



**STATE OF ARIZONA
FORCE MAJEURE LAW
COMPENDIUM
(during COVID-19 pandemic)**

Prepared by

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A. Introduction

This memorandum will seek to provide Arizona exemplar for the USLAW NETWORK Compendium of Law on relevant considerations with respect to invoking “force majeure” clauses in contracts in light of the ongoing COVID-19 crisis.

B. Force Majeure in Arizona

In Arizona, there are four main defenses that could excuse a party’s nonperformance of a contractual obligation due to a supervening act of God or other extraordinary event like the current COVID-19 pandemic: (1) Force Majeure; (2) Impracticability; (3) Frustration of Purpose; and (4) Impossibility.

1. Force Majeure

Force Majeure (a “superior force”) is a contractual provision that excuses a party’s nonperformance when “acts of God” or other extraordinary events prevent that party from fulfilling its contractual obligations. It is an equitable legal principle which gives a party to a contract relief when that party’s performance has been made physically and/or economically impossible (or at least impracticable) due to circumstances totally beyond its control. A force majeure clause serves as “insulat[ion] from damages based upon an act of God.” *Tech. Const., Inc. v. City of Kingman*, 229 Ariz. 564, 567, 278 P.3d 906, 909 (App. 2012).

More importantly, a “force majeure” clause is governed by the language of the contract itself. Thus, the applicability of a force majeure clause under the COVID-19 circumstances will depend solely on the language of any given contractual provision. The primary focus will be on whether the clause covers the type of event (a pandemic) that a party claims is causing its nonperformance. Because such clauses are generally interpreted narrowly, the qualifying event must be specifically articulated in the clause at issue. However, even when a potential force majeure event is anticipated by the relevant clause, a party is under an obligation to mitigate any foreseeable risk of nonperformance, and cannot invoke force majeure where the potential nonperformance was foreseeable and could have been prevented or otherwise mitigated.

2. Impracticability

Arizona courts have recognized and applied the doctrine of impracticability as a viable defense to nonperformance. Specifically, Arizona follows the Restatement of Contracts regarding this doctrine. *7200 Scottsdale Rd. Gen. Partners v. Kuhn Farm Mach., Inc.*, 184 Ariz. 341, 345, 909 P.2d 408, 412 (App. 1995). The Restatement provides:

Where, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Restatement (Second) of Contracts § 261 (1981). The doctrine of impracticability only applies where the party did not assume the risk. *Thoracic Cardiovascular Associates, Ltd. v. St. Paul Fire & Marine Ins. Co.*, 181 Ariz. 449, 456, 891 P.2d 916, 923 (App. 1994).

The standard applicable to a claim for impracticability “is whether performance was objectively unreasonable, i.e., whether ‘the industry as a whole found the specifications impossible.’” And that “[c]ompletion of the job must require so much beyond the parties’ contemplation that it becomes an exercise in commercial futility.” *Willamette Crushing Co. v. State By & Through Dep’t of Transp.*, 188 Ariz. 79, 83, 932 P.2d 1350, 1354 (Ariz. App. 1997).

3. Frustration of Purpose

Frustration of purpose is an equitable doctrine that excuses nonperformance when a “supervening frustrating event” prevents the contract from fulfilling its essential purpose. This doctrine focuses on intent of the parties that entered the agreement and whether the purpose of the agreement has been impeded by some unforeseeable event. This doctrine “deals with the problem that arises when a change in circumstances makes one party’s performance virtually worthless to the other, frustrating his purpose in making the contract.” *Kuhn Farm*, 184 Ariz. at 345, 909 P.2d at 412 (quoting Restatement § 265 cmt. a). “Performance remains possible but the expected value of performance to the party seeking to be excused has been destroyed by a fortuitous event, which supervenes to cause an actual but not literal failure of consideration.” *Id.*

However, this defense has its limitations. It “has been severely limited to cases of extreme hardship so as not to diminish the power of parties to contract, and . . . require[s] proof from the party seeking to excuse himself that the supervening frustrating event was not reasonably foreseeable.” *Next Gen Capital, L.L.C. v. Consumer Lending Assocs., L.L.C.*, 234 Ariz. 9, 11, 316 P.3d 598, 600 (App. 2013) (holding the doctrine was inapplicable to excuse a tenant payday loan establishment from rent obligations to the landlord after the expiration of the payday lending authorizing statute because it was reasonably foreseeable that the statute might not be extended and the parties could have contracted around this contingency).

Arizona courts also look to the Restatement with regard to frustration of purpose, which enumerates the following four requirements before relief may be granted:

First, the frustrated purpose must have been a principal purpose of that party and must have been so within the understanding of both parties. Second, the frustration must be so severe that it is not to be regarded as within the risks assumed [] under the contract. Third, the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made. And, finally, relief will not be granted if it may be inferred from either the language of the contract or the circumstances that the risk of the frustrating occurrence, or the loss caused thereby, should properly be placed on the party seeking relief.

Id. at 11, 316 P.3d at 600. Moreover, “[p]roper application of the doctrine requires proof from the party seeking to excuse themselves from performance that the supervening frustrating event was not reasonably foreseeable.” *B.F. Goodrich Co. v. Vinyltech Corp.*, 711 F. Supp. 1513, 1519 (D. Ariz. 1989) (citing *Garner v. Ellingson*, 18 Ariz. App. 181, 183, 501 P.2d 22, 24 (1972)). In *B.F. Goodrich*, the Court held that frustration of contract was inapplicable simply because there was a change in prices or market conditions. *Id.*

4. Impossibility

This defense to nonperformance provides that a party may be excused of its performance if it “becomes impossible due to circumstances beyond the parties’ control.” *Garner v. Ellingson*, 18 Ariz.App. 181, 182, 501 P.2d 22, 23 (1972).

The doctrine of impossibility of performance dates back to the celebrated case of *Taylor v. Caldwell*, 3 Best & S. 826 (1863) wherein Caldwell was relieved of liability in damages for non-delivery of a music hall to Taylor because the hall had been destroyed by fire. Since that case the courts have grown increasingly liberal in their construing of what constitutes “impossibility.”

Minderman v. Perry, 103 Ariz. 91, 93–94, 437 P.2d 407, 409–10 (1968). In *Minderman*, the Supreme Court of Arizona articulated the rule as set forth in the Restatement of Contracts:

[W]here performance of a promise becomes impossible because of facts which the promisor had no reason to anticipate and for the occurrence of which the promisor is not at fault his duty is discharged unless a contrary intention has been manifested; and, more specifically, where the existence of a specific person is essential to the performance of a promise the duty to perform that promise is discharged if the person is not in existence at the time for seasonal performance, unless a contrary intention is manifested or the contributing fault of the promisor causes the nonexistence[.]

Id. (quoting Restatement of Contracts §§ 457, 460). In addition, this defense also requires “proof . . . that the supervening frustrating event was not reasonably foreseeable.” *Id.* Consequently, this doctrine is often pled as a defense in conjunction with impracticability and frustration of purpose.

5. Conclusion

There is no doubt that we will see many of the above defenses raised for nonperformance of contractual obligations as a result of stay-at-home orders, business closures, and travel restrictions. Whether such defenses will be successful will obviously depend on the facts relevant to the particular contracts and businesses at issue.

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