



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

Prepared by

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A. Introduction

This memorandum will seek to provide a Hawaii 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 Hawaii

1. Introduction

The COVID-19 crisis has had an unprecedented and disastrous impact on the economy of most states, including the State of Hawaii. As a result of emergency lockdown orders issued by both the Governor of Hawaii and the Mayors of the various municipalities in Hawaii, most economic activity, including the State of Hawaii’s primary industry, tourism, has been shut down. This, in turn, has caused a cascading effect on the ability of parties, such as commercial tenants, to fulfil their contractual obligations, leading them to seek relief from those obligations by invoking “force majeure” clauses in contracts.

2. Requirements to Obtaining Relief Using Force Majeure

As a general proposition, force majeure clauses allocate risk between contracting parties by relieving obligations under exceptional and/or unforeseeable circumstances deemed beyond the control of the parties. These clauses expand upon the common law doctrines of impracticability and impossibility, which also may relieve parties of their contractual obligations (even in the absence of an express force majeure clause). The “test” for force majeure usually requires the satisfaction of three distinct criteria:

- the event must be beyond the reasonable control of the affected party;
- the affected party’s ability to perform its obligations under the contract must have been prevented, impeded or hindered by the event; and
- the affected party must have taken all reasonable steps to seek to avoid or mitigate the event or its consequences.

The party who relies on a force majeure clause to excuse performance bears the burden of proving that the event was beyond the party’s control and without its fault or negligence. See *OWBR LLC v. Clear Channel Communications, Inc.*, 266 F.Supp.2d 1214, 1222 (D. Haw. 2003). Importantly, in Hawaii, mere economic hardship is not enough, standing alone to bring an event within a force majeure provision. Id. at 1223. Rather, the circumstances necessary to invoke relief and excuse performance must be extreme and unreasonable. Id. at 1225.

What constitutes a force majeure event is often, though not always, defined by the force majeure clause itself. Where its application to a specific event, such as the current COVID-19 crisis, is undefined or uncertain, Hawaii courts apply general principles of contract law to interpret the clause invoked. As in other jurisdictions, in Hawaii, contract interpretation is a matter of law (See *Reed & Martin v. City and County of Honolulu*, 50 Haw. 347, 440 P.2d

526, 527 (1968)) with contractual terms interpreted according to their plain, ordinary meaning and accepted use in common speech, unless the contract indicates a different meaning. State Farm Fire and Cas. Co. v. Pacific Rent-All, Inc. 90 Hawai'i 315, 978 P.2d 753, 762 (1999).

In interpreting undefined or disputed contract language, courts apply an objective reasonable person standard. See OWBR LLC, supra, at 1221. As applied to the COVID-19 crisis, the person invoking the clause will need to be able to show that: (1) the event somehow fits into one of the events constituting a force majeure event such as "Acts of God" or other emergencies that make contractual performance impossible; and (2) that the event actually prevents performance of the agreement in question.

It should be noted that while not intended to be universally applicable, a definition of force majeure, which might be looked to in order to argue what might be considered a force majeure event, can be found in two sections of the Hawaii Revised Statutes ("H.R.S.") as follows:

CHAPTER 182 - RESERVATION AND DISPOSITION OF GOVERNMENT MINERAL RIGHTS

H.R.S. §182.1 – Definitions

"Force majeure" means any fire, explosion, flood, volcanic activity, seismic or tidal wave, mobilization, war (whether declared or undeclared), act of any belligerent [of] any such war, riot, rebellion, the elements, power shortages, strike, lock-out, difference of workers, any cause which prevents the economic mining of the lease, or any other cause beyond the reasonable control of the party affected, whether or not of the nature or character hereinabove specifically enumerated.

CHAPTER 209E - STATE ENTERPRISE ZONES

H.R.S. §209E-2 -Definitions.

"Force majeure event" means an event, including damaging weather or natural disasters such as epidemic disease, pest outbreak, high wind, thunderstorm, hailstorm, tornado, fire, flood, earthquake, lava flow or other volcanic activity, drought, tidal wave, hurricane, or without limiting or restricting the foregoing in any way, any event reasonably beyond the control of, and not attributable to neglect by, an agricultural business.

3. Scope of Relief

There is no case law in Hawaii which defines generally the scope of relief available when invoking a force majeure clause. Obviously, the first place to look in order to define the scope of relief available is the clause the party seeks to invoke. Does the clause merely permit a delay in performance until the force majeure event passes, or does the occurrence of the event, allow the invoking party to terminate the contract either immediately or after a certain amount of

time has passed? Consistent with the application of general contract principles discussed above, Hawaii courts would likely enforce the clause in accordance with its plain ordinary meaning.

Absent specific language in the force majeure clause defining the relief available when invoked, and given the absence of Hawaii case law on the subject of force majeure clauses generally, Hawaii courts often look to the Restatement (Second) of Contracts for guidance. As the Court in *OWBR LLC*, supra, noted, although the Restatement of Contracts does not specifically address force majeure clauses, § 261 does provide for discharge of contractual duties by reason of supervening impracticability in those cases 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. *Id.* at 1222.

4. Other Considerations

In those cases where the force majeure event is either vaguely described (i.e. “Acts of God”) or undefined, one party might attempt to invoke the rule of contract interpretation that any ambiguities in a contract should be construed against the drafter. That principle would likely be of little use in the commercial context because under Hawaii law, , “when the contract has been negotiated between two parties of equal sophistication and equal bargaining power, the rule of interpreting ambiguities against the drafter has been held inapplicable.” See *Amfac, Inc. v. Waikiki Beachcomber Inv. Co.*, 74 Haw. 85, 839 P.2d 10, 25 n. 5 (1992).

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.