

Force Majeure Clauses and Common Law Defenses in Commercial Real Estate Transactions (IL)

A Practical Guidance® Practice Note by Howard K. Jeruchimowitz, Greenberg Traurig, LLP



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This practice note explores the applicability of force majeure clauses under Illinois law in the commercial real estate context as a defense to contractual obligations during the COVID-19 era. It also addresses common law doctrines of impossibility, commercial impracticability, and frustration of purpose. Historically, force majeure clauses and common law doctrines have not provided much relief for parties failing to pay or perform under a contract. The pandemic, however, raised a new setting for courts to analyze the applicability of force majeure clauses. Note that if a contract contains a force majeure clause, it is unlikely that the common law doctrines of impossibility, impracticability, or frustration of purpose will apply.

For further guidance on drafting force majeure clauses, see [Force Majeure Clause Drafting](#). For guidance on force majeure clauses in construction contracts, see [Force Majeure Clauses in Construction Contracts](#). For additional resources on force majeure clauses and the impact of COVID-19, see [Coronavirus \(COVID-19\) Resource Kit: Force Majeure, Contract Performance, and Dispute Resolution](#).

For resources on real estate transactions in Illinois, see [Purchasing and Selling Commercial Real Estate Resource Kit \(IL\)](#) and [Commercial Real Estate Leasing \(IL\)](#).

Overview

Force majeure is a contract law concept in Illinois. A force majeure clause is a contract provision that excuses a party's performance of its obligations under the contract when certain usually express circumstances arise beyond the party's control.

Because force majeure is contract-based, Illinois courts look to the contract language when interpreting and applying force majeure clauses. The Seventh Circuit has noted that "a force majeure clause must always be interpreted in accordance with its language and context, like any other provision in a written contract, rather than with reference to its name." *Wis. Elec. Power Co. v. Union Pac. R.R. Co.*, 557 F.3d 504, 507 (7th Cir. 2009).

Typical force majeure events include acts of God, war, terrorism, governmental laws, regulations or orders, weather-related causes, labor strike, riots, labor shortage, and other events or causes beyond the parties' control. While sometimes stated as one of the express circumstances covered by the clause, the concepts of epidemic or pandemic were not typically included in force majeure provisions before the COVID-19 pandemic.

When enforcing force majeure clauses, Illinois courts tend to interpret the terms narrowly and limit them to the specific events listed. See *Glen Hollow P'shp ex rel. Big Hollow Land Trust v. Wal-Mart Stores*, 1998 U.S. App. LEXIS 3214, at *9 (7th Cir. Feb. 26, 1998) (force majeure clause covers only those situations specified therein). Below is a discussion of select force majeure events.

Governmental Laws, Regulations, or Orders

The law, regulation, or order at issue must be directly relevant to the contractual obligation or directly order or request specific action that is contrary to the contractual duty. See *Glen Hollow P'shp*, 1998 U.S. App. LEXIS 3214, at *9–10 (no force majeure when developer's delay in starting construction was tied not to the zoning delays under government regulation but rather to developer's trouble getting financing); *Northern Illinois Gas Co. v. Energy Cooperative, Inc.*, 461 N.E.2d 1049, 1058 (1984) (finding that Illinois Commerce Commission order denying natural gas supplier's request for rate increase did not qualify as force majeure under contract for supply of natural gas).

Act of God

The Illinois Supreme Court has held that an act of God did not include an epidemic or pandemic to excuse payment of teachers while school was closed. See *Phelps v. Sch. Dist. No. 109, Wayne Cty.*, 134 N.E. 312, 312 (Ill. 1922). The court stated:

The general rule established by all the decisions is, that where performance of the contract is rendered impossible by act of God or the public enemy the district is relieved from liability, but where the school is closed on account of a contagious disease or destruction of the school building by fire, and the teacher is ready and willing to continue his duties under the contract, no deduction can be made from his salary for the time the school is closed.

Id. But see *Gray v. State*, defining "Act of God" as "[e]xtraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great draughts, lightning, earth quakes, sudden death and illness." *Gray v. State*, 21 Ill. Ct. Cl. 521, 527 (1964) (emphasis added).

Regardless of the force majeure event, force majeure "is not intended to buffer a party against the normal risks of a contract A *force majeure* clause interpreted to excuse the buyer from the consequence of the risk he expressly assumed would nullify a central term of the contract." *N. Indiana Public Serv. Co. v. Carbon County Coal Corp.*, 799 F.2d 265, 275 (7th Cir. 1986) (emphasis in original).

Force Majeure in the COVID-19 Era

COVID-19 has presented a challenging time for most business, consumers, and the economy generally. The legal challenges presented by this pandemic under force majeure clauses are whether the parties contemplated a

pandemic as a force majeure event and, if so, whether the COVID-19 event was the direct and proximate cause of the nonperformance.

For example, during the pandemic, airlines cancelled flights and typically provided passengers a credit rather than a refund. In *Rudolph v. United Airlines Holdings*, Plaintiffs filed a class action lawsuit against United Airlines for breach of contract for the airline's refusal to refund travel fares in the wake of the COVID-19 pandemic rather than only offer future travel credits under the theory that the airline must issue a refund under the "Contract of Carriage" if there is an involuntary cancellation based on a schedule change or irregular operations. 519 F. Supp. 3d 438, 442 (N.D. Ill. 2021). United Airlines filed a motion to dismiss based on the contract's other cancellation language that states that if it cancels a flight due to a "Force Majeure Event," then passengers are entitled to a travel credit but no refund. Id. On the one hand, United argued that various travel warnings and bans, as well mandatory stay-at-home orders, are "condition[s] beyond [United's] control," and "not reasonably foreseen, anticipated, or predicted." Id. at 448 (brackets in original). Plaintiffs, on the other hand, argued that United's decision to cancel flights was based on "pure economics" and United's broad force majeure reading would eviscerate the Schedule Change and Irregular Operations provisions. Id. at 449.

At the motion to dismiss stage, the court agreed with Plaintiffs that "reading 'Force Majeure Event' too broadly could gut the Schedule Change or Irregular Operations provisions." Id. at 449. "Certainly, there must be some point where a Force Majeure Event ends, and a Schedule Change or Irregular Operation begins. And to the extent that boundary is unclear, the COC [Conditions of Carriage], drafted entirely by United, must be construed in Plaintiffs' favor." Id. The court also found that even if the COVID-19 pandemic was a Force Majeure Event under the contract, United still must show it was the direct and proximate cause for the cancellations and it is "plausible that United cancelled ... flights in mid-March 2020 'because of a desire to save on operating expenses' ... and not because COVID-19 had been declared at that time as a public health emergency and global pandemic." Id.

Landlord/tenant issues have presented a challenge during the pandemic. Most tenant challenges to terminate a lease or seek redress for abated or reduced rent relief have not succeeded based on force majeure. It was thought that an early bankruptcy court decision might open the door to providing rent relief due to COVID-19. In *In re Hitz Restaurant Group*, the bankruptcy court found that the governor's executive order closing in-person dining in restaurants during the COVID-19 pandemic triggered

the force majeure clause in a debtor's lease, but because the executive order still permitted restaurants to provide takeout, curbside pickup, and delivery, the force majeure clause did not entitle the debtor to a 100% rent reduction. In re Hitz Rest. Grp., 616 B.R. 374, 376–80 (N.D. Bankr. 2020). Because the debtor could have used 25% of the restaurant for carryout, curbside pickup, and delivery purposes, the debtor owed at least 25% of the rent amount to the creditor even after application of the force majeure clause. In re Hitz, 616 B.R. at 379–80.

The bankruptcy court allowed for a rent reduction even though the force majeure clause at issue provided that “[l]ack of money shall not be grounds for Force Majeure.” The court rejected the creditor’s argument that the language in the clause should prevent the debtor from relying on it:

Second, Creditor characterizes Debtor’s failure to perform as arising merely from a “lack of money,” which it argues is not grounds for force majeure according to the lease’s own terms. But Debtor has not argued that lack of money is the proximate cause of its failure to pay rent. Instead, it is arguing that Governor Pritzker’s executive order shutting down all “on-premises” consumption of food and beverages in Illinois restaurants is the proximate cause of its inability to generate revenue and pay rent. The Court agrees, at least in part, and rejects Creditor’s argument to the contrary.

In re Hitz, 616 B.R. at 378.

Note that the lease at issue in *Hitz* excepted out only “lack of money.” Typically, force majeure provisions in leases except out—and expressly do not excuse—the payment of rent and other charges. In addition, commentators have suggested that because bankruptcy courts tend to apply equitable principles more often than other courts do, the case may have little value outside of the bankruptcy context. Nevertheless, given that the court here did allow a force majeure clause to abate rent, the case may provide a potential argument for tenants.

Proof Needed to Enforce Force Majeure Clauses

Courts in Illinois have looked at the factors below to determine if a force majeure clause is triggered.

Contract Language

Review the force majeure clause to determine what the contractual provision covers. Consider whether the force majeure clause covers epidemics or pandemics or whether

such a provision should be added to future clauses. For further guidance on drafting force majeure provisions, see Force Majeure Clause Drafting. For sample force majeure clauses to use in Illinois, see Midwest Transaction Guide § 110.232 and Corbin on Illinois Contracts § 74.12. For sample force majeure clauses to use in Illinois leases, see Illinois Real Estate Forms § 7.12 and Midwest Transaction Guide §§ 431.210–431.212.

Causation

Establish proximate causation. Force majeure applies only if the party invoking the force majeure can establish proximate causation between the event causing the delay (e.g., a government restriction) and what is being delayed. See Rudolph, 519 F. Supp. 3d at 449-50 (denial of United’s motion to dismiss because United’s flight cancellations might be related to saving operating expenses rather than COVID-19 as United was still operating certain flights); Glen Hollow P’shp, 1998 U.S. App. LEXIS 3214, at *9–10 (7th Cir. Feb. 26, 1998) (developer’s delay in starting construction was not proximately caused by government regulation); N. Ill. Gas Co., 461 N.E.2d at 1058 (“Since the rate order, as a matter of law, did not compel any performance by NI-Gas, there was no question of fact as to whether NI-Gas’ breach was proximately caused by compliance with the order as contemplated by the force majeure clause of the contract.”).

Notice

Notice is contract-based. Check to see if your contract requires notice to trigger a force majeure event. Some contractual force majeure provisions contain language requiring the party impacted by the force majeure event to give notice within a certain number of days of the occurrence of the event or to give general notice with an estimate of the delay.

Like any failure to give timely notice, failure to give proper notice for force majeure could bar the exercise of the force majeure clause. Courts occasionally have allowed other contract provisions to save a litigant who has not given the prompt notice called for in its contract.

For example, in analyzing a force majeure claim, the Seventh Circuit (applying Wisconsin law) addressed the relationship between force majeure notice requirements and no waiver provisions. See Wis. Elec. Power, 557 F.3d at 504. A no waiver provision, which is often found in commercial real estate contracts, says that a party’s failure to exercise its rights or remedies (or its delay in doing so) will not be deemed a waiver of such rights or remedies. The court held that one party’s failure to immediately enforce a contractual right did not result in a waiver of that

right, and that there was no detrimental reliance by the other party on the lack of prompt notice under the force majeure clause. See *Wis. Elec. Power*, 557 F.3d at 508–09.

Another court ignored the special notice requirements, finding:

We are reluctant to find that Moore waived its rights to raise the force majeure defense. While it can be argued that the para. 19(b) notice requirements are separate from the quarterly report requirements, we do not think, under these special circumstances, the difference carries a distinction.

United States v. Moore Am. Graphics, 1989 U.S. Dist. LEXIS 7751, at *14–15 (N.D. Ill. July 1989).

Defenses to the Enforcement of Force Majeure Clauses

When arguing against the applicability of a force majeure clause, you should consider the defenses discussed below.

Anticipation / Foreseeability

Determine if the event was anticipated or foreseeable. There is a recognized split of authority on whether force majeure clauses apply only to unforeseeable events or whether they can also apply to foreseeable events. Illinois federal and state courts appear to take the more restrictive approach and tend to require that an event be unforeseeable for a party to invoke force majeure.

Certain courts that discuss foreseeability look at the issue as one of the “allocation of risk in a contract situation.” *Moore Am. Graphics*, 1989 U.S. Dist. LEXIS 7751, at *15–17. “When an event is likely to prevent performance and a party is aware of an appreciable risk that the event may well happen, he can protect himself against the risk of non-performance or the occurrence of that event.” *Id.*

In a case involving a force majeure provision in a lease, the court focused on whether “it was within the contemplation of the parties—or it was reasonably foreseeable—that a failure by the [tenant] to pay the rent on the Existing Space Lease would cause [the landlord] to lose the property.” *Lakeview Collection, Inc. v. Bank of Am., N.A.*, 942 F. Supp. 2d 830, 855–56 (N.D. Ill. 2013). The court stated:

In other words, the question is not whether at the time the parties executed the Existing Space Lease it was reasonably foreseeable that the market would collapse. Rather, it is whether at the time the parties executed the Existing Space Lease, it was reasonably foreseeable

that a breach by the [tenant] to pay under the lease would cause [landlord’s] losses if delay of construction was caused by Force Majeure or any other event.

Lakeview, 942 F. Supp. 2d at 856.

Failure to Mitigate Damages / Supervening Impossibility

Determine if the party seeking to invoke the force majeure provision could have mitigated against the damage resulting from its failure to perform its contractual obligation. This defense is contract-based; its success may depend on the language of the particular clause and whether or not it includes an express mitigation requirement.

It is important to note that some courts have read into the force majeure clause a good faith requirement to mitigate damages, finding that “there is a general requirement related to the duty of good faith that is read into all express contracts unless waived, that the promisor make a bona fide effort to dissolve the restraint that is preventing him from carrying out his promise.” *Commonwealth Edison Co. v. Allied-General Nuclear Servs.*, 731 F. Supp. 850, 859 (N.D. Ill. 1990).

Other courts have interpreted this defense as “supervening impossibility”; for the defense to be successful, the party seeking to invoke force majeure must have taken some step to “disable himself from carrying out his promise and then complain that, by virtue of that disability, performance is impossible.” *Commonwealth Edison*, 731 F. Supp. at 860.

Common Law Doctrines

Separate from force majeure, a party may still be excused from its contractual obligation if that party shows frustration of purpose or impossibility, which generally has morphed over time into the concept of contractual impracticability.

Be aware that, if there is a contractual force majeure provision, the court may find these common law doctrines to be inapplicable because “the clause supersedes the doctrine.” *Commonwealth Edison*, 731 F. Supp. at 855; see also *In re Hitz*, 616 B.R. at 377; *N. Indiana Public Serv. Co.*, 799 F.2d at 276. The “doctrine of impossibility is an ‘off-the-rack’ provision that governs only if the parties have not drafted a specific assignment of the risk otherwise assigned by the provision.” *Commonwealth Edison*, 731 F. Supp. at 855. Given that these cases dealt specifically with impossibility, it is possible that frustration of purpose could still apply in the face of a force majeure provision.

Below is a discussion of these common law doctrines and key points to keep in mind when raising them for the court's consideration.

Frustration of Purpose

The doctrine of frustration of purpose applies when a party's principal purpose in entering a contract is substantially frustrated (without the fault of the party making the claim) by the occurrence of an event the parties had assumed would not occur at the time the contract was made. Under Illinois law, the doctrine of frustration of purpose (or commercial frustration, as it is sometimes called) is "not to be applied liberally." *N. Ill. Gas Co.*, 461 N.E.2d at 1059. In fact, the defense is "disfavored." *Scottsdale v. Plitt Theatres, Inc.*, 1999 U.S. Dist. LEXIS 7785, at *9 (N.D. Ill. Mar. 30, 1999). Illinois courts require a defendant to meet a "stringent" and "rigorous" two-factor test: "(1) the frustrating event was not reasonably foreseeable; and (2) the value of counterperformance by the lessee had been totally or near totally destroyed by the frustrating cause." *Smith v. Roberts*, 370 N.E.2d 271, 273 (Ill. App. Ct. 1977).

Courts have found commercial frustration to apply in the following examples:

- A lease for construction of movie theater, where change in zoning classification specifically forbid movie theaters (see *Scottsdale*, 1999 U.S. Dist. LEXIS 7785, at *11 (finding that even though leased premises could be used for something else, lease was specific to movie theater))
- A lease for the expansion of a department store where the adjacent main building was destroyed by fire (see *Smith*, 370 N.E.2d at 273)

Note, though, that courts have mostly declined to apply commercial frustration, including, for example, in the following situations:

- The federal government's restriction on sale of automobiles to automobile seller did not excuse performance under its lease; although the lessee's business was less profitable as the result of restriction, the lessee still could conduct business. See *Diebler v. Bernard Bros. Inc.*, 53 N.E.2d 450 (Ill. 1944).
- A change in interest rate did not relieve the mortgagor of its obligations under its mortgage loan because the change was foreseeable. See *Farm Credit Bank v. Dorr*, 620 N.E.2d 549, 555–56 (Ill. App. Ct. 1993).
- A riot causing some disruption in business did not destroy business to a sufficient degree. See *Greenlee Foundries, Inc. v. Kussel*, 301 N.E.2d 106, 111–12 (Ill. App. Ct. 1973).

- Changes in demand for natural gas and a government order rejecting a rate increase were sufficiently foreseeable. See *N. Ill. Gas Co.*, 461 N.E.2d at 1059.

Impossibility

The doctrine of impossibility excuses the nonperformance of duties under a contract based on a change in circumstances that makes performance of the contract literally impossible (e.g., the destruction of a theater makes the performance within the venue impossible). The party advancing the doctrine must show that the events or circumstances that he or she claims rendered performance impossible were not reasonably foreseeable at the time of contracting. *YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC*, 933 N.E.2d 860, 865 (Ill. App. Ct. 2010) (citing *Leonard v. Autocar Sales & Serv. Co.*, 64 N.E.2d 477, 479 (Ill. 1945) ("subsequent contingencies, not provided against in the contract, which render performance impossible, do not bring the contract to an end")).

Courts have routinely rejected impossibility. *Leonard*, 64 N.E.2d at 478–79 (rejected impossibility in case involving condemnation of the subject property for war purposes); *YPI 180 N. LaSalle*, 933 N.E.2d at 865 (2008 global financial crisis did not excuse performance under contract even though purchaser was unable to obtain financing). The Illinois Supreme Court explained that "[t]he doctrine of legal impossibility, or impossible performance, excuses performance of a contract only when performance is rendered objectively impossible either because the subject matter is destroyed or by operation of law." *Innovative Modular Solutions v. Hazel Crest School District*, 965 N.E.2d 414, 421–22 (impossibility rejected when school district tried to avoid cancellation fees for cancelled lease contracts based on takeover of a state-sponsored body following a fiscal emergency because building was not destroyed, and the takeover did not render performance of the contracts objectively impossible).

Impracticability

Modern contract law has evolved the view of the impossibility doctrine into one of impracticability, meaning that now, courts may no longer require literal impossibility. "Impracticability rather than absolute impossibility is enough; and the words 'impossible' and 'impossibility' are used in the Restatement of this Subject with that meaning. Mere unanticipated difficulty, however, not amounting to impracticability is not within the scope of the definition." *Fisher v. U.S. Fid. & Guar. Co.*, 39 N.E.2d 67, 70 (Ill. App. Ct. 1942).

The rationale for the defense of commercial impracticability is that the circumstance causing the breach has rendered

performance “so vitally different from what was anticipated that the contract cannot be reasonably thought to govern.” *Waldinger Corp. v. CRS Grp. Engineers, Inc.*, Clark Dietz Div., 775 F.2d 781, 786, 789 (7th Cir. 1985) (inability to supply a filter press to satisfy mechanical specifications rendered performance of its contract commercially impracticable).

If the seller did not assume greater obligations under the agreement, performance could be excused for impracticability if “(1) a contingency has occurred; (2) the contingency has made performance impracticable; and (3) the nonoccurrence of that contingency was a basic assumption upon which the contract was made.” *Id.* “The applicability of the defense of commercial impracticability, then, turns largely on foreseeability.” *Id.*

Importantly, courts reject economic downturn or distress as a basis for commercial impracticability. See *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283, 293 (7th Cir. 1974); *Bank of Am., N.A. v. Shelbourne Dev. Grp., Inc.*, 732 F. Supp. 2d 809, 827–28 (N.D. Ill. 2010) (same); *Ner Tamid Congregation of N. Town v. Krivoruchko*, 638 F. Supp. 2d 913, 927 (N.D. Ill. 2009), as amended (July 9, 2009).

Common Law Defenses in the COVID-19 Era

Similar to force majeure, common law defenses have not provided much relief for defaults due to the COVID-19 pandemic. For example, in *SEC v. Equitybuild, Inc.*, purchasers of real property bought out of receivership could no longer purchase the properties because they lost acquisition financing. 2021 U.S. Dist. LEXIS 175920, *5-*6 (N.D. Ill. Aug. 13, 2021). When the receiver sold the property to new buyers, the original purchasers tried to reinstate the old contracts. When that failed, they sought a return of the earnest money based on the doctrines of impossibility and commercial frustration due to losing the financing because of the pandemic. *Id.* at *6-*7. Because the contract at issue did not contain a force majeure clause, that doctrine did not supersede the common law doctrines. *Id.* at *7 n1. The court concluded that impossibility did not apply because the failure to obtain financing and a market downturn was not a sufficiently unforeseeable event and the purchasers could have allocated for the risk. *Id.* at *8-*10. The court also concluded that commercial frustration, which also requires the event not to be reasonably foreseeable, did not apply because “[e]ven assuming that the ‘frustrating event’ was the COVID-19 pandemic (and not a mere loss of financing due to a market downturn ...), purchaser has failed to carry its burden to demonstrate that the value of the contract was totally or nearly totally destroyed by the pandemic’s onset.” *Id.* at *11-*12.

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