STATE OF LOUISIANA FORCE MAJEURE LAW COMPENDIUM

(during COVID-19 pandemic)

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A. Introduction

This memorandum will seek to provide Louisiana 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 Louisiana

1. Introduction

Louisiana law is derived from the French civilian tradition. The jurisprudence uses the concepts of *cas fortuit* (fortuitous event) and *force majeure* (irresistible force) interchangeably. "Force majeure" is an event or effect that can neither be anticipated nor controlled. The Louisiana Civil Code defines a "fortuitous event" as "one that, at the time the contract was made, could not have been reasonably foreseen." La. Civ. Code art. 1875. Such events include acts of nature such as floods and hurricanes, and the term is essentially synonymous with the common law concept of an 'act of God,' although the term has been expanded to include man-made events such as strikes, terrorist attacks, computer hacking, and governmental acts.

Undoubtedly, the COVID-19 pandemic has affected the ability of contracting parties to perform their contractual obligations. Force majeure clauses, common in many contracts,[1] may excuse the nonperformance or delay in performance in certain instances. Moreover, the Louisiana Civil Code provides that "[a]n obligor is not liable for his failure to perform when it is caused by a fortuitous event that makes performance impossible." La. Civ. Code art. 1873.[2] Thus, in Louisiana, a "force majeure" defense may arise through a contractual provision or by operation of law.

2. Requirements to Obtaining Relief Using Force Majeure

To obtain relief through the force majeure defense, the obligor must prove that the fortuitous event rendered performance impossible. Although "impossibility of performance" has evolved to include the concept of "impracticability of performance" in contracts for the sale of goods, which discharges performance obligations when basic assumptions on which the contract was made no longer exist, as a practical matter, courts have concluded that relief based on impracticability will be afforded only in situations that meet the strict requirements for impossibility. Louisiana's strict requirement of "impossibility of performance" is particularly germane in the context of the COVID-19 pandemic, which may delay performance rather than render performance absolutely "impossible."

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[1] A contract gives rise to an obligation, which is a legal relationship whereby one party (the obligor) is bound to render performance in favor of another (the obligee). La. Civ. Code art. 1756.

[2] "Force majeure" does not relieve an obligor (1) who "assumed the risk of such fortuitous event," (2) who was put in default before the fortuitous event, or (3) if the obligor's fault preceded the fortuitous event and failure to perform would not have occurred but for the obligor's fault. La. Civ. Code art. 1873.

No Louisiana court has considered a force majeure clause or the statutory defense of impossibility of performance in the context of a worldwide pandemic. Thus, whether the COVID-19 pandemic and resulting closures and government restrictions constitute a force majeure is yet to be determined. One consideration that drives this determination is the language of the force majeure provision, if one exists. Many contractual force majeure provisions include "epidemics,"[3] which would arguably include the COVID-19 pandemic. Government orders or restrictions, civil authority, "executive or administrative orders or acts", and catch-all provisions[4] could also trigger a force majeure clause in the context of the COVID-19 pandemic.

However, the party claiming the defense must also prove that performance under the contract was truly "impossible" because of the COVID-19 pandemic. Louisiana caselaw evidences that this is an onerous burden; as the Louisiana Supreme Court concluded almost one century ago, "[t]he nonperformance of a contract is not excused by a fortuitous event where it may be carried into effect, although not in the manner contemplated by the obligor at the time the contract was entered into."[5] Thus, nonperformance is not excused if other reasonable alternatives to performance exist.

Moreover, an obligor is not relieved of his duty to perform by the mere fact that performance has been made more difficult or burdensome by the fortuitous event. Rather, "the fortuitous event must pose an insurmountable obstacle in order to excuse the obligor's nonperformance."[6] At least one Louisiana court has held that adverse economic conditions and modifications in governmental regulations and policy which tend to render performance burdensome and unprofitable do not constitute force majeure.[7]

The Louisiana courts' reluctance to excuse contractual performance under force majeure provisions became evident following Hurricane Katrina. For example, in *Associated Acquisitions, L.L.C. v. Carbone Properties of Audubon, LLC, et al.*,[8] Carbone Properties of Audubon ("CPOA"), began construction of a hotel on its historic property in 2004 and entered into a contract with Associated Acquisitions ("AA") to purchase AA's 11% ownership in CPOA. As construction costs increased, CPOA encountered financing problems with its lender. When Hurricane Katrina hit in August of 2005, the construction loan and hotel franchise agreement were terminated. CPOA thus sought to cancel its contract with AA for purchase of the shares. The Court reasoned that "agreements legally entered into have the effect of law for the parties and must be performed in good faith, thus, 'it follows that a party is obliged to perform a contract entered into by him if

[3] *Hanover Petroleum Corp. v. Tenneco Inc.*, 521 So.2d 1234, 1237 (La. App. 3 Cir. 4/11/88).

[4] Common catch-all provisions contain language similar to "and any other causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension *and which by the exercise of due diligence such party is unable to prevent or overcome.*" *Ergon-West Virginia, Inc. v. Dynegy Marketing & Trade*, 706 F.3d 419, 423 (5th Cir. 1/22/13).

[5] *Dallas Cooperage & Woodenware Co. v. Creston Hoop Co.,* 161 La. 1077, 109 So. 844, (La.1926).

[6] Saúl Litvinoff, Louisiana Civil Law Treatise: The Law of Obligations, § 16.17, at 476 (2nd ed.2001).

[7] *Hanover Petroleum Corp. v. Tenneco Inc.*, 521 So.2d 1234, 1240 (La. App. 3 Cir. 4/11/88).

[8] *Associated Acquisitions, L.L.C. v. Carbone Properties of Audubon, LLC, et al*., 2007-0120 (La. App. 4 Cir. 7/11/07), 962 So.2d 1102.

performance be possible at all, and regardless of any difficulty he might experience in performing it.'"[9] Thus, CPOA was bound by its contract with AA, because although Hurricane Katrina was a "fortuitous event" that made performance more burdensome, CPOA's performance was not made impossible by the hurricane.[10]

3. Scope of Relief

The doctrine of impossibility excuses both parties from performance if the contracted-for performance has become impossible because of some event or changed circumstance that is not the fault of either party. The scope of relief available is codified by the Louisiana Civil Code. "When the entire performance owed by one party has become impossible because of a fortuitous event, the contract is dissolved. The other party may then recover any performance he has already rendered." La. Civ. Code art. 1876. If the fortuitous event has made a party's performance impossible in part, "the court may reduce the other party's counterperformance proportionally, or, according to the circumstances, may declare the contract dissolved." La. Civ. Code art. 1877. If the fortuitous event occurs after one party has performed in part and the contract is dissolved, "the obligee is bound but only to the extent that he was enriched by the obligor's partial performance." La. Civ. Code art. 1878.

The COVID-19 pandemic and resulting government-ordered closures and stay-at-home orders have undoubtedly prevented timely performance without necessarily making performance an absolute impossibility. Such is the case when a fortuitous event is of limited duration, temporarily preventing performance, without destroying the means for performing under the contract. If the delayed performance is still useful to the obligee, then the obligor remains bound to perform once the barrier to performance ceases to exist, and the obligor would owe no damages for the delay caused by the COVID-19 pandemic. Determining when the fortuitous event no longer poses a barrier to performance is a pivotal question, which may have to be determined at trial.

4. Other Considerations

All parties to a contract are obligated to perform in good faith. La. Civ. Code art. 1983. The effects of the COVID-19 pandemic are worldwide and have resulted in government shutdowns, stay-at-home orders, and limits on resources. This unique situation presents an opportunity for contracting parties to negotiate an amicable resolution to performance delays and nonperformance. Ultimately, whether nonperformance is excused by a force majeure clause or operation of law depends on the facts of each case, whether performance was truly impossible, the language bargained for in the contract, and the intent of the parties to the original contract.

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[9] *Id.* at 1107 (citing *Picard Const. Co. v. Bd. Of Com'rs of Caddo Levee Dist.,* 161 La. 1002, 109 So. 816, 818 (La.1926)).

[10] See also *Payne v. Hurwitz*, 2007-0081 (La. App. 1 Cir. 1/16/08), 977 So. 2d 1000 (Fact that area was hit by a hurricane did not relieve home owner of obligation to sell home pursuant to contract executed one week prior to Hurricane Katrina).

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