

Pennsylvania – Force Majeure Law

In Pennsylvania, in order to enforce a force majeure clause as an excuse for non-performance, the event alleged as an excuse must have been beyond the party's control and not due to any fault or negligence by the non-performing party. *Gulf Oil Corp. v. Federal Energy Regulatory Commission*, 706 F.2d 444, 452 (3d Cir.1983), cert. denied, 464 U.S. 1038, 104 S. Ct. 698, 79 L.Ed.2d 164 (1984); see also *Allegheny Energy Supply Co., LLC v. Wolf Run Mining Co.*, 53 A.2d 53 (Pa. 2012)(company's inability to comply with tonnage requirement in contract was not a condition beyond the reasonable control of the nonperforming party and was caused by nonperforming party's negligence); *Morgantown Crossing, L.P. v. Manufacturers-and-Traders Trust Co.*, 2004 WL 2579613, No. 03-CV-4707 (E.D. Pa 2004); *Rohm & Haas Co., v. Crompton Corp.*, 2002 WL 1023435 (Pa. Ct. Com. Pls. 2002). The non-performing party has the burden of proof as well as a duty to show what action was taken to perform the contract, regardless of the occurrence of the excuse. *Gulf Oil Corp.*, 706 F.2d at 452.

When construing a force majeure clause, the court will look closely at how the parties defined the terms of their agreement. Ordinarily, only if the force majeure clause specifically includes the event that actually prevented a party's performance will that party be excused. *Morgantown Crossing*, 2004 WL 2579613 at *5. In *Morgantown Crossing*, for example, the court held that a delay in obtaining a government issued permit was a not a force majeure event included within the particular contract at issue. *Id.* The court went on to construe the "catch-all" provision in the force majeure clause, holding that "a delay attributed to a governmental entity is not of the same kind or nature as those enumerated in the lease, i.e., strikes, lockouts, an inability to obtain labor or materials on the open market, war, riots, unusual weather conditions, and acts of God. (Lease § 13.32). These specified events are unforeseeable. Thus, an event covered by the catchall provision must also be unforeseeable." *Id.* Accordingly, the court held that the non-performing party's performance was not excused.

Pennsylvania courts also recognize the doctrine of commercial impracticability. Uniform Commercial Code ("UCC") § 2-615, which is set forth in 13 Pa.C.S. § 2615 ("Section 2615"), codifies this concept:

Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (2) and (3) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic

assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

13 Pa.C.S. § 2615(1). Section 2615 “excuses a seller from timely delivery of goods contracted for, where his performance has become commercially impracticable because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting.” 13 Pa.C.S. § 2615(1) cmt.1.

Pennsylvania courts strictly construe Section 2615, noting that

“[I]mpracticability” means more than “impracticality.” A mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, does not amount to impracticability since it is this sort of risk that a fixed-price contract is intended to cover.

Dorn v. Stanhope Steel, Inc., 534 A.2d 798, 812 (Pa. Super. 1987). See also *Commonwealth v. Neff*, 114 A. 267, 269 (Pa. 1921) (To excuse performance under doctrine of commercial impracticability, it must be averred that “that the contract could not be performed, not that it merely became difficult and expensive of performance”). Foreseeability is also a factor such that delays or events that are foreseeable are not likely to support an impracticability defense. See e.g., *Frank B. Bozzo, Inc. v. Electric Weld Division of the Fort Pitt Bridge Division of Spang Indus.*, 423 A.2d 702, 707 (Pa. Super. 1980) (no impracticability where seller could have provided product earlier in year but failed to stock pile in anticipation of later performance); *Hancock Paper Co. v. Champion International Corp.*, 424 F.Supp. 285 (E.D. Pa. 1976) (drop in market price even if caused by one of the parties is not a “supervening impossibility” but merely an “unanticipated difficulty”).