The Impacts of the Coronavirus Pandemic on Real Estate Contracts: Force Majeure, Frustration of Purpose, and Impossibility

By George P. Bernhardt and Jack Fersko

George P. Bernhardt is managing counsel-global real estate at Baker Hughes Company in Houston, Texas, a member of the Section's Council, co-chair of the Leasing Group, and member of the Continuing Legal Education Committee. Jack Fersko is a partner at Greenbaum, Rowe, Smith & Davis LLP in Roseland, New Jersey, a member of the Section's Council, and vice chair of the Groups and Substantive Committees Committee.

Many are calling the current pandemic "an unprecedented event of force majeure" or "the very definition of force majeure." Before reaching that conclusion, however, a closer examination of the issues is required.

Force majeure is not a common law doctrine, but rather a creature of contract. Consequently, force majeure is only what a contract expresses—if it provides a force majeure clause at all. If it does, then most courts will narrowly construe the clause. Some force majeure clauses may be stated very broadly, such as "any event neither caused by nor reasonably foreseeable by the parties," or may list very specific events, in which case an occurrence will not be considered a force majeure event unless it meets the specific contract definition.

When a force majeure clause contains specific events, followed by very general language, some courts invoke the rule of *ejusdem generis*, under which principle the catch-all language is not to be construed to its broadest extent; rather, such language is to be narrowly interpreted as contemplating only events or matters of the same general nature or class as those specifically enumerated. In contrast, some courts have held that a force majeure clause that includes acts of God will be more expansively interpreted when followed by the phrase "or other unforeseen events or circumstances." *See, e.g.*, *Facto v. Pantagis*, 390 N.J. Super. 227 (App. Div. 2007). As such, understanding the law of your particular jurisdiction and then precise drafting are critical.

This article reviews the concepts of force majeure, frustration of purpose, and impossibility in the context of lease, construction, and purchase and sale agreements. It offers some drafting strategies to consider as the real estate sector continues to navigate the pandemic.

Force Majeure and Common Law Remedies

Before the 9/11 attacks in 2001, most force majeure clauses did not include terrorism. Before 2020, most did not cover epidemics or pandemics. The question is whether a broadly worded force majeure provision—for example, a clause that includes "all events outside the control of the parties"—will be interpreted to cover the COVID-19 pandemic.

Generally, to be construed as a force majeure, the event must be covered by the language of the clause,

not have been foreseeable, be outside of the control of the contracting parties, and be the proximate cause preventing performance, which is an objective rather than subjective determination. If a contract does not contain a force majeure clause, however, there still may be relief if the jurisdiction has a statutory force majeure provision, such as California (Cal. Civ. Code § 1511) and Georgia (Ga. Code Ann. § 13-4-21).

Section 13-4-21 of the Georgia Code (Acts of God) provides: "If performance of the terms of a contract becomes impossible as a result of an Act of God, such impossibility shall excuse nonperformance, except where, by proper prudence, such impossibility might have been avoided by the promisor." The Georgia Code defines "Act of God" to mean "an accident produced by physical causes which are irresistible or inevitable, such as lightning, storms, perils of the sea, earthquakes, inundations, sudden death, or illness. This expression excludes all idea of human agency." Ga. Code Ann. § 1-3-3. The Georgia definition focuses primarily on physical damage. Although it does refer to "sudden death, or illness," it may be difficult to apply the statute to the pandemic, particularly because Georgia case law provides that an "Act of God" must not be human-caused. An argument may be crafted, however, that closure resulting from a government order issued because of the pandemic qualifies. The case law is sure to develop to address this and many other arguments.

The California provision excuses performance when the performance is delayed or prevented by operation of law, or by "an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary." Cal. Civ. Code § 1511. Similarly, California has codified common law impossibility, providing that a "condition in a contract, the fulfillment of which is impossible or unlawful, within the meaning of the Article on the Object of Contracts, or which is repugnant to the nature of the interest created by the contract, is void." Cal. Civ. Code § 1441.

If neither the contract nor the jurisdiction's statutory scheme provides for force majeure, then a contracting party may find refuge in the common law doctrines of frustration of purpose and impossibility or impracticability. Frustration of purpose applies when performance is technically possible, but a change in circumstances frustrates the essential purpose of the contract. The event must not be reasonably foreseeable and must be so severe that it is not to be regarded as a risk allocated by the parties or assumed by any one party. Depending on the jurisdiction, the doctrine will be narrowly applied and must be proved by clear and convincing evidence.

The classic case on frustration of purpose is *Krell v. Henry* [1903] 2 KB 740 (Eng.). This case arose out of a contract to rent a flat of rooms in London to view the coronation of King Edward VII. Although a deposit was paid, Henry refused to pay the balance due after the coronation was postponed because of the king's illness. The court determined that there was an implied condition, and when that condition did not occur, the contract was voided. The decision was based on analogy to an earlier case, *Taylor v. Caldwell* [1863] 122 Eng. Rep. 309 (Eng.), which relieved the parties from performance of a contract related to the rental of a concert hall after the concert hall burned down.

The doctrine of impossibility arose to excuse performance when it is made impossible because of an intervening occurrence not caused by the parties. To prevail, the event must not have been reasonably foreseeable by either party and performance must be objectively impossible—a personal inability to perform is not sufficient. For example, the destruction of the concert hall in the *Taylor* matter made it impossible to hold a concert at the hall. Modern courts typically do not require strict impossibility, having adopted a doctrine of impracticability. Thus, if a contractual obligation becomes excessively burdensome because of the occurrence of an unforeseen event not caused by one of the parties, the parties are excused from performing.

Typically, force majeure and the common law doctrines of frustration of purpose, impracticability, and impossibility are not often applied to real estate contracts outside of construction-related contracts. Instead, in either a purchase and sale agreement or a lease, an event that might otherwise be considered a force majeure, resulting in physical damage to the property, would be covered by a lease casualty clause or a damage and destruction clause in an agreement of purchase and sale.

Lease Issues

Often, force majeure clauses either are not found in leases or, when they are present, tend to be landlord-oriented. It is common, for example, for a force majeure clause in a lease to expressly exclude the tenant's rent obligations. *See 476 Grand, LLC v. Dodge of Englewood, Inc.*, A-2048-10T1, 2012 WL 670020 (N.J. Super. App. Div. Mar. 2, 2012) (force majeure clause concluded with: "Nothing herein shall be deemed to relieve Tenant of its obligation to pay Rent when due").

When considering a force majeure defense, one must be mindful of the remedy available under the lease (or other contract): Does the clause simply toll the time for performance, such as the payment of rent, excuse performance for the period of interference, or permit outright termination of the lease? Similarly, one must examine whether the event complained of—the COVID-19 pandemic, for example—renders performance impossible or frustrates the essential purpose of the lease, thereby excusing the obligation, such as the payment of rent.

Several actions have been filed by tenants concerning whether a tenant has a right to terminate a lease and avoid its rent obligations due to the COVID-19 pandemic and related circumstances. The law firm Simpson Thacher & Bartlett LLP has filed an action against its landlord on the basis that the lease included a force majeure provision that specifically includes the circumstance where the government preempts the right of the firm to use and occupy its office space in connection with a national or other public emergency, thereby entitling the firm to a rent abatement. *Simpson Thacher & Bartlett v. VBGO 425 Lexington LLC*, Index No. 653415/2020 (N.Y. Sup. Ct. filed July 27, 2020). In June 2020, Victoria's Secret filed a complaint seeking rescission of its New York City Herald Square lease on the theories of frustration of purpose and impossibility due to the COVID-19 pandemic and related government-mandated shutdowns. *Victoria's Secret Stores, LLC v. Herald Square Owner LLC*, Index No. 651833/2020 (N.Y. Sup. Ct. filed June 8, 2020), https://bit.ly/3mBylnA. A similar action was filed by Bath and Body Works. *Bath & Body Works, LLC v. 304 Pas Owner LLC*, No. 651833/2020 (N.Y. Sup. Ct. filed June 8, 2020). Lawyers will have to await the outcome of these and many other cases, but several courts have rendered decisions that are instructive.

In *Lantino v. Clay LLC*, 2020 WL 2239957 (S.D.N.Y. May 8, 2020), the court examined whether a government order issued as a result of the COVID-19 pandemic, resulting in the closure of a gym, would justify nonpayment under a settlement agreement on the theory of impossibility. The court determined that economic hardship, even if resulting in a party's ultimate bankruptcy, does not render performance impossible. In contrast, the court in *In re Hitz Restaurant Group*, 616 B.R. 374 (Bankr. N.D. Ill. 2020), determined that a government order suspending on-premises dining because of the COVID-19 pandemic fell within a force majeure clause in the lease. Although the clause included a provision that a lack of funds will not be deemed a force majeure, the court, in a *Rube Goldberg* sort of analysis, reasoned that the debtor did not argue it lacked funds to perform, but rather that the government order prohibiting on-premises dining was the proximate cause of the tenant's inability to generate revenue in order to pay rent.

A case that is instructive from a drafting perspective is *Backal Hospitality Group LLC v. 627 West 42nd Retail LLC*, No. 154141/2020, 2020 N.Y. Misc. LEXIS 4050 (Sup. Ct. Aug. 3, 2020). Here, the tenant

argued impossibility because of a government order prohibiting large gatherings at facilities due to the COVID-19 pandemic, thereby allowing the tenant to terminate its lease. The court, however, determined that the event (the government order) was foreseeable based on the fact that the parties addressed the situation by the inclusion of a clause in the lease obligating the tenant to enter into agreements and take such action as may be legally permissible to enable the landlord to collect the maximum rent due in the face of a government order or regulation affecting the collection of rent. Consequently, the tenant was not permitted to unilaterally terminate its lease based on impossibility.

Other Possible Theories of Relief

Another possible theory that has been discussed in connection with the pandemic is the implied warranty of habitability or suitability for a particular purpose. This warranty generally relates to the physical condition and repair of the premises and typically is focused on latent defects. When evaluated in respect of commercial tenancies, the condition arguably must have existed at the time the lease is signed. There is case law supporting the proposition that a tenant can offset against rent the cost to correct or decontaminate a facility if the landlord fails to do so. *See Marini v. Ireland*, 56 N.J. 130 (1970). But that is of little solace to a tenant forced to continue to pay rent without the full benefit of the premises during the pandemic.

Even if this doctrine is found to apply with regard to contamination by the COVID-19 pandemic, it is unlikely that the tenant would have any rights beyond requiring the landlord to decontaminate the premises. In *Majestic Hotel Co. v Eyre*, 65 N.Y. Supp. 745 (N.Y. App. Div. 1900), a tenant tried to cancel his residential lease because of an outbreak of scarlet fever. Because the implied warranty of habitability assumes a physical defect in the premises, the court held that the mere fear of contagion does not justify voluntarily abandoning the premises or excuse payment of rent. Additionally, although public health officials initially were extremely concerned about COVID-19 spreading through contact with contaminated surfaces, more recent studies have indicated that this is not a major factor in spreading the virus. Press Release, Ctrs. for Disease Control & Prevention, CDC Updates COVID-10 Transmission Webpage to Clarify Information About Types of Spread (May 22, 2020), https://bit.ly/30askpc.

In a more recent case, the Texas Supreme Court found in *Davidow v. Inwood North Professional Group*, 747 S.W.2d 373, 377 (Tex. 1988), that the implied warranty of fitness for a particular purpose "means that at the inception of the lease there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose and that these essential facilities will remain in a suitable condition." Consequently, a post-commencement date event will not excuse performance.

Issues When Structuring a Landlord-Tenant Deal

As we continue to face the effects of the COVID-19 pandemic, there is a host of issues that landlords and tenants will need to evaluate as they wrestle with declining tenant revenues, requests for rent deferral or abatement, and lease termination.

A landlord that contemplates a hard stance should examine closely the lease and its current mortgage loan terms to determine its rights and responsibilities. In particular, the landlord should evaluate (i) whether tenancy courts are open for business and, if not, backlogs once courts are back in business; (ii) the ability to evict a tenant and on-going eviction moratoria; (iii) the pool of replacement tenants; (iv) the cost of a new tenancy in terms of free rent, tenant fit-up costs, and new brokerage fees; (v) the likely replacement rent rate; (vi) the effect on current mortgage loan financial covenants and reserve requirements; and (vii) the potential filing for bankruptcy by the current tenant and the consequences of such a filing.

When considering a tenant's request (whether for a deferral, abatement, or termination), a landlord should require the tenant to enter into a pre-negotiation agreement that (i) confirms that there is no agreement unless and until there is a writing signed and delivered by both landlord and tenant; (ii) confirms there is no obligation on the part of either to continue to negotiate; (iii) confirms the tenant's continuing obligation to abide by the lease terms; (iv) confirms the agreement is not to be deemed an amendment to the lease (so that the landlord does not run afoul of loan requirements for lender consent to lease amendments); (v) includes estoppel language confirming that there are no defaults by the landlord under the lease and no present rights of set-off, abatement, or claims; and (vi) imposes confidentiality so that the tenant does not divulge the discussions, or results of those discussions, to third parties—particularly other tenants at the property. In addition, the landlord should request a business plan from the tenant in order to know that the tenant has a plan to emerge from the crisis and should assess the viability of that plan, including the repayment of any outstanding loans to the tenant from secured and unsecured creditors.

If the landlord does decide to abate rent, then the landlord also should consider a lease extension so that the economic value of the lease remains constant for purposes of future financing or sale. Further, whether granting a deferral or abatement, the landlord should consider whether to require added security (cash or guaranty) and whether any tenant "give-backs" are appropriate, including the deletion or modification of existing termination rights, extension or expansion rights, set-off rights, going dark and co-tenancy provisions, purchase options, and so on.

From a tenant's perspective, the tenant should evaluate (i) the lease terms, its financing arrangements, and the effect of any lease action on its financial covenants; (ii) whether occupancy is affected, and to what extent, because of health concerns, government orders, or employee concerns, and the rights and responsibilities each situation presents; (iii) whether an SNDA was signed with the landlord's mortgage lender and if lender consent is required before any lease amendment, termination, or other lease-related activity can be validly taken vis-à-vis the lender; (iv) whether there is a viable business plan to emerge from the economic consequences of the COVID-19 pandemic, and what is necessary for the successful implementation of the plan; (v) whether tenancy courts are open for business and, if not, backlogs once courts are back in business; and (vi) the ability of the landlord to evict because of ongoing eviction moratoria, inasmuch as "cash is king" and ongoing eviction moratoria may provide the tenant with the practical ability to hold onto its cash for a period of time.

Drafting Factors to Consider

When evaluating whether to include a force majeure clause in a lease (or any other contract), the parties need to examine (i) whether the result of a force majeure event will excuse performance of both parties; (ii) what events will constitute a force majeure event and whether to include a detailed list of events or simply general descriptive and nonexclusive language; (iii) whether to impose conditions such as notice, the passage of a specific time period before a party can claim the benefits of the force majeure event (e.g., a specific number of days and whether they need to be consecutive), and mitigation obligations; (iv) whether to expressly carve out certain responsibilities under the lease, such as the payment of rent and additional rent; and (v) what remedies will be available in the case of a covered force majeure—suspension of performance or lease termination. Because matters will be evaluated on a case-by-case basis, clarity in drafting each force majeure provision is critical.

Because foreseeability is an element of each of the contract and common law remedies, a lease signed after the pandemic should expressly address the parties' intent with respect to the effect of the COVID-19 pandemic on performance. Even without a specific requirement that the event be unforeseeable, a court may decide that the pandemic is not covered by a new contract, even if the force majeure clause

specifically calls out epidemics and pandemics.

Some of the other issues to consider include (i) a landlord's inability to deliver the premises resulting from a holdover tenancy because the current tenant cannot move out; (ii) a landlord's inability to evict a current tenant because of a moratorium on evictions resulting in a holdover of a current tenant; (iii) delivery dates for premises—provide not only for a delay in the completion of construction and thus delivery because of force majeure but also expressly resulting from the COVID-19 pandemic, including equipment and material supply delays or shortages and any other supply chain delays, labor shortages, government orders delaying or stopping performance, delays by utility companies, including delays in bringing utility lines to the premises, and other matters outside a party's control because of the COVID-19 pandemic; (iv) the right of a tenant to expand into the adjoining parking area in order to accommodate outside dining or curbside delivery (although query whether such space is included in the tenant's insurance coverage as being a part of the "Premises" or meets standards required under the Americans with Disability Act); (v) modified notice provisions if parties are not in their office or place of business and cannot gain access to overnight delivery or certified mail; (vi) time of essence provisions; and (vii) the effect of the COVID-19 pandemic and related government orders, or temporary building closures resulting from "deep cleaning" requirements, on the obligation to pay rent.

In situations where a build to suit is involved or a major tenant improvement project is required and the tenant has a right of early occupancy, consider the effect of the pandemic, including social distancing and other work-related guidelines that currently exist and may hereafter be required.

Consider providing for the general contractor to serve as the final arbiter in determining whether any work that the tenant desires to perform or have performed during early occupancy may delay substantial completion, including whether the number of workers to perform any work will affect any pandemic-related work guidelines. If the general contractor determines that the tenant's work may delay substantial completion, then the tenant should not be allowed to perform such work until after substantial completion. If the general contractor determines that the work will not delay substantial completion but will add to the cost of the work, then the tenant shall be required to execute and deliver to the landlord a change order and pay the additional costs as a condition precedent to the performance of such work. If, at any time during the performance of any work by the tenant (and its vendors and contractors) during such early occupancy, the general contractor determines the work may delay substantial completion, then the tenant should be obligated to cause all work to stop.

Construction Issues

Contrary to the situation in leases and purchase agreements, it would be unusual to see a construction contract without some type of force majeure or similar clause, though it may be called a "delay" clause or something similar. Delay is a standard risk in construction, whether from adverse weather, strikes, material delays, or government permitting issues. For example, probably the most common construction document in the United States, the AIA A-201-2007 General Conditions, includes § 8.3 Delays and Extensions of Time, which provides, "If the Contractor is delayed at any time . . . (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions . . . or other causes beyond the Contractor's control . . . or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay then the Contract Time shall be extended for such reasonable time as the Architect may determine." The contractor also has the right to terminate the contract if the delay continues more than 30 consecutive days because of a court order or a government-ordered work stoppage. AIA A-201-2007, § 14.1.1.

Note that the standard agreement says nothing about additional compensation arising from a delay. Many contracts even include a specific "no damages for delay clause" expressly providing that the contractor's only remedy for a delay (typically excluding delays caused by the owner) is an extension of time to complete the work. The contractor may be able to claim an emergency under § 10.4 of the A-201, which states that the contractor shall act to prevent threatened damage or injury and may be entitled to compensation. Presumably, this will permit the contractor to be reimbursed for increased expenses needed to comply with laws and directives for social distancing, disinfecting, additional personal protective equipment, and otherwise preventing the spread of the coronavirus at the worksite.

The AIA documents are often heavily negotiated, and contracts may have very different language or additional clauses not found in the standard A-201 form. For example, a contract may provide for additional compensation because of a change in laws after the contract is signed or provide for additional costs, rather than just time, in connection with a work stoppage. A contract may provide for contingency funds to cover unexpected expenses. A contractor will want to look at all its options to determine whether it makes the most sense to proceed as a simple delay under § 8.3, to make a claim for additional cost under a change in law clause, or to just terminate after 30 days of stoppage under § 14.1.1.

Where stay-at-home or similar closure orders are in place, some or all construction may be permitted to continue as an essential activity. These orders vary widely from state to state and even from city to city and must be carefully reviewed to determine whether a project may continue. Some ordinances will permit all construction, while others will only permit construction related to essential businesses.

If parties are commencing a new project or restarting after a closure, they will need to review carefully any local safe work orders, both specific to construction and more general, to determine what restrictions and requirements may apply to the project. Typical examples include social distancing requirements that limit the number of workers at a jobsite, restrictions on common water coolers, mask requirements, availability of sanitizer, maintenance of personnel records for contact tracing, and provision of an onsite safety monitor.

In addition to legal requirements, the parties also should consider best practices for maintaining a safe work environment during the pandemic. For example, the American Industrial Hygiene Association provides industry-specific guidance to maintain a safe work environment. Am. Indus. Hygiene Ass'n, *Returning to Work: Construction Environment* (July 8, 2020), https://bit.ly/3cvctXn. Various chapters of the Associated General Contractors of America also have published Recommended Practices for Construction Jobsites, such as the information published by the Houston chapter: *COVID-19: Construction Industry Resources*, Associated Gen. Contractors of Am.: Hous. Chapter, at https://bit.ly/3mTtkYM. The parties will want to consider these guidelines both to avoid potential liability and to minimize down time due to jobsite virus outbreaks.

An outbreak will always be possible, even when the parties employ best practices, and so the contract should consider how to deal with potential problems arising from an outbreak and with other pandemic-related issues. These issues include short- and long-term job shutdowns, shortages of labor and materials (and the resulting effect on pricing), the effect on timing because of smaller crews or the inability to stack crews, and costs for personal protective equipment and otherwise complying with work-safe orders.

Because the COVID-19 pandemic is a known condition and not unforeseeable, best practice is to include a specific coronavirus clause in the contract. This allows the parties both to be specific in their handling of foreseeable issues and to avoid any argument about whether a delay or force majeure clause applies. Typical issues to cover would include costs of demobilization and remobilization, treatment of any

unexpected increase in labor or material costs, costs of compliance with changes in law, permitting and inspection delays, determination of whether the contractor will receive damages for delays, determination of how to deal with an outbreak within the work crews, and any requirements for personal protective equipment. Costs of all expected expenses such as a COVID-19 safety monitor and personal protective equipment should be included in the contract price.

The COVID-19 pandemic could also affect financing and insurance aspects of the project. Among the issues that the parties should consider are: the consequences of a lender or municipal official being unable to inspect a site and the effect on draw requests, proceeding along the construction phase, delays in completion, and the effect of such delays on the term of a builder's risk policy or construction loan.

A Suggested Clause

A suggested general force majeure clause (as opposed to a specific COVID-19 clause) that might be used by a contractor or subcontractor follows:

> Should Contractor be obstructed or delayed in the prosecution of or completion of the Work for a time period equal to or greater than ____ days, as a result of *[unforeseeable causes] or [causes, whether or not foreseeable]*, beyond the control of Contractor, and not due to its fault or neglect, including but not limited to (i) act(s) of God, (ii) war or wars, (iii) government regulation (including, but not limited to, any law, rule, order, proclamation, regulation, ordinance, demand or requirement of any governmental agency), (iv) act of terror, (v) disaster (including, but not limited to, hurricane, flood, [ice storm,] tornado, tropical or other major storm, earthquake, or earth movement or subsidence), (vi) any pandemic, epidemic, pestilence, plague, or outbreak, (vii) strike or work stoppage (excluding strike or work stoppage of the Contractor's own employees), (viii) civil disorder, riot, or disturbance of the peace, (ix) any unreasonable restriction of any airports or airlines, buses or bus terminals, railroads or trains, taxicabs, rental car services, or any other transportation facility, (x) any third party act for which the Contractor is not responsible, (xi) any [unforeseeable] shortage in materials or labor or [(xii) any other condition or circumstance, whether similar to or different from the foregoing (it being agreed that the foregoing enumeration shall not limit or be characteristic of such conditions or circumstances) beyond the Contractor's control,] Contractor shall *[promptly notify Owner] or [notify Owner within __ days]* after the commencement of such delay and shall be entitled to an extension of the Contract Time. Any such notice shall be effective as of the date of the event causing such force majeure. [No such notice shall be required in the event that a disaster or emergency is declared by any state or local government or by the U.S. government.] An event of force majeure shall be deemed to have ended at such time as the event in question no longer reasonably obstructs or delays Contractor's performance of the Work. [Contractor may also submit a claim to the Architect for additional costs actually incurred for any documented increase in the cost of labor and materials, uninsured damage to the Work, demobilization and remobilization expenses, costs due to delays in permitting and approvals and expenses to comply with required or recommended personal protective equipment and practices.]

Purchase and Sale Agreement Issues

As mentioned earlier, it is not usual to include a force majeure provision in a purchase and sale agreement because the parties normally address such circumstances in a casualty clause. Depending on the nature of the transaction, certain of the landlord-tenant issues discussed above may be relevant where a seller is required to deliver a property free of a current tenant. In addition, the parties need to evaluate the potential COVID-19 pandemic effects on due diligence and closing and expressly address those effects

in the contract. Failing to address COVID-19 pandemic effects head-on may preclude any argument of impossibility or frustration of purpose. *See Martorella v. Rapp*, 2020 WL 2844693 (Mass. Land Ct. June 1, 2020) (rejecting impossibility defense where prospective buyer's wife contracted COVID-19 and the buyer was unable to secure financing but the purchase agreement contained no financing contingency clause or evidence that the agreement was contingent upon the health of the wife, who was not a party to the agreement).

Due diligence may be affected in the following ways, among others: (i) title searches and access to public title records may be limited; (ii) access to government offices may be limited or government offices may be closed, affecting open public record reviews and code violation reviews; (iii) site access may be limited, affecting the performance of surveys; and (iv) physical and environmental investigations may be affected, particularly interior inspections because of precautionary measures instituted by existing tenants. Also, if the transaction involves a tenancy that will soon renew at a fair market rental value, how does the purchaser underwrite the potential fair market rental value of the premises considering the COVID-19 pandemic?

Consideration also needs to be given to the potential effect on lender underwriting and lender due diligence, and whether a financing contingency is appropriate; whether document execution may be affected by shelter-in-place orders or illness of critical signatories, including document execution, witnessing, and notarization; whether title run-downs can be accomplished; and what the requirements are for gap indemnities by sellers in favor of the title company. If your jurisdiction permits remote notarization, does the jurisdiction in which the property is located also accept remote notarization and, if so, how do the requirements of each jurisdiction jibe? Also, what effect, if any, should the COVID-19 pandemic have on time of essence provisions or the right of the seller or landlord to address tenant requests for rent deferral or abatement? These issues are even more challenging if the transaction involves a multijurisdictional acquisition or sale.

Finally, if the property acquisition involves a joint venture, the parties should examine the effect of the COVID-19 pandemic on performance obligations of the partners—whether the return waterfall may be reduced or a limited holding period may diminsh value and resulting returns for either or both of the partners.

A Suggested Clause

A suggested COVID-19 clause is as follows:

> Purchaser and Seller acknowledge and agree that the current COVID-19 pandemic may have an impact on the timing of the proposed transaction due to closures or reductions in staffing of certain governmental services and private businesses, as well as certain other restrictions (e.g., travel and contact restrictions) that may cause performance under this Agreement to be delayed for these reasons, which are beyond the reasonable control of Purchaser or Seller, as applicable. If, during the term of this Agreement, Purchaser or Seller is delayed or unable to perform due to COVID-19-related closures, travel restrictions [(other than by Purchaser or Seller)], staffing reductions [(other than by Purchaser or Seller)], or other restrictions (each a "COVID-19 Delay"), then such affected party shall give notice to the other party within two (2) Business Days of the event, and Purchaser and Seller shall work, in good faith, to (1) extend the Inspection Period and the Closing and (2) otherwise amend this Agreement as may be reasonably necessary to account for such COVID-19 Delays[; provided however, that no such extension of the Closing shall extend beyond _____ , 20___, unless mutually agreed to by the parties in each such party's sole discretion].

Conclusion

The COVID-19 pandemic has forced us all to take a new look at our lease, construction, and purchase and sale agreements, with respect to an issue that previously was given little attention—force majeure. Perhaps more than anything, the lesson to be learned is that each clause of a document merits careful scrutiny, notwithstanding the remoteness of the triggering event or circumstance. As lawyers, we owe our clients the responsibility to evaluate all provisions of an agreement and provide a degree of protection consistent with the circumstances of each transaction.