



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

Prepared by

Brian Terry, Esq.

Gregory Schulman, Esq.

THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER

1100 E. Bridger Ave.

Las Vegas, NV 89101

(702) 366-0622

www.thorndal.com

A. Introduction

This memorandum will seek to provide Nevada 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 Nevada

1. Introduction

As the ongoing COVID-19 crisis continues to severely impact commercial activity in Nevada, many businesses and commercial actors need to know whether they will be liable for any inability to perform contractual obligations. “Force Majeure” clauses—common to many commercial agreements—generally provide that a party that has been unable to perform under a contract due to the occurrence of certain events outside of their control (such as wars, work stoppages, or natural disasters) may suspend, delay or terminate its performance and will not be liable for costs or damages due to the lack of performance caused by the event. In the absence of any such force majeure language, parties are likely limited to the common law defenses of impracticability or frustration of purpose. That being said, opportunities for negotiation and cooperation are perhaps more available than in pre-COVID 19 times given the uncertain and fluid nature of this crisis, so a lack of a force majeure clause is not necessarily fatal to the ability of contracting parties to come to a workable arrangement in the event of a lack of performance.

2. Requirements to Obtaining Relief Using Force Majeure

Whereas certain other states define “force majeure” via statute, the term is not mentioned in the Nevada Revised Statutes. Nevada has no direct case law specifically addressing the application of force majeure provisions, let alone in the context of pandemics or outbreaks of disease. Instead, the Court has only briefly touched upon invalidating a contract under the “acts of God” provision, holding the condition “must be such a providential occurrence or extraordinary manifestation of the forces of nature that it could not reasonably have been foreseen, and the effect thereof avoided by the exercise of reasonable prudence, diligence and care, or by the use of those means which the situation renders reasonable to employ.”¹

Nevada follows the impracticability and impossibility of performance doctrine, which allows a contract to be invalidated if the contract conditions cannot objectively be met. Statutorily, this doctrine applies to the sale of goods and is codified in NRS 104.2615. The party seeking impracticability must prove the agreed upon performance “has been made impracticable by the occurrence or contingency the nonoccurrence of which was a basic assumption on which the contract was made or by the compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.”² A mere increase in cost is considered foreseeable. For example, the increase in cost of performance due to the OPEC oil embargo did not render performance under the contract impracticable.³

¹ *Alamo Airways v. Benum*, 78 Nev. 384 (1962).

² NRS 104.2615(1).

³ *Helms Constr. & Dev. Co. v. State*, 97 Nev. 500, 634 P.2d 1224 (1981).

While the statute only applies to contracts for the sale of goods, the impossibility doctrine is also available in performance contracts.⁴ The doctrine is available where performance is made “impossible or highly impractical by the occurrence of unforeseen contingencies.”⁵ In order for the contractual duty to be discharged, the unforeseen contingency must have been a basic assumption on which both parties made the contract.⁶

Although Nevada has not directly addressed force majeure clauses, there is no reason to doubt Nevada will enforce a force majeure clause. Such a clause has not been deemed to be invalid for public policy reasons. The common or normal meaning of contract language will be enforced unless circumstances show a special meaning in a particular case should be imposed.⁷

3. Scope of Relief

If a party is able to successfully invoke a force majeure clause, it must next consider the scope of the relief available to it. Nevada will likely enforce a force majeure clause only to the extent the force majeure event is in effect unless the force majeure clause specifies otherwise. A duty to mitigate against losses will likely be imposed upon a party seeking to enforce a force majeure clause. The scope of relief from contractual performance will likely be only enforced to the extent the event prevented performance.

4. Other Considerations

Whether the COVID-19 pandemic is considered a force majeure triggering event will most likely depend on the language contained in the force majeure clause. To the extent the contract does not contain such a clause, a party will have to show impracticability or impossibility of performance. In Nevada, the Governor’s emergency declaration shut down non-essential businesses since mid-March, 2017. While some of the restrictions are now being lifted, many businesses remain closed and those that are permitted to reopen are doing so with social distancing restrictions. To the extent any restrictions prevent performance, not just make it difficult, contractual performance may be excused. Once the restrictions are lifted, however, the mere cost of performance may not be a sufficient basis to enforce a force majeure clause or to argue impracticability/impossibility.

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

⁴ *Cashman Equip. Co. v. W. Edna Assocs.*, 132 Nev. 689, 380 P.3d 844 (2016), following the Rest. (Second) of Contracts § 261 cmt. b.

⁵ *Id.*

⁶ *Id.*

⁷ *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75 (9th Cir. 1987)

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.