



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

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A. Introduction

This memorandum will seek to provide Minnesota the 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 Minnesota

1. Introduction

The global COVID-19 pandemic creates new challenges for business owners with contractual obligations. Our current business climate causes employees to work remotely, reduced production, and restrictions on travel that can impact efficiency. Companies are now adapting to the new business climate and corporate leaders are questioning their obligations previously negotiated in contracts. For some businesses, production may not be feasible, deliveries may be delayed, and services must be rescheduled.

Companies must evaluate their contractual obligations and understand how non-performance of their contractual duties may affect their business relationships with corporate partners, customers, lenders, and suppliers. Many companies are prepared for non-performance issues by negotiating a contractual “force majeure” clause that excuses the duty to perform in the event of unforeseeable circumstances. However, the inclusion of a force majeure clause may not completely prevent liability for non-performance.

2. Requirements to Obtaining Relief Using Force Majeure

Under Minnesota law, the application of a force majeure clause is a question of contract interpretation. Minnesota courts hold that contract interpretation is a question of law. *Travertine Corp. v. Lexington-Silverwood*, 638 N.W.2d 267, 271 (Minn. 2004). The primary goal of contract interpretation is to determine and enforce the intent of the parties. *Id.*, citing *Motorsports Racing Plus, Inc. v. Artic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003). When a contract term is clear and unambiguous, Minnesota courts are instructed not to rewrite, modify, or limit its effect by engaging in contractual interpretation. *Id.* The party who is attempting to invoke the force majeure clause bears the burden of proof to establish its application. *Toll Bros., Inc. v. Sienna Corp.*, Not Reported, 2009 WL 961379, at *6 (D.Minn., April 7, 2009)(citing *Den Mar Constr. Co. v. Am. Ins. Co.*, 290 N.W.2d 737, 743 (Minn. 1979)). Many contracts contain a force majeure clause that will excuse performance under specified conditions. The most recent Minnesota case law on force majeure clauses focuses on whether the triggering event for non-performance was reasonably foreseeable.

A force majeure clause excuses contract performance in the event of unforeseen circumstances. *Melford Olson Honey, Inc. v. Adeo*, 452 F.3d 956, 963 (8th Cir. 2006). The performance to be excused is determined by the explicit language of the clause. *United Sugars Corp. v. U.S. Sugar Co., Inc.*, Not Reported, 2015 WL 1529861, at *3 (D. Minn., April 2, 2015). When the specific event is not listed in the contract language, Minnesota courts focus their analysis on whether the event

causing non-performance was unforeseeable to the parties. Circumstances are considered “unforeseen” when human vigilance and the business industry can neither foresee nor prevent the occurrence. *State ex rel. Nelson v. Dist. Court*, 138 Minn. 260, 164 N.W. 917 (Minn. 1917). Conversely, events do not fall under general force majeure language when they are reasonably foreseeable. *Great Lakes Gas Transmission, Ltd. P’ship. v. Essar Steel Minnesota, LLC*, 871 F.Supp.2d 843, 852 (D. Minn. 2012)(holding that a party’s inability to obtain financing was foreseeable and did not implicate the force majeure clause because it was foreseeable). Circumstances are also not reasonably foreseeable if they are, “caused by the party invoking [the clause] or could have been prevented by the exercise of prudence, diligence, and care.” *Id.*

Minnesota courts have not analyzed whether a global pandemic, like COVID-19, creates an “unforeseeable circumstance” to trigger a force majeure clause. Initially, the court will analyze whether the contract language includes specific triggering events, such as “pandemic”, “widespread disease”, or “travel restrictions.” If the contract does not provide language that encompasses the triggering event, the court will likely assess the following factors:

- Whether the parties intended the force majeure clause to include precautions for pandemic, widespread sickness, or travel restrictions,
- Whether or not the global pandemic was reasonably foreseeable to the respective parties in their industry, or
- Whether or not the parties contemplated the risk of a pandemic at the time of contract creation.

3. Scope of Relief

Generally, a force majeure clause excuses a party’s obligation to perform under the contract. However, Minnesota courts recognize that performance is not excused when the inability to perform is “wholly attributable” to the subjective inability of the promisor. *Siats*, 70 N.W.2d 344, 348; see also Restatement (Second) of Contracts § 261 (1981). While the global pandemic may slow business and limit travel, organizations must be careful to not solely rely on the pandemic as a source for relief. Many industries, such as transportation, logistics, and commercial sales, may have the ability to perform their contractual obligations under the current work climate. Non-performance may not always be excusable if the party can subjectively still perform.

4. Other Considerations

If the contract does not have a force majeure clause, business owners have valid contractual defenses based on impracticability or impossibility. Contractual performance may be excused when “performance becomes impracticable or impossible, due to circumstances or facts, at the time the parties made the contract, that neither party knew nor had reason to know.” *Power v. Siats*, 70 N.W.2d 344, 348 (Minn. 1955). Impracticability and impossibility have been codified in the Minnesota Uniform Commercial Code. (Minn. Stat. § 336.2-615(a) (2020)). When determining whether performance is impossible or impracticable, Minnesota courts assess whether, (1) the occurrence or circumstances caused the breach, (2) the obligor had no reason

to know about the occurrence at the time the contract was made, and (3) performance is now impossible or will create excessive or unreasonable hardship, loss, expense, or injury on a party. 4 MNPRAC CIVJIG 20.80 (2020), citing *Siats*, 70 N.W.2d 344. Mere inconvenience or difficulty is not sufficient to void performance. *Id.* If travel restrictions or social distancing requirements make performance impossible or create an excessive or unreasonable burden, performance may be excused.

A party may also use the contractual defense for frustration of purpose. When the entire purpose of a contract has been frustrated by the occurrence of an unforeseen event, Minnesota courts excuse contractual performance. The defense for frustration of purpose has three elements: (1) the principal purpose of the contract is frustrated, (2) without that party's fault, and (3) frustration was caused by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made. *City of Savage v. Formanek*, 459 N.W.2d 173, 176 (Minn. 1990). The frustrated purpose must be the principal purpose of the contract for the party claiming excuse. *Id.*, citing Restatement (Second) of Contracts § 265, comment a (1981). For example, contracts for rental units, event space, or time sensitive orders may have a specific purpose for prompt performance or delivery. If the pandemic has frustrated the sole purpose of the contract so that performance would be senseless, a party may still have a contract remedy.

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