

Additional Insights on Force Majeure Under Texas Law

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PRACTICES Construction Litigation, Procurement and Supply Chain Management, Outsourcing Transactions, Energy Litigation, Project Finance and Development, Franchise and Distribution, Insurance Recovery, Litigation

As individuals, businesses, and governments continue to take actions to mitigate or contain the worldwide impact of the novel coronavirus (COVID-19), it is likely that performance of contracts agreed to long before the emergence of the pandemic will become difficult, if not entirely impossible. This raises the question of how does a person avoid breach of contract liability when such a breach is through no fault of their own? Fortunately, Texas law may provide the ability to excuse such breaches in certain situations pursuant to the doctrine of force majeure and equivalent principles under common and statutory law.

The Contract Controls the Applicability of Force Majeure

A party to a contract can assert – as an affirmative defense – the existence of a force majeure clause in the contract that excuses the party’s alleged failure to perform. *Hydrocarbon Mgmt., Inc. v. Tracker Exploration, Inc.*, 861 S.W.2d 427, 436 (Tex.App.—Amarillo 1993, no writ). The purpose of a force majeure clause in a contract is to excuse a party from non-performance of obligations when the non-performance is caused by circumstances beyond the reasonable control of the party. *Id.* at 435-36. Therefore, in theory, if performance of a contract is not possible due to circumstances created by or related to the COVID-19 pandemic, a force majeure provision in the contract may excuse failure to perform.

However, Texas law does not provide one universally accepted definition of force majeure. *Sun Operating Ltd. P’Ship v. Holt*, 984 S.W.2d 277, 283 (Tex.App.—Amarillo 1988, pet. denied) (“Force majeure, is [] little more than a descriptive phrase without much inherent substance. Indeed, its scope and application, for the most part, is utterly dependent upon the terms of the contract in which it appears”). Instead, courts will rely on the parties’ contract to determine whether a specific event rises to the level of force majeure. *Zurich Am. Ins. Co. v. Hunt Petroleum (AEC), Inc.*, 157 S.W.3d 462, 466 (Tex.App.—Houston [14th Dist.] 2004, no pet.) (“Regardless of its historical underpinnings, the scope and application of a force majeure clause depend on the terms of the contract”). In ascertaining whether a force majeure provision applies, a Court’s primary concern is to ascertain the true intent of the parties as expressed in the contract. *Allegiance Hillview, L.P. v. Range Texas Prod., LLC*, 347 S.W.3d 855, 865 (Tex.App.—Fort Worth 2011, no pet.).

There is no such thing as a uniform example of a force majeure clause, however they typically contain a list of specific events that will trigger force majeure (fire, storms, acts of God, orders by governmental authorities, etc.). For example, the force majeure provision in a natural-gas supply contract was properly invoked when gas-production platforms and pipelines were destroyed by Hurricanes Katrina and Rita. *Virginia Power Energy Mktg., Inc. v. Apache Corp.*, 297 S.W.3d 397, 403 (Tex.App.—Houston [14th Dist.] 2009, pet. denied). Similarly, performance under a mineral lease was excused when a force majeure provision included failure to comply caused by a Federal or State law or regulation as a possible event, and the Texas Railroad Commission issued shut-in orders that precluded the production of gas. *Frost Nat’l Bank v. Matthews*, 713 S.W.2d 365, 368 (Tex.App.—Texarkana 1986, writ ref’d n.r.e.). However, a party should take care to ensure that any

non-performance caused by COVID-19 was not within its reasonable control. See, e.g., *Hydrocarbon Mgmt.*, 861 S.W.2d at 436-37 (force majeure clause found to be inapplicable when defendant's failure to comply with Texas Railroad Commission requirement, which resulted in shut-in order that prevented defendant from performing under oil and gas lease, was found to be "within the reasonable control" of defendant).

Catch-All Force Majeure Language Requires Unforeseen Events

It is unlikely – outside of the most prepared parties – that the force majeure provision in your contract specifically references global pandemics as an excuse for performance. If any incident related to COVID-19 does not fit into one of the specific incidents of force majeure outlined in the agreement, one may have to rely on catch-all language in the provision to excuse performance. In this event, a Texas court has recently held that a party must not only demonstrate that the incident in question falls into the catch-all language of the force majeure provision, but that the event in question was not foreseeable by the parties when the contract was agreed to. *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 182-83 (Tex.App.—Houston [1st Dist.] 2018, pet. denied). If an event is foreseeable, parties have the ability to protect themselves through explicit reference to the event in the force majeure provision. However, when the alleged force majeure event is not listed "it is unclear whether a party has contemplated and voluntarily assumed the risk." *Id.* at 184. Therefore, the Court found that a market downturn in the oil and gas industry was not an unforeseen event that excused the party's failure to begin performing under a drilling contract. *Id.* While it would be unexpected for a court to conclude something similar regarding the events surrounding the COVID-19 pandemic, one should be prepared to demonstrate that the parties did not foresee such events occurring.

Common Law Impossibility is an Alternative Argument if No Force Majeure Clause is Present

In the event that there is no force majeure provision in the contract (or if no written form of the agreement exists), then it will not be possible to assert a force majeure defense, and other doctrines must be asserted to excuse performance. See, e.g., *Railroad Comm'n of Texas v. Coppock*, 215 S.W.3d 559, 566-67 (Tex.App.—Austin 2007, pet. denied) (appellees not permitted to assert principles of force majeure doctrine where there are no force majeure provisions present for the Court to interpret). Once such alternative argument under Texas common law is the affirmative defense of impossibility of performance.

Typically, the defense of supervening impossibility is applied when circumstances arise – such as a change in the law or court order – that make a party's performance under the contract impossible or impracticable. See *Centex Corp. v. Dalton*, 840 S.W.2d 952, 954 (Tex. 1992) (Centex's duty to perform under letter agreement with Dalton excused when Bank Board issued cease and desist order prohibiting Centex from paying fees to Dalton under the letter agreement). However, Courts have held that impossibility of performance is not an excuse "if the impossibility might have reasonably been anticipated and guarded against in the contract." *Metrocon Const. Co., Inc. v. Gregory Const. Co., Inc.*, 663 S.W.2d 460, 462 (Tex.App.—Dallas 1983, writ ref'd n.r.e.), citing *Kolterman v. Underream Piling Co.*, 563 S.W.2d 950 at 957 (Tex.Civ.App.—San Antonio 1977, writ ref'd n.r.e.) ("act of God" in the form of high winds causing masonry wall to collapse was not legal excuse for failure to perform). If the terms of a contract are absolute, and a party fails to take adequate measures to protect itself in the contract against a foreseeable impossibility, the defense of impossibility of performance is not available. *Huffines v. Swor Sand & Gravel Co., Inc.*, 750 S.W.2d 38, 40 (Tex.App.—Fort Worth 1988, no writ). Furthermore, a party seeking to excuse its failure to perform must also demonstrate that they are without fault. For example, an operator of two pooled gas units was not allowed to assert the doctrine of impossibility against a breach of

contract claim for failing to properly attribute production from certain wells to the units, because the conditions frustrating the operator's performance were wholly based on its own fault in creating overlapping pools. *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).

Whether an intervening event caused by COVID-19 would be considered reasonably anticipated or could have been guarded against in a contract will likely be a case-by-case determination involving factors such as the industry in question and the specific intervening event. The party seeking to excuse performance should be prepared to present evidence that shows the act in question was not contemplated by the parties at the time the contract was executed.

Contracts for Sales of Goods May Find Further Relief Under the Texas Business and Commerce Code

If the contract in question deals with the sale of goods, another alternative to force majeure language can be found in Article 2 of the Uniform Commercial Code, codified in Texas under Chapter 2 of the Texas Business and Commerce Code. For such contracts, a party could potentially argue that any alleged failure to perform is excused by Section 2.615 of the Texas Business and Commerce Code, which notes that delay in delivery or non-delivery by a seller is not a breach of the contract if performance “has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made.” TEX. BUS. & COM. CODE §2.615(1). If such a contingency occurs, the seller must have provided reasonable notice to the buyer that there will be a delay or non-delivery. TEX. BUS. & COM. CODE §2.615(3). In addition, in the event the seller has the capacity to partially deliver some of the goods promised under the contract, and has contractual obligations to deliver the product to other parties, excuse of non-performance under Section 2.615 is permitted only if the available products are allocated among the sellers' customers in a manner which is fair and reasonable. TEX. BUS. & COM. CODE §2.615(2).

The case law related to excusing performance under Section 2.615 is relatively undeveloped when it comes to dealing with extraordinary circumstances such as hurricanes or pandemics. Any potentially analogous interpretations have been avoided by Courts because they've been able to point to force majeure language in the contract that obviates the need to invoke the statute. See *PPG Indus., Inc. v. Shell Oil Co.*, 919 F.2d 17, 18-19 (5th Cir. 1990) (rejected appellant's argument that Section 2.615 imposes a requirement that all force majeure events be beyond the parties' reasonable control by holding that the parties' written force majeure provision overrode any requirements imposed by the statute). However, in the event that the sales contract in question lacks any explicit force majeure provision, the statute may present an alternative opportunity to excuse performance.