



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

Prepared by

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A. Introduction

This memorandum will seek to provide an Oklahoma Exemplar for the USLAW Compendium of Law on Relevant considerations with respect to invoking “force majeure” clauses in contracts in light of the ongoing pandemic of COVID-19.

B. Force Majeure in Oklahoma

1. Introduction

In general, a force majeure clause is one which provides that a party that has been unable to perform under a contract due to the occurrence of certain events outside of its control (such as wars, change in laws, or natural disasters) may suspend or terminate its performance. The clauses typically have the effect that the party will not be liable for costs/damages due to the lack of performance caused by the enumerated event.

Black’s Law Dictionary explains that a force majeure clause “is meant to protect the parties in the event that a contract cannot be performed due to causes which are outside the control of the parties and could not be avoided by exercise of due care.” Force majeure clauses allocate risk between the parties when an unanticipated event makes performance impossible or impracticable.

In the absence of any force majeure clause in a contract, the party seeking relief will likely be left to related but conceptually distinct legal theories including impracticability or frustration of purposes under the common law, or, if applicable, other UCC provisions.

2. Requirements to Obtaining Relief Using Force Majeure

Oklahoma does not have a robust body of pertinent force majeure law with which to consult. Perhaps unsurprisingly, the bulk of the cases decided in Oklahoma pertain to oil and gas contracts. Indeed a common theme of the sparse case law is the largely consistent rejection by courts of petrochemical industry parties’ attempts to use force majeure clauses, or related theories, to change or escape their contractual duties when the market prices related to this volatile industry fluctuate unpredictably.

Oklahoma’s force majeure law is, at base, a simple common law contractual endeavor. The parties include some manner of force majeure clause within their written contract, and the court interprets the clause upon dispute, guided by prior decisions in analogous cases. As in any contract matter, strict compliance with the technical requirements of the contract may be necessary for a party to invoke a force majeure clause. Typically, a contract requires prompt notice of a claim of force majeure. Several courts have refused parties’ force majeure claims when they failed to provide adequate notice under the contract. *See, e.g., Three RP Limited Partnership v. Dick’s Sporting Goods, Inc.*, 2019 WL 573413 (E.D. Okla. Feb. 12, 2019), *quoting Sabine Corp. v. ONG Western, Inc.*, 725 F. Supp. 1157, 1168 (W.D.Okla.1989) (“failure to give proper notice is fatal to a defense based upon a *force majeure* clause requiring notice”).

Without, though, a significant body of case law to refer to, Oklahoma courts often turn to terms of the UCC for guidance in cases directly involving or invoking the specter of force majeure principles. Both the Oklahoma and Official Code Comments to 12A O.S.1981 § 2–615 make explicit that (absent, perhaps, a strong textual indication to the contrary) there is no excuse of performance by failure of presupposed condition where the rationale is simply that the performance becomes more expensive. Official Code Comment four to the section states: “Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. Neither is a rise or collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices intended to cover....” Oklahoma courts have tended to take this principle seriously. *See, e.g., Golsen v. ONG W., Inc.*, 1988 OK 26, 756 P.2d 1209.

The party seeking to assert the force majeure clause typically has the burden of proving its applicability, including that the event was beyond its control and without its fault or negligence. While this burden will likely not be difficult where the contract lists specific events like viruses, epidemics or pandemics, the analysis may become more complicated when the force majeure clause is not explicit and simply uses the term “act of God,” which is boilerplate language in many force majeure clauses. One court in Oklahoma has observed that unless the force majeure clause so states, an event of force majeure does not necessarily have to be “unforeseeable.” Rather “the focus of the clause is upon a party’s ability to control rather than its ability to foresee the alleged cause.” *Sabine Corp. v. ONG W., Inc.*, 725 F. Supp. 1157, 1170 (W.D. Okla. 1989).

3. Scope of Relief

In Oklahoma, a force majeure clause “like any other contractual provision” should be “construed... in light of ‘the contractual terms, the surrounding circumstances, and the purpose of the contract.’” *Grindstaff v. Oaks Owners’ Ass’n, Inc.*, 2016 OK CIV APP 73, ¶ 40, 386 P.3d 1035, 1045 (citation omitted).

The sales article of the Uniform Commercial Code has been said to represent the “policy of law in this State” by the Oklahoma Supreme Court. *Golsen v. ONG W., Inc.*, 1988 OK 26, 756 P.2d 1209, 1212–13. Authority regarding the UCC provisions pertaining to excuses of performance and measure of damages, even if from out of the jurisdiction, could thus prove useful in an Oklahoma dispute that touches on force majeure or other “excuse” from performance issues. *See, e.g.*, 12 Okla. Stat. 2-615, 2-706, 2-708.

4. Force Majeure and COVID-19

The COVID-19 pandemic may be a triggering event for force majeure but it has yet to be determined if the courts will consider the pandemic an “act of God,” if that is the sole clause in the overall force majeure language of a contract possible to invoke. If the contract has broad language related to force majeure, it seems likely that COVID-19 will be a covered event. Informed speculation suggests the effective date for invoking the clause may relate back to March 11, 2020, when the World Health Organization declared a pandemic.

Force majeure applicability is often a close call in weather-related natural disasters—the geographic scope and actual impact on the stream of commerce of a storm is often debatable—a pandemic resulting in mass closures of all public events and schools does not seem like it should be a close call. This is not a normal risk of doing business. However, the particulars of a given dispute will undoubtedly be key, in addition, of course, to the nature of the contractual language and breadth of the force majeure clause. It should be noted that Oklahoma law does require the mitigation of damages, and many businesses can continue to operate at some, if not full, capacity.

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.