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Enforceability of Contracts and the Coronavirus Pandemic: Force Majeure, Impossibility and Frustration of Purpose

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With current events, contracts are being reviewed for termination based on force majeure (“FM”) or for other reasons. FM clauses are sometimes poorly drafted and included in the ‘boilerplate’ that is sometimes not given appropriate attention.

When reviewing (or drafting) a FM clause, a long list of FM events (i.e., war, earthquake, pandemic, etc.) may paradoxically operate to *limit* the scope of the clause to just the events listed. The canon of construction *expressio unius est exclusio alterius* would exclude any event not specifically listed. Where a broad FM clause is desired, you may be better off with a catch-all following a list of carefully selected FM events, such as,

“....or any other events or circumstances not within the reasonable control of the party affected, whether similar or dissimilar to any of the foregoing.”

In addition to protections which may be afforded via an FM clause (or in the absence of an FM clause), there are two common law doctrines which may allow a party to avoid a contract: (i) impossibility (also known as impracticability) and (ii) frustration of purpose. The U.C.C. may also offer some protections.

The **doctrine of impossibility or impracticability** allows for a party to be excused of its responsibilities because performance has been made impossible or excessively burdensome by an unforeseen event that was not caused by the party seeking to be excused.

Frustration of purpose is not dependent on a party’s inability to perform. The doctrine is applicable where an unforeseen event has made performance of the contract worthless to a party. In the landmark case of *Krell v. Henry*, 2 K.B. 740 [1903], Henry rented a room from Krell for the purpose of viewing the coronation of King Edward VII. But the King fell ill, and the coronation was postponed. Given that the very purpose of the contract (a room with a view of the coronation) was frustrated, performance of the contract was excused.

However, in some instances and in some jurisdictions, the inclusion of a force majeure provision will be interpreted to supersede the protections afforded under the doctrines.

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