

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

circumstances giving rise to a force majeure defense were the sole cause of delay or nonperformance will be enforced. *Middle E. Broad. Networks, Inc. v. MBI Global, LLC*, No. 1:14-cv-01207-GBL-IDD, 2015 WL 4571178, at *5 (E.D. Va. July 28, 2015), *aff'd* 689 Fed. App'x 155 (4th Cir. 2017).

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)).