Virginia – Force Majeure Law

A court in Virginia will strictly interpret and enforce a force majeure clause according to the contract’s terms and will employ interpretive canons narrowly. A force majeure clause may broadly include both natural and man-made events, such as “acts of god, unusual governmental delays, restrictions, moratoria, strikes, war, civil unrest, rioting, unavailability of labor or materials, and unusually inclement weather.” Vienna Metro LLC v. Pulte Home Corp., 786 F. Supp. 2d 1076, 1082 (E.D. Va. 2011). But to the extent an occurrence or event is not sufficiently similar to those listed in the contract, a court will not presume its inclusion. See also White Oak Power Constructors v. Mitsubishi Hitachi Power Sys. Americas, Inc., Civ. A. No. 3:17-cv-00355-JAG, 2019 WL 3752961, at *5 (E.D. Va., Aug. 8, 2019). In interpreting such clauses, courts will apply whatever contractual definitions constitute force majeure. Id. If, for example, a force majeure clause expressly excludes certain natural events, such as “weather conditions reasonably foreseeable in the geographic region,” those events will not excuse performance. Old Dominion Elec. Coop. v. Ragnar Benson, No. Civ. A. 3:05CV34, 2009 WL 2854444, at *46 (E.D. Va. Aug. 4, 2006). “Foreseeability” may or may not be a precondition of relief, depending on whether the term appears or is implied by the contractual language. United States v. Hampton Roads Sanitation Dept., Civ. No. 2:09-cv-481, 2012 WL 1109030, at *7 (E.D. Va. Apr. 2, 2012).

For example, in Drummond Coal Sales, Inc. v. Norfolk S. Ry. Co., the court held that an environmental regulation was not a cause outside the parties’ control similar to those listed in the contract’s force majeure clause, nor did the regulation render performance impossible. Civ. A. No. 7:16cv00489, 2018 WL 4008993, at *10-12 (W.D. Va. Aug. 22, 2018). By strictly applying the canon, noscitur a sociis, the court determined that while a government regulation was outside the parties’ control, it was too dissimilar to the examples listed in the contract to be covered by the force majeure clause. Id.

Virginia courts also will consider whether a procedure must be followed to invoke force majeure as a defense. Comput. Sciss Corp. v. Fed. Home Loan Mortg. Corp., 731 Fed. App’x 188, 195 (4th Cir. 2018). For example, in Virginia, courts will enforce any notice requirement (or duty to mitigate damages) contained in a force majeure clause as a potential bar to raising the issue in court. Id.; Old Dominion Elec. Coop., 2009 WL 2854444, at *47. Similarly, contract language requiring a party to demonstrate that the

Contract language may also limit the relief available when a circumstance of force majeure has occurred. In *Vienna Metro LLC v. Pulte Home Corp.*, the U.S. District Court for the Eastern District of Virginia presumed the validity of a force majeure clause that allowed a 360-day time extension, but which did not excuse delays after that point. 786 F. Supp. 2d 1076, 1082 (E.D. Va. 2011). Moreover, a force majeure clause can be superseded by subsequent contractual agreements or limited by other provisions. *Middle E. Broad. Networks, Inc.*, 2015 WL 4571178, at *5 (holding that subsequent agreement superseded the force majeure clause); *Wuxi Letotech Silicon Material Tech. Co., Ltd. v. Applied Plasma Techs.*, No. 1:10-cv-356 (AJT/JFA), 2010 WL 2340260, at *3 (E.D. Va. June 7, 2010) (holding that a specific contingency addressed within the contract controlled the more general force majeure clause).

If a contract does not include a force majeure clause, a Virginia court will not recognize force majeure as a defense, but it may consider the doctrines of impossibility and frustration of purpose (or impracticability). While the doctrines are “essentially the same,” they differ slightly. *Drummond Coal Sales, Inc.*, 2018 WL 4008993, at *12. Under both doctrines, the moving party “must offer evidence to show the contract’s principal purpose has been substantially frustrated and/or its performance made impracticable” without the party’s fault, by the “occurrence of an event, the non-occurrence of which was the basic assumption of which the contract was made.” *Id.* (quoting Restatement (Second) of Contracts §§ 261, 265). Impracticability or frustration of purpose must result from an event or a fact which the alleging party had “no reason to know.” *Stump v. Commonwealth*, Rec. No. 1902-13-3, 2015 WL 1297054, at *4 (Va. Mar. 24, 2015) (quoting Restatement (Second) of Contracts § 266). Courts in Virginia will therefore look to three elements when considering and applying the modern doctrines of impossibility and impracticability: “1) the unexpected occurrence of an intervening act; 2) that such occurrence was of a character that its non-occurrence was a basic assumption of the agreement of the parties; and 3) that occurrence made performance impracticable.” *Drummond Coal Sales,*
Inc., 2018 WL 4008993, at *13. (citing Opera Co. of Boston v. Wolf Trap Found. for the Performing Arts, 817 F.2d 1094 (4th Cir. 1987)).