The arbitration hearing in this matter was heard May 4, 2020, by Zoom video. The arbitrator has reviewed the briefs filed by the parties; the amicus briefs, some supporting the position of the student tenant and some supporting the position of the landlord; and the statements made by the parties and their representatives at the hearing.

The Covid-19 virus pandemic has impacted in a personal way the parties to this case, as it has had tremendous impact on peoples throughout the US and all around the world. This matter is being reviewed solely on the facts and merits of this individual case. In reaching the resolution set forth below, I acknowledge that each of the parties has been seriously impacted by the pandemic, and acknowledge that no resolution is able to give recognition to all the effects of the virus on these parties or their lives.

Statement of Facts

1. [Tenant] purchased another student’s contract for a residential unit with [Landlord] and paid a $450 security deposit. Tenant’s obligation to pay $410 rent per month was to begin April 1 and run until August 14, 2020.

2. Properties (Landlord) is a BYU approved housing provider.

3. All single BYU students are required to reside in BYU approved housing, to live at home, or to obtain a waiver of this requirement. Meeting this requirement is one of the benefits of living in BYU approved housing.

4. Landlord is obligated under a contract with BYU Off Campus Housing Office which governs Landlord’s duties as a BYU approved housing provider.

5. In January 2020 the world watched as news hit of a coronavirus in Wuhan, China, and as hundreds, then thousands of Chinese citizens were reported to be infected. Images of a vigorous lockdown of millions of people in Wuhan were shown on tv. By late January the World Health Organization declared the virus a global health emergency. On January 31 the Trump administration declared the virus a public health emergency and issued an order quarantining Americans who had recently been in certain parts of China. By late February the virus was rampant in Italy and Italy entered stringent lockdown orders for people residing there. In late February a virus outbreak occurred in Kirkland, Washington and it was clear the virus was now in the US. On March 11, 2020, the World Health Organization declared the virus a worldwide pandemic. By March 12, 2020, more than 1200 cases of the virus had been diagnosed in the US and people were dying. On March 13, 2020, the Trump administration declared the virus a national emergency.
6. Subsequently the impact of the virus spread throughout the world. Governmental entities around the world and in the US, entered stay-at-home and similar orders. Schools around the country were closed. The NCAA March Madness basketball tournament was cancelled. Major League Baseball, the NBA and NHL Hockey each were cancelled. Restaurants, museums, amusement parks, swimming pools, workout facilities, spas, and hair salons all were closed. The virus, now named Covid-19, has been dominating the daily news since early March.

7. As this was unfolding across the world, BYU made decisions with respect to its students, classes and campus. On March 12, 2020, it announced that all classes were cancelled for several days, and that classes would resume on March 18 through remote instruction. Students were "strongly encouraged" to return home and BYU allowed all students in on campus housing to be released from their lease contracts with the university. At that time BYU closed the campus for essentially all activities.

8. On March 14, BYU 2020, the BYU Off Campus Housing Office (OCHO) issued a notice to all BYU approved housing providers responding to the question raised by many students of whether they would be let out of their off campus housing contracts. That notice advised:

The OCHO recognizes that the contract is a legally binding agreement between the landlord and the student. However, the OCHO strongly encourages landlords and their agents to consider the value of releasing students. BYU has encouraged students to consider leaving campus and return home to finish Winter semester through remote coursework.

9. In early March Tenant was temporarily residing in Florida where she recently had completed a school term at a college in Florida. She did not have a residence of her own but was sleeping on a couch at the residence of a family member.

10. Her plan was to enroll in BYU beginning with the spring term which was to commence on April 28, 2020. Her purpose in acquiring the rental contract from Landlord was to have a place to reside when she arrived in Provo, Utah, to attend BYU.

11. Tenant had been awarded a scholarship from the government of the [foreign country] to attend BYU.

12. Tenant’s purposes in renting from Landlord included living near to BYU campus, obtaining various benefits of BYU approved housing, and enjoying living conditions provided by Landlord such as floor space and amenities inside and outside the apartment.

13. Landlord’s purpose in renting to Tenant included providing housing with benefits, conditions and amenities such those listed among Tenant’s purposes, in return for specified payments and actions such as adherence to BYU residential living standards and other actions.
14. By March 17, 2020, Tenant was genuinely concerned about the effect of the virus. She has asthma and worried that with an impaired respiratory system, contracting the virus would be particularly troublesome for her. On that day she called Landlord advising she may not reach Provo until the end of April. Landlord responded that Tenant would nevertheless be responsible to pay rent April 1.

15. On March 18, 2020, Tenant called Landlord advising that she did not want to fly to Provo due to concern for her safety in light of the pandemic and her condition as a person with asthma. In that phone call Landlord said Tenant was very indecisive, not knowing what she should do, and asked Landlord about her options for terminating the contract. Landlord responded that “the option would be to sell it.” Landlord told Tenant that Landlord “would legally need her to fill out an ‘intent to sell’ form and directed her to [Landlord]’s website to find the form.” Tenant called again that day “with questions on paying the advertising fee for the contract” and sent the intent to sell form to Landlord by email.

16. On March 19, 2020, full of worry about her health and safety, Tenant flew from Florida and returned to her home in the [foreign country].

17. On March 22, 2020, all ports in the [foreign country] were closed to inbound travel. Subsequently all ports also were closed to all outbound travel. As of May 4, 2020, the date of the hearing, the ports remained closed both to inbound and outbound travel.

18. On March 27, 2020, the Government of the [foreign country] implemented a mandatory 24-hour curfew that prevented Tenant from leaving the country.

19. Because of the 24-hour curfew and the port closures in the [foreign country], Tenant could not come to Provo. Additionally, the government office which awarded her the scholarship was closed and she has not been able to obtain the scholarship funds she was going to use to pay rent.

20. In order to go forward with her schooling while confined at home in the [foreign country], Tenant obtained a short term loan from BYU Financial Services which has a program providing short-term loans “to help students pay tuition by the tuition deadline if financial aid or other payment arrangements haven’t been finalized.”

21. Tenant has been participating in the BYU spring term remotely from her home in the [foreign country].

22. While in the [foreign country] Tenant resides with her parents, an electrician and a housekeeper. Because of the curfews and the port closures which prevent tourist travel in the [foreign country], each of her parents’ employment has been lost or substantially reduced.

23. Tenant authorized Landlord to use her security deposit for the rent that was due April 1. Landlord refused to do so and purported to terminate Tenant’s contract for breach of contract for non-payment and abandonment seven days after her April 1 rent was due.
Landlord reports a 95% occupancy rate, including about 20 new students who have newly arrived for spring term.

**Legal Analysis**

Tenant attempted to terminate her lease with Landlord under the provisions of paragraph 23B. That paragraph allows a student tenant to terminate a lease if the “student leaves school due to a verified unforeseeable and unexpected catastrophic loss or serious illness.” Tenant never arrived in Provo to attend school, and she is away from Provo because of direct effects of the virus on her personally and actions taken by the government of her home country. While it may be argued that the provision that the student “leave” school still would apply in this case because Tenant is not in Provo because of the virus, I am unprepared to conclude that Tenant left school because of a serious illness or catastrophic loss. Without belaboring these points, it is clear that this case is properly resolved under the doctrine of frustration of purpose, which is most appropriate to the facts and merits of this case.

As enunciated by the Utah Court of Appeals in *Tech Ctr. 2000 LLC v. Zrii, LLC*, 2015 UT App 281, ¶32, 363 P.3d 566, the doctrine of frustration of purpose applies when, “after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made.” If such an event occurs, the party is discharged from her duty to perform further under the contract. *Zrii* makes clear that the application of this doctrine “depends on the total or nearly total destruction of the purpose for which, in the contemplation of both parties, the transaction was made.” *Id.* ¶32. In describing this doctrine further, in *Western Properties v. Southern Utah Aviation, Inc.*, 776 P.2d 656, 659 (Utah Ct. App. 1989), the court said that while frustration of purpose is related to whether performance of the contract is impossible or impracticable, frustration of purpose applies when “performance is pointless” to the person seeking the discharge, here, to the Tenant.

Frustration of purpose does not apply every time “circumstances … fail to conform to the parties’ expectations.”\(^1\) To determine applicability of this doctrine, the first question which must be answered is: What purpose was the basis of the contract?\(^2\) What did the parties contract to accomplish? The simple answer to this first question is that the Landlord agreed to provide, and the Tenant agreed to rent, BYU approved space for the Tenant to live.

The second question follows: How substantially was the principal purpose of the contract frustrated?\(^3\) In this case the Tenant has not been able realize that purpose because she remains unable to travel from her home country.

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2. *Bitzes v. Sunset Oaks, Inc.*, 649 P.2d 66, 69 (Utah 1982) (“First, the purpose that is frustrated must have been a principal purpose of that party in making the contract….”) (quoting Restatement 2d of Contracts § 265).
3. *Id.* (“Second, the frustration must be substantial.”) (quoting Restatement 2d of Contracts § 265) and (“The courts have required a promissor seeking to excuse himself from performance of his obligations to prove… that the value of counterperformance is totally or nearly totally destroyed, for frustration is no defense if… counterperformance remains valuable.”) (quoting *Castagno v. Church*, P.2d 1282, 1284 (Utah 1976) (internal citations omitted)).
Further, Landlord declared the apartment abandoned by Tenant and purported to terminate Tenant’s contract. Thus, Landlord itself ceased to perform on the contract, while Tenant was still under government orders that prohibited her from leaving her country to travel to BYU. Therefore, there is no clear evidence that the apartment is currently available to Tenant should Tenant become able to travel to Provo.

The principal purpose of the lease and the value of its performance were destroyed by these direct specific effects of the pandemic in Tenant’s life.

A third element of frustration of purpose must be addressed in this case. Frustration of purpose applies only when the supervening event, in this case the closing of the ports in the [foreign country], to both inbound and outbound travel, was unforeseen by the parties at the time of contract and out of the control of the party seeking discharge. Without dispute, when viewed from the perspective of Tenant, because she is prevented by government order from leaving the [foreign country], this closure was both unforeseen by Tenant (also unforeseen by Landlord) and it was completely out of and remains out of her control. When viewed from her perspective this element is satisfied.

On the other hand, Landlord argues that by choosing to fly to the [foreign country] from Florida, rather than traveling to Provo to occupy the apartment, Tenant’s inability to take occupancy of the apartment is due to Tenant’s own actions and in her control, rather than pursuant to the pandemic and out of her control. This argument fails for at least two reasons. First, on March 19th, when she left Florida, she could not have travelled to Provo and taken possession of the apartment. It was not available until April 1st. Second, when Tenant decided to return home on March 19th, she still had more than a month to return to the US and to Provo before the spring term began.

The facts of Tenant’s inability to attend school in person clearly are due to events outside of her control. She is a [foreign country] citizen with a student visa permitting, but restricting, her presence in the United States for school; her initial response to the pandemic - returning to where she lives with her parents in the [foreign country] - was in accord with urging from governments, BYU, and family concerned about her as a person with asthma; her scholarship funds became inaccessible and the substitute funds she was able to borrow are for tuition, not rent; and the [foreign country] port closure and severe curfew a few days after Tenant’s arrival there were not foreseen nor under her control. Clearly this is not a case where Tenant is attempting to avoid her lease obligations because she simply decided to go another direction (such as the case where a Tenant decides she would prefer to reside in a different complex with a friend). Rather, by governmental action in her home country she is physically prevented from coming to Provo to attend school. In sum, Tenant’s “principal purpose is substantially frustrated without [her] fault” and the common law doctrine of frustration of purpose squarely applies to her situation. Frustration of purpose is grounds, in this specific case, for Tenant to be discharged from her contractual obligations.

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4 Id. (“[F]rustration is no defense if... it was controllable by the promissor....”) (quoting Castagno v. Church, P.2d 1282, 1284 (Utah 1976) (internal citations omitted)).
Summary, Conclusion and Ruling

While Tenant sought termination of the lease under paragraph 23B, she does not need to make out a claim for termination under that provision as she is excused from performance of the lease through the doctrine of frustration of purpose. Tenant was home in a foreign country pursuant to the effects of the pandemic when it became impossible for her to travel to Provo to take occupancy of the apartment and begin spring term in person at BYU. The specific direct effects of the pandemic upon Tenant destroyed the principal purpose of the lease, rendering it pointless because Tenant was prevented by unforeseeable governmental actions which were out of her control from occupying the apartment. Tenant is excused from all her obligations of the lease under the doctrine of frustration of purpose.

Tenant is entitled to the return of her deposit and Landlord is directed to forward it to her.

Dated: May 8, 2020

Anthony W. Schofield
Arbitrator