

## Ohio – Force Majeure Law

Ohio courts have recently noted that the implementation of a force majeure clause to excuse nonperformance under a contract is a “relatively new concept in Ohio law.” *United Gulf Marine, LLC v. Continental Refining Co., LLC*, No. CV 2017 0040, 2017 WL 11458085, at \*4 (Ohio Com.Pl., Allen County Aug. 16, 2017). However, under Ohio law, force majeure clauses are enforceable and may be used as an excuse for nonperformance under a contract. *Stand Energy Corp. v. Cinergy Services, Inc.*, 760 N.E.2d 453, 457 (Ohio App. 1 Dist., 2001). Further, Ohio courts recognize that the concept of force majeure “has been characterized . . . as a defense that has some overlap with the common law defenses of impossibility or impracticability,” *Haverhill Glen, L.L.C. v. Eric Petroleum Corp.*, 67 N.E.3d 845, 850 (Ohio App. 7 Dist., 2016). That said, the language of the force majeure clause is of the utmost importance in analyzing whether such a clause may excuse nonperformance of a contractual obligation.

Accordingly, when construing a force majeure clause, Ohio courts will ultimately “look to the language of the contractor’s force majeure provision to determine its applicability.” *Haverhill Glen, L.L.C.*, 67 N.E.3d at 850. Additionally, in order “[t]o use a *force majeure* clause as an excuse for nonperformance, the nonperforming party bears the burden of proving that the event was beyond the party’s control and without its fault or negligence.” *Stand Energy Corp.*, 760 N.E.2d at 457. Thus, Ohio courts analyzing the enforceability of a force majeure claim must first look to the claimed force majeure event and compare it to the specific contract language to determine whether performance is excused, and then determine whether the nonperforming party has demonstrated that such event was beyond its control and that it does not have any fault or negligence relating to such occurrence.

As such, it is important to note that Ohio Court’s will look at force majeure provisions in a contract just like any other contract provision. See e.g. *National City Bank v. Garfield Land Development, LLC* No. CV-684290, 2009 WL 5872572 (Ohio Com.Pl., Cuyahoga County July 09, 2009). In doing so, where the terms of a contract are not ambiguous, courts are to interpret the contract as written in accordance with its plain and ordinary meaning. *Motorist Mutual Ins. Co. v. Dandy-Jim, Inc.*, 912 N.E.2d 659, 663 (Ohio App. 8 Dist., 2009); See also *St. Marys v. Auglaize Cty. Bd. Of Commrs.*, 875 N.E.2d 561, 566 (Ohio, 2007). Accordingly, the specific contract language, if clear and unambiguous, will be the ultimate factor in determining whether the force majeure clause acts to excuse nonperformance. Thus, when a

force majeure provision explicitly sets forth specific conditions in which nonperformance would be excused, but one of those events not occur and/or the nonperforming party cannot demonstrate the applicability of the provision, Ohio courts have found that subsequent force majeure claims for excused nonperformance would fail. *See Dunaj v. Glassmeyer*, 580 N.E.2d 98, 100-01 (Ohio Com.Pl., 1990).

Notably, a number of Ohio courts have specifically held that “[w]hen a party assumes the risk of certain contingencies in entering a contract . . . such contingencies cannot later constitute a ‘force majeure.’” *Dunaj*, 580 N.E.2d at 101. Likewise, Ohio courts have also stated that performance is not excused simply because performance may prove difficult, burdensome, or economically disadvantageous. *Id.*; *See also State ex rel. Jewett v. Sayre*, 109 N.E. 636 (Ohio, 1914). As such, in order to enforce a force majeure provision and excuse performance, the nonperforming party must demonstrate that the occurrence giving rise to the claim was beyond its control, that the party is without fault, and that the occurrence is the proximate cause for the failure to perform. *Stand Energy Corp.*, 760 N.E. at 457; *See also Beth Hachneseth Yad Charutzim Congregation v. Kesmo Del*, 81 N.E.2d 543, 543–44 (Ohio App. 1948) (“To excuse performance under an absolving clause in a contract, the cause relied on must also be the proximate cause of the failure to perform.”) Thus, even when an event is specifically listed in a force majeure provision and such event occurs, Ohio courts will also look to how the occurrence impacts the party’s ability to perform. *See e.g., United Gulf Marine, LLC v Continental Refining Co., LLC*, No. CV 2017 0040, 2018 WL 10036528, at \*5 (Ohio Com.Pl., Allen County, Feb. 27, 2018).

Furthermore, as alluded to above, in the absence of a force majeure provision, common law contract principles provide that impossibility of performance and/or frustration of purpose may constitute an affirmative defense where “after the contract is entered into, an unforeseen event arises rendering impossible the performance of one of the contracting parties” or where the contract’s purpose “essentially becomes moot.” *Mitchell v. Thompson*, 2007 WL 2897752 at \*1 (Ohio App. 4 Dist., 2007); *See also Marshall v. Smith*, 174 N.E.2d 558 (Ohio Com.Pl. 1960)(tenant under lease of a tavern excused from performance where a local law passed after consummation of lease made the sale of liquor illegal). However, the applicability of these defenses is narrow. For example, the impossibility defense relates to situations in which the parties enter into a contract and an event arises that renders the performance of one of the contracting parties

impossible. In that type of situation, the performance must be rendered impossible (1) without the party's fault, and (2) the event must have been reasonably unforeseeable. *Truetried Service Co. v. Hager*, 691 N.E.2d 1112, 1119 (Ohio App. 8 Dist., 1997) ("In order to assert either defense, a party must show 'that an unforeseeable event occurred, that the non-occurrence of the event was a basic assumption underlying the agreement, and that the event was impracticable.'"); See also *Mth Real Estate, LLC v. Hotel Innovations, Inc.*, 2007 WL 2821135, at \*3 (Ohio App. 2 Dist., 2007). Likewise, the frustration of purpose doctrine is also narrowly construed and is limited to situations in which a contract is made and the party's principal purpose is substantially frustrated. *America's Floor Source, L.L.C. v. Joshua Homes*, 946 N.E.2d 799, 808 (Ohio App. 10 Dist., 2010). Notwithstanding, the frustration of purpose doctrine is not widely accepted by Ohio courts. *Wells v. C.J. Mahan Const. Co.*, 2006 -Ohio- 1831, ¶ 18, 2006 WL 951444, at \*6 (Ohio App. 10 Dist., 2006). Moreover, just as with force majeure clauses, Ohio courts will not excuse performance merely because performance is dangerous, difficult, or burdensome. *Paulozzi v. Parkview Custom Homes, L.L.C.*, 122 N.E.3d 643, 649 (Ohio App. 8 Dist., 2018) (citations omitted).

In summary, Ohio courts recognize the enforceability of force majeure clauses set forth in a contract and will look to the language of the contract itself to ultimately determine the applicability of a force majeure clause to a claim for excused nonperformance under a contract. In doing so, Ohio courts will use general contract principles, but will also analyze the factual circumstances surrounding the claim (such as proximate cause and ability to perform in light of the occurrence) to make its final determination as to whether nonperformance under the contract may be excused. Additionally, while common law doctrines of impossibility and frustration of purpose may potentially apply to situations in which a force majeure clause may be at issue, Ohio courts narrowly construe such defenses. Therefore, for nonperformance of a contractual obligation to be excused, the contract and the specified force majeure provision included therein (if such clause is, in fact, included) will be the ultimate best evidence of whether a Court will excuse a party's nonperformance.