

2nd Circ. Reasoning In COVID Force Majeure Case Is Flawed

By **Joshua Wurtzel** (May 17, 2022)

On March 23, the U.S. Court of Appeals for the Second Circuit issued a decision in *JN Contemporary Art LLC v. Phillips Auctioneers LLC*,^[1] applying New York law and holding that a force majeure clause in an art auction contract permitted an auction house to cancel its contract with its customer because it was unable to hold an in-person auction as a result of then-Gov. Andrew Cuomo's 2020 shutdown orders.



Joshua Wurtzel

Sounds reasonable enough, right? Not so much. Here's why:

Many force majeure clauses expressly apply to pandemics, epidemics, disease outbreaks or governmental regulations — which makes it pretty easy to conclude that the pandemic or related statewide shutdown orders fall within their application.^[2]

But under the New York Court of Appeals' seminal 1987 decision in *Kel Kim Corp. v. Central Markets Inc.*, a force majeure clause must be read narrowly, and "only if the Force-Majeure clause specifically includes the event that actually prevents a party's performance will that party be excused."^[3]

The problem in *JN Contemporary*, however, was that the force majeure clause there didn't say anything about pandemics or governmental regulations or orders. Instead, it said:

In the event that the auction is postponed for circumstances beyond our or your reasonable control, including, without limitation, as a result of natural disaster, fire, flood, general strike, war, armed conflict, terrorist attack or nuclear or chemical contamination, we may terminate this Agreement with immediate effect. In such event, our obligation to make payment of the Guaranteed Minimum shall be null and void and we shall have no other liability to you.

Conspicuously absent from the laundry list of force majeure events in this clause is any reference to pandemics or governmental regulations or orders. And under *Kel Kim*, if the alleged force majeure event — here, the pandemic and Cuomo's shutdown orders — is not specifically included in the force majeure clause, then it is necessarily excluded from the clause.

But if you are reading the force majeure clause above and noticing that the list of force majeure events is not exhaustive — hence the "including without limitation" language — you are onto exactly what the Second Circuit held.

Indeed, according to the Second Circuit, though neither pandemics nor governmental regulations or orders were listed in this force majeure clause, the pandemic and Cuomo shutdown orders were "circumstances beyond our or your reasonable control." And so, the force majeure clause here kicked in and allowed the auction house to cancel its contract.

This conclusion makes logical sense. But the Second Circuit didn't stop there — which is where its holding starts to fall apart. Indeed, the Second Circuit went on to liken the "circumstances beyond our or your reasonable control" language in the force majeure clause to a more typical catchall clause in a force majeure clause. But the problem is that the

clause here wasn't a catchall at all. It was the whole thing.

A typical force majeure clause — like the one in *Kel Kim* — may list a whole bunch of force majeure events, and then say "and anything else beyond the parties' reasonable control."

Under *Kel Kim*, this type of typical catchall clause is "not to be given expansive meaning," and instead, must be "confined to things of the same kind or nature as the particular matters mentioned."^[4]

But the force majeure clause here, rather than listing specific force majeure events and including a catchall at the end, starts by saying that the contract may be canceled if the auction is postponed for any "circumstances beyond our or your reasonable control."

Thus, the so-called catchall is not a catchall at all. It is instead the operative portion of the clause.

The rest of the clause says that "circumstances beyond our or your reasonable control" — i.e. the operative portion — includes, without limitation, the specific things that follow.

In other words, the specific list was just a list of examples, with their meaning guided by the broader, operative portion. Not the other way around.

In analyzing this clause, however, the Second Circuit makes two critical mistakes.

First, it treats the operative portion of the clause as a catchall. This required the Second Circuit to analyze this portion of the clause in the way that *Kel Kim* says catchall clauses must be analyzed — by considering whether the asserted force majeure event is "of the same kind or nature as the particular matters mentioned."^[5] But this analysis wasn't necessary at all, because this clause wasn't actually a catchall.

Second, in conducting this unnecessary analysis, the Second Circuit conflates the pandemic itself with Cuomo's shutdown orders.

According to the Second Circuit, the "COVID-19 pandemic, coupled with the state government's orders restricting the activities of nonessential businesses, constitute an occurrence beyond the parties' reasonable control," because "[e]ach of the enumerated events" — like the pandemic and Cuomo shutdown orders — "are of a type that cause large-scale societal disruptions, are beyond the parties' control, and are not due to the parties' fault or negligence."

But the Second Circuit ignores that while this may be true of the pandemic itself, it is not true of the Cuomo shutdown orders. Indeed, unlike "natural disaster, fire, flood, general strike, war, armed conflict, terrorist attack or nuclear or chemical contamination" — which are generally beyond the control of organized civil society — executive orders are the epitome of control and organization.

That the executive orders were unprecedented or far-reaching doesn't change this conclusion.^[6]

Nor does it matter that the executive orders were issued in response to the pandemic, because, under *Kel Kim*, a force majeure clause will apply only when the force majeure event "actually prevents a party's performance."^[7] So the focus must be on the event that the nonperforming party claims directly prevented its performance.

And in JN Contemporary, the auction house's stated excuse for canceling the auction was not the pandemic itself, but was instead the "New York State and New York City governments plac[ing] severe restrictions upon all non-essential business activities."

In sum, the Second Circuit incorrectly characterized the operative clause here as a catchall clause. And then, having done so, it did an unnecessary and contorted legal analysis that conflicts with seminal New York law on this point — leading to a commercially unworkable result.

This case was correctly decided, but for the wrong reasons. And because most force majeure clauses are written not like the one here, but instead with specific lists followed by a real catchall clause, this decision has the potential to drastically expand — contrary to Kel Kim — how New York courts interpret force majeure clauses.

And it also allows the risk of loss in a contract to be shifted by the court despite sophisticated parties having allocated that risk in their force majeure clauses in a different way.

JN Contemporary hasn't yet been meaningfully applied by state or lower federal courts. So for commercial practitioners, be on the lookout for how state and lower federal courts interpret JN Contemporary. And also keep an eye out for whether the court of appeals takes up this issue.

Joshua Wurtzel is a partner at Schlam Stone & Dolan LLP.

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[1] JN Contemp. Art LLC v. Phillips Auctioneers LLC, 2022 U.S. App. LEXIS 7652.

[2] See Ruxton Tower LP v. Central Park Taekwondo, LLC, 2021 N.Y. Misc. LEXIS 5015, at *11–12 (Sup. Ct. N.Y. Cty. Sept. 3, 2021) (Bannon, J.S.C.) (discussing cases involving force-majeure clauses that refer to governmental regulations or laws).

[3] 70 N.Y.2d 900, 902–03 (1987).

[4] Kel Kim Corp., 70 N.Y.2d at 903; see also Team Mktg. USA Corp. v. Power Pact LLC, 41 A.D.3d 939, 942–43 (3rd Dep't 2007) ("[w]hen the event that prevents performance is not enumerated," then "words constituting the general language of excuse are not to be given the most expansive meaning possible, but are held to apply only to the same general kind or class as those specifically mentioned"); Forward Indus., Inc. v. Rolm of NY Corp., 123 A.D.2d 374, 376 (2nd Dep't 1986) (term "other cause beyond the control" of the defendant in force-majeure clause "restricted to some extraordinary cause analogous to the specifically named contingencies and not to problems which must naturally be anticipated as to performance").

[5] Kel Kim Corp., 70 N.Y.2d at 903.

[6] See Ruxton Tower LP, 2021 N.Y. Misc. LEXIS 5015, at *11 ("strikes, lockouts, material shortages, failure of power, riots, insurrection, [and] war" are "different in kind and nature" from inability to perform "due to the pandemic and resulting government shutdown orders").

[7] Kel Kim Corp., 70 N.Y.2d at 902.