

Illinois – Force Majeure Law

Illinois law allows for excused performance of contractual obligations pursuant to common law contractual doctrines of impossibility of performance and frustration. Along the same lines, parties may include a force majeure provision in their contract excusing performance in the event of specified occurrences happening. See *Stewart-Warner Corp. v. Remco, Inc.*, 205 F.2d 583, 587 (7th Cir. 1953). Notably though, if the parties to the contract include a force majeure clause, such clause supersedes any applicable common law doctrine. *Commonwealth Edison Co. v. Allied-General Nuclear Services*, 731 F.Supp. 850, 855-56 (N.D. Ill. 1990).

That said, when parties include a boilerplate force majeure clause in their contract common law doctrines may supplant the clause, however, when the parties' force majeure provision specifically spells out the circumstances constituting a defense to the duty to perform, the contractual language controls and Courts must use general contract law principles to analyze the application of the provision. *Commonwealth Edison Co.*, 731 F.Supp. at 855-56. With that in mind, Illinois law on contract interpretation is similar to most jurisdictions in that the primary objectives for Courts when construing contracts include giving effect to the intent of the parties, construing the contract as a whole and viewing each part in light of the others, and ensuring its interpretation does not render any provision of a contract meaningless. See *Dearborn Maple Venture, LLC v. SCI Illinois Services, Inc.*, 2012 IL App (1st) 103513; See also *Atwood v. St. Paul Fire and Marine Ins. Co.*, 363 Ill.App.3d 861 (App. Ct. of Ill. 2006). That said, while a Court will use the above contract interpretation principles to determine the applicability of a force majeure clause, the Courts will also look to the factual background of a case construe the subject force majeure clauses with "equitable principles" in mind. *Chemetron Corp. v. McLouth Steel Corp.*, 381 F.Supp. 245, 256 (N.D. Ill. 1974).

In summary, Illinois law allows for the inclusion of force majeure clauses in contracts as such clauses demonstrate the best evidence of the intent of the parties' allocation of risk when contracting. Nevertheless, Illinois Courts will keep "equitable principles" in mind, construe such clauses pursuant to general contractual interpretation principles. Therefore, Illinois Courts will likely narrowly interpret any force majeure provisions based on plain language used therein.

Nevertheless, while Illinois law allows for and Courts will apply well-written force majeure clauses, just as in other jurisdictions, parties to a contract

may also attempt to excuse performance under common law doctrines of impossibility and commercial frustration thereby making contractual obligations unenforceable or excused. Notably, Illinois Courts narrowly interpret these doctrines as it is well-settled Illinois law that the purpose of contract law is to allocate the risk that might affect performance and that performance should be excused only in extreme circumstances. *Rosenberger v. United Community Bancshares*, 2017 IL App (1st) 161102, ¶ 24.

The essence of an “impossibility of performance” claim, is that the “performance is rendered objectively impossible.” *Downs v. Rosenthal Collins Group, L.L.C.*, 2011 IL App (1st) 090970, ¶ 39. However, “application of the doctrine requires that the circumstances creating the impossibility were not and could not have been anticipated by the parties, that the party asserting the doctrine did not contribute to the circumstances, and that the party demonstrate that it has tried all practical alternatives available to permit performance.” *Id.* (citations omitted). Moreover, Illinois Courts have stated that “[w]here a contingency that causes the impossibility might have been anticipated or guarded against in the contract, it must be provided for by the terms of the contract or else impossibility does not excuse performance.” *YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC*, 403 Ill.App.3d 1, 6-7 (App. Ct. of Ill. 2010). Accordingly, while an occurrence may render performance of contractual duties objectively impossible, this doctrine cannot be used in a claim for excused performance where the occurrence was foreseeable and/or could have been guarded against in a contract. Notably, there are reasonable arguments on both sides of an impossibility of performance claim due to a pandemic and/or government-manded shut down.

On the other hand, the doctrine of commercial frustration renders a contract unenforceable if a party’s performance under the contract is rendered meaningless due to an unforeseen change in circumstances. *Illinois-American Water Co. v. City of Peoria*, 332 Ill.App.3d 1098, 1106 (App. Ct. of Ill. 2002). In order for a claim for commercial frustration to prove successful, “there must be a frustrating event not reasonably foreseeable and the value of the parties’ performance must be totally or almost totally destroyed by the frustrating cause.” *Id.* As such, a party making a claim for commercial frustration must demonstrate (1) the occurrence was not foreseeable and (2) that the value of any the party’s work has been totally destroyed by such occurrence.