Facing the escalating crisis of the COVID-19 outbreak, commercial landlords building out space for tenants are likely concerned about completing their projects on time. Many leases provide tenants with day-for-day rental abatements if the landlord’s work obligations are not completed before the targeted completion date. In addition, although less common, some leases provide a tenant with the right to terminate a lease due to delays to complete work.

COVID-19 is introducing the risk of widespread contractual delays that months ago would not have been foreseeable and which thrust the concepts of force majeure and the common law doctrines of impracticability, impossibility and frustration of purpose into the limelight. Although seldom litigated, understanding how force majeure and these other common law doctrines function is helpful in confronting delays in existing leases and negotiating new leases.

Force Majeure and Common Law Protections for Landlord Delays

Force majeure clauses evolved from the common law doctrines of impracticability, impossibility and frustration of purpose. In general, the common law doctrines excuse a party’s performance under a contract if an event occurs that is beyond a party’s control. The doctrine of impracticability is an offshoot of the doctrine of impossibility, and for purposes of this article, discussion of both doctrines will be combined and discussed as the doctrine of impracticability. Although the common law provisions provide some protections, they are not available defenses to performance if the contract at issue contains a force majeure clause.

Impracticability excuses contractual performance when a supervening event renders a party’s performance so excessively burdensome that performance is excused. Frustration of purpose, on the other hand, excuses performance when a supervening event occurs that renders performance worthless to the other party. For both impracticability and frustration of purpose, jurisdictions are split whether the supervening event needs to have been unforeseeable to excuse performance.

Force majeure clauses function in the same vein as the common law doctrines. When confronting delays, a force majeure clause will best serve a landlord if the cause for the delay at hand is specifically identified. In some instances, a force majeure clause may be more limiting than the common law doctrines. For example,
Courts generally hold that a force majeure clause with a limited subset of triggering events will exclude those events that are not explicitly identified. Courts, though, look favorably on broad language that includes events outside of a party’s control.

**COVID-19 and Landlord Work Delays**

Using delays caused by COVID-19 as an example, a landlord’s work obligations under a lease could be delayed for several reasons. On the macro level, a region-wide quarantine, similar to measures taken in Italy or Hubei province, could halt all construction. On a more micro level, a laborer becoming ill could lead to a work stoppage for the crew working on a specific project. Either situation could ruin a schedule, and absent protections from a force majeure clause or the common law doctrines, expose the landlord to ever-increasing rent abatement costs or lease termination.

A landlord facing these delays should prepare in advance for the possibility of missing a deadline. As an initial step, the landlord should conduct a thorough review of the lease and become familiar with the provisions governing its work obligations. Are there monetary impacts for missing a deadline? Does the tenant have a right to terminate the lease for late delivery? Also, the landlord should review the lease’s force majeure clause to see whether it includes pandemics, government action or a broad catch-all provision. If the lease has a force majeure clause without a broad catch-all, the landlord will only be protected if the delay can fit within one of the identified reasons for force majeure. In addition, the force majeure clause may require that the landlord give notice within some period after the event causing the force majeure. Missing the notice deadline could have a devastating financial impact on the landlord.

Again, all is not lost if the lease does not contain a force majeure clause. The common law doctrine of impracticability would, in all likelihood, be available to a landlord whose construction project grinds to a halt due to the COVID-19 outbreak.

**This advisory was prepared by Christopher W. Papavasiliou and Michael Cavoto, in Nutter’s Real Estate Department. If you have questions about how COVID-19 may affect your case, please reach out to your Nutter attorney at 617.439.2000.**

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