



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

Prepared by

Baird Holm LLP

Jennifer D. Tricker

Katie R. Wunderlich

1700 Farnam Street, Suite 1500

Omaha, NE 68102-2068

Tel: 402-344-0500

jtricker@bairdholm.com

kwunderlich@bairdholm.com

www.bairdholm.com

A. Introduction

This memorandum provides guidance on Nebraska law with respect to invoking “force majeure” clauses in contracts in light of the ongoing COVID-19 crisis.

B. Force Majeure in Nebraska

1. Introduction

Nebraska law recognizes “force majeure” as a means to allocate risk in a contract if performance becomes impossible or impracticable as a result of an event that the contracting parties could not have anticipated or controlled.¹ In light of the ongoing COVID-19 crisis, parties contracting in Nebraska may wonder (i) whether they, or their contractual counterparts, may be excused from performance under existing contracts for reasons related to COVID-19, and (ii) how to protect themselves prospectively when entering into new contracts, in light of COVID-19.

2. Requirements to Obtaining Relief Using Force Majeure

Force majeure is an analogue of the “act of God” principle. There is fairly well developed – albeit old – line of case law in Nebraska discussing when an act of God may excuse performance under a contract. Nebraska recognizes that acts of God are effectively built into every contract, whether written expressly or not; in other words, the law will excuse performance if a party is prevented from performing “directly and exclusively by an act of God.”² (In modern case law, this principle is referred to as the doctrine of “discharge by reason of impracticability” – see Section 4, below).

By contrast, a force majeure clause is an express allocation of risk in the contract. Thus, the concept of force majeure rests primarily on principles of contract interpretation. Nebraska has insubstantial case law on the subject of force majeure, generally, and little to no case law specifically addressing the application of force majeure provisions in the context of outbreaks of disease. (Note, however, that there is some conflation in Nebraska case law of force majeure and the doctrine of discharge by reason of impracticability, as discussed in greater detail, below.)

In general, to be excused from performing under a contract by reason of force majeure, a party must establish that (i) a force majeure event has occurred, however that is defined in the relevant contract, which (ii) excuses performance under the contract. Thus, a party to a contract seeking relief for reasons related to COVID-19 must first establish that an event qualifies as a force majeure event under the relevant contract. Plainly, a contract that expressly references the COVID-19 related event, or “COVID-19,” generally, would afford the most protection. (This may be helpful for prospective-drafting purposes). A general reference to “epidemic” or “pandemic” would likely also cover COVID-19 related events.

¹ *Blue Creek Farm, Inc. v. Aurora Coop. Elevator Co.*, 259 Neb. 1032, 614 N.W.2d 310, 312 (Neb. 2000).

² *Matousek v. Galligan*, 104 Neb. 731, 178 N.W. 510, 510 (Neb. 1920).

Given the profound effects of COVID-19, a force majeure clause that expressly references “acts of government” or travel restrictions might also cover COVID-19 related events. Notably, force majeure clauses that references “acts of God” – without more – may not cover COVID-19 related events, as this phrase is typically interpreted to refer to natural disasters or weather-related events.

Oftentimes, force majeure clauses are drafted with a “catch-all” provision, to encompass unspecified events beyond the control of the parties which inhibit or prevent performance. Whether a catch-all provision in a particular contract covers COVID-19 related events depends on the intent of the parties. Generally, force majeure clauses are construed narrowly; therefore, it may be difficult to argue for the inclusion of COVID-19 related events, absent an express reference. There is a Nebraska case, however – *Cleasby v. Leo A. Daly Co.*³ – which may be useful in support of a contrary position.

In *Cleasby*, the Supreme Court of Nebraska reversed and remanded the decision of the trial court to deny the employer’s (Daly’s) motion for directed verdict, and to award damages to the employee (Cleasby). Cleasby was terminated after a prolonged illness as project manager by Daly, an architectural firm, in connection with a project in Saudi Arabia. Cleasby brought suit against Daly for breach of a 2-year employment contract. The contract contained a force majeure clause which reserved to Daly the right to “interrupt or discontinue overseas assignments upon the occurrence of unforeseen or unexpected conditions such as termination of the Client’s project, war, incurrence [sic], and the like.” The Court determined that the jury should have been instructed that Cleasby’s termination – related to illness – was justified by reason of “business necessity,” and the failure to give such instruction was prejudicial to Daly.⁴ *Cleasby* is interesting because the Court relied on the court-made doctrine of business necessity to excuse performance by Daly (otherwise known as, “impossibility of performance, extreme impracticability, frustration of contract, or implied condition in the promise”⁵) despite the presence of a force majeure clause in the contract (which notably did not reference disease).

3. Scope of Relief

Assuming that a COVID-19 related event is a force majeure event within the meaning of the relevant contract, the next question is whether the occurrence of that event is sufficient to excuse performance. The standard to excuse performance may vary depending on the language of the contract. For example, a contract might state that a force majeure event must render performance “impossible,” “impracticable,” “inadvisable,” or perhaps, “illegal.” Each such standard could be interpreted differently. A force majeure clause may be drafted in such a way that performance may not be excused, but instead, merely delayed during the time of the force majeure event. Generally speaking, a party will not be able to obtain relief under a force majeure clause for losses that could have been avoided with reasonable effort.

³ 221 Neb. 254, 376 N.W.2d 312 (Neb. 1985).

⁴ *Id.* at 318.

⁵ *Id.*

4. Other Considerations

As alluded to above, Nebraska recognizes several court-made doctrines that may afford relief, even in the absence of a force majeure clause covering COVID-19 related events in a contract. For example, the doctrine of discharge by reason of impracticability (which historically has gone by a variety of other names – see discussion of *Cleasby*, above) will excuse performance 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, unless the language of the contract or the circumstances provide otherwise.⁶ Relatedly, the doctrine of frustration of purpose may excuse performance where a party’s principal purpose in entering into the contract is substantially frustrated, without his fault, by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made.⁷

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.

⁶ *Id.*

⁷ *Id.* at 318-319.