STATE OF TEXAS FORCE MAJEURE LAW COMPENDIUM

(during COVID-19 pandemic)

Prepared by

"Trey" B.G. Sandoval III
MEHAFFYWEBER PC
500 Dallas, Suite 1200
Houston, Texas 77002
713.655.1200
TreySandoval@mehaffyweber.com
www.mehaffyweber.com

Michael P. Sharp
Timothy R. George
FEE SMITH SHARP & VITULLO LLP
Three Galleria Tower
13155 Noel Road, Suite 1000
Dallas, Texas 75240
214.934.9100
msharp@feesmith.com
tgeorge@feesmith.com
www.feesmith.com

2020

A. Introduction

As individuals and businesses confront the impact of the novel coronavirus (COVID-19), performance of contracts agreed to before the pandemic emerged may be difficult, and sometimes impossible. In such cases it may be possible to avoid breach of contract liability in Texas pursuant to the doctrine of force majeure, or the related doctrine of impossibility of performance, but it is not easy to do so and each situation must be closely examined as to its specific facts. This memorandum sets out the basic principles of these defenses in Texas.

B. Force Majeure in Texas

1. Introduction

No Texas court appears to have examined a force majeure defense in the context of a pandemic like the one at issue. Generally, however, a force majeure defense in Texas is a creature of contract and must be based on a specific contractual provision agreed to by the parties. *See Zurich Am. Ins. Co. v. Hunt Petroleum (AEC), Inc*., 157 S.W.3d 462, 466 (Tex. App.—Houston [14th Dist.] 2004, no pet.) ("[r]egardless of its historical underpinnings, the scope and application of a force majeure clause depend on the terms of the contract"); *Sun Operating Ltd. P'Ship v. Holt*, 984 S.W.2d 277, 283 (Tex. App.—Amarillo 1988, pet. denied) (force majeure is just a "a descriptive phrase" since "its scope and application, for the most part, is utterly dependent upon the terms of the contract in which it appears"). Moreover, there is no single "standard" force majeure clause in Texas. While a force majeure clause may be found in some "standard" terms and conditions of a certain contracts, they remain subject to negotiation like any other term. The iterations of specific events of force majeure can vary widely, particularly between industries, and we anticipate these clauses will be incorporated more often after this pandemic.

2. Requirements to Obtaining Relief Using Force Majeure

(a) A Force Majeure Defense is Dependent on Specific Contract Language

Thus, obtaining relief using force majeure in Texas begins with an analysis of the contract provision at issue, if there is one. Most force majeure provisions will contain a definition and an enumerated list of events that the parties have agreed are force majeure events. The parties may also have included specific limitations, such as the event must have been beyond the reasonable control of the affected party and/or not foreseeable at the time of execution of the contract. Whatever the provision at issue, a court in Texas will attempt to give effect to the intent of the parties as expressed by the agreement itself.

At the present time, it is doubtful that many contracts will have specific provisions anticipating a pandemic or quarantine event, but parties may have agreed to classify an "act of God" or an "act of governmental authority" as a specified force majeure event. Such a lack of specificity, however, raises additional questions. Under Texas law, for example, an "act of God" is one that

has not been caused or contributed to by human intervention. *See, e.g., Dillard v. Tex. Elec. Co-op*., 157 S.W.3d 429, 432 n.5 (Tex. 2005) (defining an "act of God" as an occurrence "caused directly and exclusively by the violence of nature, without human intervention or cause, and could not have been prevented by reasonable foresight or care"). It is not easy to predict how this precedent will be applied to a pandemic event, considering the human elements involved in both virus transmission and the governmental response. Likewise, reliance upon an "act of governmental authority" might also be problematic, in that its application may depend upon how closely a failure to perform can be tied to a specific order or orders. A failure to perform due to general market conditions is not enough. *See, e.g., Huffines v. Swor Sand & Gravel Co.,* 750 S.W.2d 38, 40 (Tex. App—Fort Worth 1988, no writ) ("contractual obligations cannot be avoided simply because the obligor's performance has become more economically burdensome than anticipated").

(b) Use of a "Catch-All" Provision May Require an Unforeseeable Event

In addition to specific phrases and enumerated events, a contract may include what can be referred to as "catchall" force majeure provision which, for example, may define a force majeure event to include "any event beyond the reasonable control of the affected party" or something similar. In such cases, as with any other contractual or statutory analysis, the exact wording of the clause, where it is placed in the force majeure provision, and what types of items are also in the list may be important. In addition, however, at least one Texas court has held that a party must also demonstrate that a specific incident falling within the catch-all language was not foreseeable. In *TEC Olmos, LLC v. ConocoPhillips Co*., the court reasoned that, if an event is foreseeable, parties have the ability to protect themselves through explicit reference to the event in the force majeure provision, but when the alleged event is not listed "it is unclear whether a party has contemplated and voluntarily assumed the risk." 555 S.W.3d 176, 184 (Tex. App—Houston [1st Dist.] 2018, pet. denied), (finding that a market downturn in the oil and gas industry was not an unforeseen event that excused performance of a drilling contract).

(c) The Burden is On the Party Seeking to Avoid Performance

If a contractual force majeure provision exists, of whatever type, the burden in Texas is on the party seeking to avoid performance to specifically plead and prove its application as an affirmative defense. This must include proof that the clause applies to the event in question, that the event was beyond the party's control and without its fault or negligence, and that performance of its contractual obligations has been entirely prevented by the event (as opposed to simply more economically burdensome). *SeeSun Operating Ltd. P'Ship*, 984 S.W.2d at 289-290; *Huffines*, 750 S.W.2d at 40.

3. Scope of Relief

As with its application generally, the scope of relief provided by a force majeure defense in Texas is also dependent upon the specific language of the contract at issue. Some contracts, for

example, may provide that an enumerated event excuses a party's failure to perform entirely, while in another it may simply justify a delay without penalty. Generally, a force majeure clause will allow a party to suspend its performance during the time of the force majeure event, provided that the party makes a good faith effort to continue to perform and begins performance as soon as is possible.

C. Other Considerations and Possible Defenses

If there is no force majeure provision in the contract at issue, then technically there is no force majeure defense in Texas. *See, e.g., Railroad Comm'n of Texas v. Coppock*, 215 S.W.3d 559, 566-67 (Tex. App.—Austin 2007, pet. denied) (parties not permitted to assert principles of force majeure where there are no force majeure provisions present for the Court to interpret). But there are related defenses which could be applicable in the absence of a contractual provision.

1. Tex. Bus. & Com. Code § 2.615

In connection with contracts for the sale of goods to which the Uniform Commercial Code is applicable, the Texas Business and Commerce Code excuses performance (upon reasonable notice) that is "made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order...." Tex. Bus. & Commerce Code **§ 2.615.**

This provision is not significantly discussed in Texas case law, but a comment to the Uniform Commercial Code provision upon which Section 2.615 is based specifically states that, although a "collapse in the market in itself" is not an excuse for nonperformance, "a severe shortage of raw materials or of supplies due to a contingency such as … unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance, is within the contemplation of this section." *See* U.C.C. § 2-615, at comment 4.

Note, however, that if there is a force majeure clause in an applicable contract, courts may be reluctant to reform the parties' agreement by applying Section 2.615 instead. *See, e.g., PPG Indus., Inc. v. Shell Oil Co*., 919 F.2d 17, 18-19 (5th Cir. 1990) (holding that the parties' written force majeure provision overrode Section 2.615, citing Tex. Bus. & Com. Code § 1.102(c) which permits parties to "determine the standard by which the performance of [contractual obligations] is to be measured if such standards are not manifestly unreasonable").

2. Impossibility of Performance

More generally, in the absence of a contractual force majeure provision it may be possible to invoke Texas common-law regarding the defense of impossibility or impracticability of performance. Under the impossibility defense, a party's performance is excused if made impracticable by the occurrence of an unforeseeable event, the non-occurrence of which was a

basic assumption on which the contract was made. This doctrine is also known as the defense of "supervening impossibility," and can apply when circumstances arise that make a party's performance under the contract impossible or impracticable. *SeeCentex Corp. v. Dalton*, 840 S.W.2d 952, 954 (Tex. 1992).

Generally, the impossibility defense applies in connection with the death or incapacity of a person necessary for performance. *See Key Energy Servs., Inc. v. Eustace*, 290 S.W.3d 332, 340 (Tex. App.—Eastland 2009, no pet.). But an impossibility defense can also include "a governmental regulation or order that makes impracticable the performance of a duty…" *Centex Corp.,* 840 S.W.2d at 954 (Centex' duty to perform under a letter agreement with Dalton was excused when the Bank Board issued a cease and desist order prohibiting Centex from paying fees to Dalton under the agreement).

Impossibility of performance is not an excuse, however, "if the impossibility might have reasonably been anticipated and guarded against in the contract." *Metrocon Const. Co. v. Gregory Const. Co.*, 663 S.W.2d 460, 462 (Tex. App.—Dallas 1983, writ ref'd n.r.e.); *Huffines*, 750 S.W.2d at 40. Similarly, a party seeking to excuse its failure to perform must not be at fault. *See Samson Exploration, LLC v. T.S. Reed Props., Inc*., 521 S.W.3d 26, 44-45 (Tex. App.—Beaumont 2015), *aff'd* 521 S.W.3d 766 (Tex. 2017).

As with the potential application of Section 2.615, a common law impossibility defense is more likely to apply in the complete absence of a force majeure provision. Otherwise, a Texas court may feel bound to interpret and enforce the parties' actual agreement. *See, e.g., Sun Operating Ltd. P'Ship*, 984 S.W.2d at 283 ("when the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure").

D. Conclusion

While force majeure and/or impossibility of performance defenses seem appropriate to invoke in the face of a global pandemic and unprecedented governmental shutdown orders, courts in Texas will pay close attention to the specific language in the force majeure provision, if there is one, and the facts at issue. Neither doctrine excuses nonperformance simply because things get harder or more expensive, but only when performance is essentially impossible due to circumstances outside the party's control. Whether the COVID-19 pandemic and accompanying governmental orders excuse performance, therefore, will likely be a case-by-case determination involving factors such as the industry in question and the specific intervening event.

Going forward, of course, a pandemic like this one is arguably no longer unforeseeable, and thus new contracts should define force majeure to specifically include "pandemic," "quarantine," and similar terms in any enumerated list of events. Finally, how public policy considerations will impact the judicial analysis of force majeure clauses remains to be seen. The

law is developed with the benefit of hindsight, and it is uncertain how and when the pandemic will end.

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.