter into a contract in relation to an event taking place in the near future if the party has to cancel the event due to COVID-19, given that the party is aware of the effects of COVID-19 before signing the contract?

A: Potentially.

See:

Harvey v. Lake Buena Vista Resort, LLC, 568 F. Supp. 2d 1354, 1364, 1367-69 (M.D. Fla. 2008), *aff'd*, 306 F. App'x 471 (11th Cir. 2009) ("The Resort's impossibility defense based on the 2004 hurricanes fails as a matter of law because the hurricanes passed through Orlando an entire year before the parties executed the Purchase Agreement. The Resort was clearly aware of the risk of the road construction delay at the time it signed the Purchase Agreement because the road was completed three months before it was signed."); *id.* ("Similarly, in this case, 'the winds of change were blowing' and the Resort knew or should have known of the 2004 changes to the Florida Building Code in April 2004, or by the latest, at its publication in July 2004. Either date was at least fourteen months before the Resort entered into the Purchase Agreement with Plaintiffs on September 30, 2005. As a matter of law, the 2004 change to the Building Code cannot be the grounds for the Resort's impossibility defense for a Purchase Agreement signed in September 2005.");

Cook v. Deltona Corp., 753 F.2d 1552 (11th Cir. 1985) ("Thus, it seems to us that the most profitable approach to an impossibility claim is not to pass on the relative difficulty caused by a supervening event, but to ask whether that supervening event so radically altered the world in which the parties were expected to fulfill their promises that it is unwise to hold

them to the bargain. Ultimately the issue is whether the change was foreseeable.") (citing *Shore Investment Co. v. Hotel Trinidad, Inc.*, 29 So. 2d 696 (Fla. 1947)).

14. Is COVID-19 an excuse not to pay or perform a contract?

A: Performance under a contract can be excused for frustration of purpose and/or impossibility, but depends on the circumstances and the obligation to be performed.

i. Frustration of purpose

The defense of frustration of purpose refers to the condition surrounding contracting parties where one of the parties finds that the purposes for which it bargained, and which purposes were known to the other contracting party, have been frustrated to the extent that the breaching party is not receiving the benefit of the bargain for which they contracted. *Home Design Ctr.—Joint Venture v. Cty. Appliances of Naples, Inc.,* 563 So. 2d 767, 770 (Fla. 2d DCA 1990); *Equitrac Corp. v. Kenny, Nachwalter & Seymour, P.A.*, 493 So. 2d 548, 548 (Fla. 3d DCA 1986) ("It appears without material dispute that the purpose for which the subject contract was formed became entirely frustrated under the circumstances of this case due to no fault of either party. This showing, in our view, rendered the contract unenforceable based on the contract doctrine of frustration of purpose."). However, it is a limited defense, and is not available concerning difficulties which would reasonably have been foreseen by the promisor at the creation of the contract. *Genuinely Loving Childcare LLC v. Bre Mariner Conway Crossings, LLC,* 209 So. 3d 622, 625 (Fla. 5th DCA 2017). For example, if performance is still available, but less profitable, a party is not excused from performance. *Valencia Ctr. Inc. v. Publix Supermarkets, Inc.,* 464 So. 2d 1267, 1269-70 (Fla. 3d DCA 1985) (providing that although performance under commercial lease was less profitable, as performance was still possible, defendant would not be excused from performance); *Lee v. Bowlerama Enters., Inc.,* 368 So .2d 913, 916 (Fla. 3d DCA 1979) (noting that, as subject property could be used for nightclub, albeit one not as large as contemplated, "doctrine of impossibility or economic frustration" were inapplicable).

Therefore, depending on the nature of the service at issue, and the disruption that COVID-19 has caused, frustration of purpose may be available as a defense.

ii. Impossibility of performance

Impossibility of performance "is a defense to nonperformance and refers to situations where the purpose for which the contract was made has become impossible to perform." *Spring Lake NC, LLC v. Figueroa*, 104 So. 3d 1211, 1216 (Fla. 2d DCA 2012). When determining impossibility, courts focus on "whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract." *Ferguson v. Ferguson*, 54 So. 3d 553, 556 (Fla. 3d DCA 2011) (quoting 6 Williston, Contracts (Rev. ed.) § 1931 (1938)). "[T]he defense of impossibility of performance is a fact-specific inquiry." *Kamel v. Kenco/the Oaks at Boca Raton, LP*, 07-80905-CIV, 2008 WL 2245831, at *3 (S.D. Fla. May 29, 2008), *aff'd*, 321 Fed. Appx. 807 (11th Cir. 2008). "Acts of God" and

governmental action are among several types of business risks which implicate the impossibility defense. *Cook*, 753 F.2d at 1557 (addressing government regulations); *Holly Hill Fruit Prods. Co., Inc. v. Bob Staton, Inc.*, 275 So. 2d 583, 584 (Fla. 2d DCA 1973) (addressing weather).

There are two types of impossibility: original impossibility and supervening impossibility. Original impossibility is impossibility of performance existing when the contract was entered into, so that the contract was to do something which from the outset was impossible. Supervening impossibility is impossibility that occurs after the contract is made. *Caidin v. Poley,* 313 So. 2d 88, 90 (Fla. 4th DCA 1975). However, a supervening impossibility of performance is not an excuse for nonperformance of a contract. *Metro. Dade Cnty. v. Babcock Co.,* 287 So. 3d 139, 142 fn.1 (Fla. 3d DCA 1973).

Thus, the doctrine of impossibility of performance should be employed with great caution if the relevant business risk was foreseeable at the inception of the agreement and could have been the subject of an express provision of the agreement. *See Home Design Ctr.*, 563 So. 2d 767. Where performance of a contract becomes impossible after it is executed, if knowledge of the facts making performance impossible were available to the promisor, he cannot invoke them as a defense to performance. *Shore Inv. Co.*, 29 So. 2d 696; *see also Caidin*, 313 So. 2d 88. If the risk of the event that has supervened to cause the alleged frustration was foreseeable, there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed. *See City of Miami Beach v. Championship Sports, Inc.*, 200 So. 2d 583 (Fla. 3d DCA 1967).

Further, the fact that performance becomes more costly does not render it impossible. *E.g.*, *Home Design Ctr.,* 563 So. 2d at 770 ("Accepting County Appliances' contention that it could not obtain property insurance as required under its floor plan agreement, it could still operate an appliance store without floor plan financing. Admittedly, such an operation would have required more capital than County Appliances apparently possessed, but that economic difficulty did not render its purpose 'impossible.'"); *Valencia Ctr.,* 464 So. 2d at 1269 ("Although impossibility of performance can include extreme impracticability of performance, courts are reluctant to excuse performance that is not impossible but merely inconvenient, profitless, and expensive to the lessor.").

See:

Am. Aviation, Inc. v. Aero-Flight Serv., Inc., 712 So. 2d 809, 811 (Fla. 4th DCA 1998) ("Thus, obtaining certification was clearly a business risk which Aero–Flight could have shifted by contract from itself to the appellant. It chose not to do so by contract. It should not be allowed to accomplish the same effect by claiming impossibility of performance because of a supervening risk which was foreseeable to it. We hold that defendant Aero–Flight's failure to perform was not excused by impossibility of performance, and thus it breached the contract entitling plaintiff to such damages as it may have proven at trial.")

Morton's of Chicago/Miami, LLC v. 1200 Castle 100-A, Inc., 13-23366-CIV, 2014 WL 11944280, at *7 (S.D. Fla. Apr. 10, 2014) ("In argument, Castle states that '[t]he parking

garage was sold to third-party defendant Patagonian before Castle even became the landlord . . . . Accordingly, from the time Castle became bound by the terms of the Lease, the spaces in Patagonian's parking garage were outside of Castle's control.' Therefore, record evidence shows that Castle knew at the time it became Morton's landlord it could not provide a license for Morton's to use the parking garage. As a consequence, Castle is precluded from defending its non-performance on the basis of impossibility because it assumed the risk by not expressly amending the preexisting lease agreement when it became Morton's landlord.") (internal citation omitted).

Hamilton v. Title Ins. Agency of Tampa, Inc., 338 So. 2d 569, 571–72 (Fla. 2d DCA 1976) ("Although neither party has argued that the doctrine of impossibility of performance is applicable to the instant case, and while we agree with that premise, the moratorium passed subsequent to execution of the original contract, and continuing up to and past the allotted times for performance of the condition precedent, was sufficient to render Hamilton's nonperformance excused. This conclusion is strengthened by the language in the original contract, '(I)n the event such building permits are not secured . . .' and the addendum, 'In the event that the purchaser is unable to obtain the said permits . . . .' Both of these contract provisions clearly contemplate that the defendant assumed the risk of subsequent governmental interference. Furthermore, no evidence suggests that the parties were informed of this moratorium prior to or at the time of contracting. Since neither party can be held to have foreseen this subsequent interference, then no reason exists for shifting the burden of this risk as allotted by the parties in their contract and the addendum.").

15. Are similar defenses available under Florida's Uniform Commercial Code?

A: Yes.

i. The UCC only applies to "goods"

Article II of the UCC applies only to transactions in goods; it does not apply to contracts for services, which are governed by the common law. *See* § 672.102, Fla. Stat. (2011); *BMC Indus., Inc. v. Barth Indus., Inc.*, 160 F.3d 1322, 1328 (11th Cir. 1998) (applying Florida law); *Dionne v. Columbus Mills, Inc.*, 311 So. 2d 681, 683 (Fla. 2d DCA 1975). "Goods" are statutorily defined as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (chapter 678) and things in action." § 672.105(1), Fla. Stat. (2011). The term "services," conversely, is not defined in the UCC, but generally refers to some sort of manual labor or personal utility rather than a physical object that has been sold or purchased. *See BMC Indus.*, 160 F.3d at 1329-32 (discussing and analyzing various cases that have held a contract to be for either goods or services). Determining whether a contract is for goods or services, however, is not a completely binary choice. Many contracts, commonly referred to as "hybrids," involve transactions for both goods and services. *Id.* at 1329. Whether the UCC or the common law applies to a particular hybrid contract depends on "whether the[ ] predominant factor, the [ ] thrust, the[ ] purpose [of the contract], reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with

labor incidentally involved (e.g., installation of a water heater in a bathroom)." *Id.* at 1330 (quoting *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974)) (footnotes omitted). In such instances, the determination whether the "predominant factor" in the contract is for goods or for services is a factual inquiry unless the court can determine that the contract is exclusively for goods or services as a matter of law. *Birwelco–Montenay, Inc. v. Infilco Degremont, Inc.*, 827 So. 2d 255, 257 (Fla. 3d DCA 2001) (citing *BMC Indus.*, 160 F.3d at 1331).

ii. Florida Statute §672.615

Section 672.615 is titled, "Excuse by failure of presupposed conditions." The statute excuses performance or delayed performance "if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence 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 whether or not it later proves to be invalid." §672.615(1), Fla. Stat. However, it does not apply "so far as a seller may have assumed a greater obligation." §672.615, Fla. Stat. Further, the seller must provide notice. §672.615(3), Fla. Stat. ("The seller must notify the buyer seasonably that there will be delay or nondelivery . . . ."). "The burden of proving each element of claimed commercial impracticability is on the party claiming excuse." *E. Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 432, 438 (S.D. Fla. 1975).

Importantly, where the seller's ability to perform is not completely affected,

> the seller must allocate production and deliveries among her or his customers but may at her or his option include regular customers not then under contract as well as the seller's own requirements for further manufacture. The seller may so allocate in any manner which is fair and reasonable.

§672.615(2), Fla. Stat. Moreover, the seller must have attempted substituted performance if possible. §672.615(2), Fla. Stat. (providing excuse is "subject to the preceding section on substituted performance"); §672.614(1), Fla. Stat. ("Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.").

Moreover, increased cost or the collapse of a market are not generally a basis for invoking this statute. "The comments to this portion of the Florida Commercial Code explain that '[i]ncreased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts at fixed prices are intended to cover.'" *Orlando Utilities Com'n v. Century Coal, LLC*, 608-CV-1008-ORL31KRS, 2008 WL 4570270, at *2 (M.D. Fla. Oct. 14, 2008) (quoting § 2-615. Excuse by Failure of Presupposed Conditions., UCC § 2-615

comment 4). "But a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance is within the contemplation of this section." § 2-615. Excuse by Failure of Presupposed Conditions., UCC § 2-615 comment 4.

See:

Tandy Corp. v. Eisenberg, 488 So. 2d 927, 928 (Fla. 3d DCA 1986) ("The defense of commercial impracticability as contained in Florida Statutes, § 672.615, asserted by Defendant is not applicable to this case because Defendant knew at the time it entered into the contract that the product being purchased had been cancelled and would not be produced.").

Orlando Utilities Com'n, 2008 WL 4570270, at *2–3 (declining to apply statute on basis of increased costs where seller "failed to produce evidence from which a finder of fact could even determine that its costs have increased, much less that they increased based on 'the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made'").

§ 2-615. Excuse by Failure of Presupposed Conditions., UCC § 2-615 comment 11 ("[T]his section recognizes as of equal significance either a foreign or domestic regulation and disregards any technical distinctions between 'law,' 'regulation,' 'order' and the like. Nor does it make the present action of the seller depend upon the eventual judicial determination of the legality of the particular governmental action. The seller's good faith belief in the validity of the regulation is the test under this Article and the best evidence of his good faith is the general commercial acceptance of the regulation. However, governmental interference cannot excuse unless it truly 'supervenes' in such a manner as to be beyond the seller's assumption of risk. And any action by the party claiming excuse which causes or colludes in inducing the governmental action preventing his performance would be in breach of good faith and would destroy his exemption.").

E. Air Lines, 415 F. Supp. at 441 ("No such hardship has been established. On the contrary, the record clearly establishes that 1973, the year in which the energy crises began, was Gulf's best year even, in which it recorded some $800 million in net profits after taxes. Gulf's 1974 year was more than 25% better than 1973's record $1,065,000,000 profits were booked by Gulf in 1974 after paying all taxes. For the foregoing reasons, Gulf's claim of hardship giving rise to 'commercial impracticability' fails."). *Id.* at 441-42 ("But even if Gulf had established great hardship under U.C.C. s 2—615, which it has not, Gulf would not prevail because the events associated with the so-called energy crises were reasonably foreseeable at the time the contract was executed. . . . The record is replete with evidence as to the volatility of the Middle East situation, the arbitrary power of host governments to control the foreign oil market, and repeated interruptions and interference with the normal commercial trade in crude oil. Even without the extensive evidence present in the record, the court would be justified in taking judicial notice of the fact that oil has been used as a political weapon with increasing success by the oil-producing nations for many years, and

Gulf was well aware of and assumed the risk that the OPEC nations would do exactly what they have done.").

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