

Washington, D.C. – Force Majeure Law

In the District of Columbia, force majeure clauses are interpreted by their own terms, along with any limiting clauses, such as those requiring proof of a party's inability to prevent or overcome the exigent circumstances. See *Columbia Gas Transmission Corp. v. F.E.R.C.*, 448 F.3d 382, 384 (D.C. Cir. 2006). The talismanic phrase "force majeure" is not required in a contract, but any contract clause excusing nonperformance for cause will be interpreted according to its own provisions and conditions. *Nat'l Ass'n of Postmasters of the United States v. Hyatt Regency Washington*, 894 A.2d 471, 474 n.2 (D.C. 2006) ("Such provisions are often called *force majeure* clauses, but attaching that label does not assist in our analysis. We still must 'look to the language that the parties specifically bargained for in the contract to determine the parties' intent concerning whether the event complained of excuses performance.'") (quoting *Perlman v. Pioneer Ltd. P'ship*, 918 F.2d 1244, 1248 n.5 (5th Cir. 1990)).

District of Columbia law also provides specific guidance on what constitutes an "act of God" beyond the control of the party alleging force majeure. In *Whole Foods Mkt. Grp., Inc. v. Wical Ltd. P'ship*, the U.S. District Court for the District of Columbia recently held that a rodent infestation in a tenant's building could constitute an "act of God," but the question ultimately belongs to a finder of fact. Civ. A. No. 1:17-cv-01079-RCL, 2019 WL 5395739, at *3 (D.D.C. Oct. 22, 2019). The Court reasoned that "in certain circumstances, a rodent infestation could constitute an 'act of God' if it was truly a force of nature outside the control of the party claiming the benefit of the *force majeure* clause." *Id.* But such an infestation could only excuse performance if it was "of such character that it could not have been prevented or avoided by foresight or prudence." *Id.* (quoting *Watts v. Smith*, 226 A.2d 160, 162 (D.C. 1967). Put differently, "human interference or influence on what could otherwise be considered an act of God . . . precludes an 'Act of God' legal defense." *Id.* (quoting *Am. Nat'l Red Cross v. Vinton Roofing Co.*, 629 F. Supp. 2d 5, 9 (D.D.C. 2009)). In that case, the genuine dispute of material fact centered on whether actions by Whole Foods could have prevented the rodent infestation, or whether the infestation was out of Whole Foods' control. If the infestation was out of Whole Foods' control, it qualified as an "act of God" that excused performance. *Id.* at *5.

In the District of Columbia, performance may also be excused under the doctrines of impossibility and commercial impracticability, but only in rare cases. In *East Capitol View Community Development Corp., Inc. v. Robinson*, the court explained that, "[t]o establish impossibility or

commercial impracticability, ‘a party must show (1) the unexpected occurrence of an intervening act; (2) the risk of the unexpected occurrence was not allocated by agreement or custom; and (3) the occurrence made performance impractical.’” 941 A.2d 1036, 1040 (D.C. 2008) (quoting *Nat’l Ass’n of Postmasters of the United States*, 894 A.2d at 477 n.5).

Impossibility is only a valid defense in extreme circumstances, and “courts will generally only excuse non-performance where performance is objectively impossible—that is, the contract is incapable of performance by anyone—rather than instances where the party subjectively claims the inability to perform.” *Id.* Objective impossibility is contrasted with subjective impossibility, which is personal to the promisor rather than the act to be performed. *Id.* So long as someone can perform the promised act, performance is not excused under the doctrine of impossibility. It is also unlikely that financial inability—even to the point of insolvency—can excuse performance. *Id.* at 1041.

The doctrine of “frustration of purpose” is likewise rarely applied in the District of Columbia. *See Island Dev. Corp. v. Dist. of Columbia*, 933 A.2d 340, 349 (D.C. 2007). Unlike the doctrine of commercial impracticability, the frustration defense applies where “the promisor’s performance is excused because changed conditions have rendered the ‘bargained for’ performance worthless, not because the promisor’s performance has become different or impracticable.” *Id.* (quoting *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1296 (Fed. Cir. 2002)). By contrast, “commercial impracticability excuses a promisor from performance because a supervening event changes the nature of the promisor’s performance so that it has become commercially impracticable.” *Id.* (quoting *Seaboard Lumber Co.*, 308 F.3d at 1296). In short, frustration has to do with a failure of consideration, whereas impracticability has to do with a failure of performance.