Articles + Publications | March 20, 2020

Locke Lord QuickStudy: Pulling the Trigger on Force Majeure: A Texan Perspective on COVID-19 and an Oil Price War

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Force majeure is a doctrine that excuses performance under a contract when a supervening event prevents that performance. In recent days, COVID-19 has caused many executive and in-house lawyers to examine their contractual force majeure provisions with an idea to their application, breadth, and effect in the face of potential commercial impacts caused by a pandemic — something rarely considered when drafting contracts. At the same time, many in the energy business are also looking for contractual relief in the face of steep commodity price declines ?related not only to the COVID-19 pandemic but the Saudi-Russia price war as well.?

This Quick Study assumes Texas law, which relies little on the common law force majeure, instead focusing on the parties' contract. The force majeure analysis begins and frequently ends with the language in the parties' contract, which typically answers the key questions: what conditions qualify for force majeure treatment, what must a party do to satisfy those conditions, exactly what performance is excused, and for how long.

A. Does your force majeure clause apply?

Texas law does not provide for a boilerplate, standard force majeure clause, because like many other contract clauses, the specific language is subject to the parties' negotiations. While a typical force majeure clause provides that events beyond the non-performing party's control that delay or prevent performance excuse that performance, courts have turned away from the historical force majeure interpretations and instead look to the terms agreed upon by the parties. *See Zurich Am. Ins. Co. v. Hunt Petrol.(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 depends on the terms of the contract."); *see also Virginia Power Energy Mktg., Inc v. Apache Corp.*, 297 S.W.3d 397, 402 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) ("As we interpret the parties' contract, including the *force majeure* provisions, our primary concern is to determine the parties' intent.").

To determine whether an event triggered force majeure, you should first consider the clause's enumerated list of force majeure events. For example, many contracts specifically provide that certain events qualify as force majeure: fires, floods, named storms, acts of God, governmental orders, curtailments, wars, strikes, and rebellions are commonly included terms. In the context of COVID-19, typical potentially applicable language might include

"act of God," "governmental or regulatory orders," "governmental restrictions on performance," "pandemic," or "pathogen." The more specific the language, the more likely that the provision applies. *See Perlman v. Pioneer Ltd. Partnership*, 918 F.2d 1244, 1248 n.5 (5th Cir. 1990) ("Force majeure is therefore, not a fixed rule of law that regulates the content of all force majeure clauses, but instead is a term that describes a particular type of event, *i.e.*, an 'Act of God' which may excuse performance under the contract.").

Assuming that no force majeure clauses include "COVID-19," and few include "pandemics" or "global pathogens," you may be looking to "act of God" and "governmental regulation/restriction" as the applicable provisions. Texas courts tend to find that an "act of God" arises exclusively from natural forces, events, or causes. *See McWilliams v. Masterson*, 112 S.W.3d 314, 320 (Tex. App.—Amarillo 2003, pet. denied) ("[A]n event may be considered an act of God when it is occasioned exclusively by the violence of nature."); *see also* Black's Law Dictionary (10th ed. 2014) (defining "act of God" as "an overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado"). Generally, courts consider "acts of God" as those without "human intervention." *Travelers Ins. Co. v. Williams*, 378 S.W.2d 110, 113 (Tex. App.—Amarillo 1964, writ ref'd n.r.e.). Hurricanes and unprecedented floods are the types of natural, extraordinary events that typically constitute "acts of God." *See, e.g., HRD Corp. v. Lux Int'l Corp.* at *11–12 ??(S.D. Tex. July 17, 2007) ("[I]t is undisputed that Hurricane Katrina ?was an 'act of God.'"). But more mundane events such as "freezing weather" can also constitute "acts of God" depending on the circumstances. *Compare Tejas Power Corp. v. Amerada Hess Corp.,* 1999 WL 605550 (Tex. App.—Houston [14th], Aug. 12, 1999) (freezing weather was force majeure) *with Chronister Oil Co. v. Elleron Chem. Corp.,* 1986 WL 13445 (S.D. Tex. Nov. 21, 1986) (frozen river was not force majeure).

At present, it is unclear whether a Texas court would hold that COVID-19 is an "act of God," particularly because of the human element surrounding transmission of this virus. What makes the issue more complex is any subsequent government action could arguably preclude a party from invoking the defense because of this "human intervention." The contrary argument suggests that the incentive for government action arose solely from the "act of God," and therefore, the entire event constitutes force majeure. Of course, those very government actions may themselves constitute a basis for force majeure if the contract so provides.

Nor is "pricing fluctuation" or "market conditions" typically an enumerated force majeure event. After all, one of main reasons for a contract is to hold someone to their bargain in a changing market. But in *Kodiak 1981 Drilling P'shp v. Delhi Gas Pipeline Corp.*, 736 S.W.2d 715, 721 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.), the court found that a force majeure clause that included "partial or total loss of gas supply or market" applied to excuse the purchaser when prices cratered due to "an unprecedented combination of factors—a general economic recession, a plummeting crude oil price, weather conditions …." So again, take a close look at the enumerated events and see if one applies.

In addition to specific, enumerated force majeure events, many contracts include a "catchall" provision intended to capture unspecified events. These provisions generally contain language such as "other events beyond a party's reasonable control" or "any other similar cause" following the specific list of force majeure triggers. But given its more general nature, invoking a catchall provision may raise contract interpretation and foreseeability issues that relying on an enumerated event does not.

For example, it may be significant whether that catchall provision introduces a list of applicable events, or whether

it concludes the provision and follows a list of enumerated events. In the latter instance, Texas courts apply the doctrine of *ejusdem generis* to these catchall provisions, where "the latter must be limited to things like the former." *Ross v. St. Luke's Episcopal Hosp*., 462 S.W.3d 496, 504 (Tex. 2015); *Hilco Elec. Co-op., Inc. v. Midlothian Butane Gas Co., Inc.*, 111 S.W.3d 75, 81 (Tex. 2003) (noting that *ejusdem generis* confines words to their similar class meaning and prohibits expansion). In other words, the catchall cannot extend to events that are significantly dissimilar or greatly beyond the scope of the enumerated events. Similarly, the language "including but not limited to" versus simply "including" could lead to very different outcomes. *See, e.g., Eastern Air Lines v. McDonald Douglas Corp.,* 532 F.2d 957, 988 (5th Cir. 1976) (declining to apply *ejusdem generis* because contract included the "but not limited to" language).

In addition to interpretation issues, under Texas law, catchall provisions are subject to the requirement that the event be unforeseeable, while specifically enumerated events might not be similarly restricted. *See TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 184 (Tex. App.—Houston [1st Dist.] 2018, pet. denied); *see also generally Eastern Air Lines*, 532 F.2d at 1247-48. While epidemics and pandemics have certainly occurred with some regularity in the not too distant past (Ebola, H1N1, SARS and Zika to name a few), whether COVID 19 constitutes a force majeure event is uncertain and it may well depend on the specific business and circumstance. *See generally Rembrandt Enterprises, Inc. v. Dahmes Stainless, Inc.*, C15-4248-LTS, 2017 WL 3929308 (N.D. Iowa Sept. 7, 2017) (discussing whether poultry farmer's inability to perform the contract was self-inflicted given his facility's operations which may have exacerbated the Avian Flu outbreak). It is worth noting, however, that the director of the National Center for Immunization and Respiratory Diseases has described the event as an "unprecedented public health threat."[1]

There is much more clarity in the law regarding commodity price changes; "fluctuations in the oil and gas markets are foreseeable as a matter of law." *TEC Olmos,* 555 S.W.3d at 184; *Valero Transmission Co. v. Mitchell Energy Co.*, 743 S.W.2d 658, 663-64 (Tex. App.—Houston [1st Dist.] 1987, no writ). In *TEC Olmos*, the court refused to excuse a party that failed to drill under a farmout agreement when that party could not obtain financing due to falling oil prices. 555 S.W.3d at 184. And in *Valero*, the court held Valero to a long-term gas purchase agreement notwithstanding Valero's inability to control downstream prices in a falling market, noting that "the uncertainty of future market prices is often the motivation for entering into a long-term contract." 743 S.W.2d at 663. In one case quite similar to the present market, the court found that a drop in prices caused by Saudi Arabia's attempt to increase its share of the world oil market did not constitute force majeure under a catchall provision. *See Langham Hill Petroleum, Inc. v. S Fuels Co.*, 813 F.2d 1327, 1329 (4th Cir. 1987).

B. If your provision applies, what performance is excused?

Once you identify the relevant conditions, you have to determine what standard applies to measure diminished performance. Does the condition have to make performance illegal or impossible, or something less, such as delayed, hindered, or not "within reason?"

If the condition applies and meets the standard to excuse performance, then the party has to determine what the provision excuses. The typical provision excuses delayed performance during the period of delay caused by the force majeure event. Once the event ends, or the party is able to find a solution to the delay, the excuse ends and performance must continue. Force majeure provisions rarely completely excuse all performance, which would effectively terminate the contract.

C. How do you invoke force majeure?

But all of this careful analysis means little if you fail to give the notice required under the contract, when it is required. You should review your contact and comply with the agreed notice requirement. Contract terms define a party's notice requirements under force majeure. Whereas some contracts require notice within a specific timeframe (*e.g.*, "notice must be within 10 days of the event"), others employ more broad terminology (*e.g.*, "reasonable notice" or "prompt notice"). Determining when the event occurred could be a key issue surrounding COVID-19 because of the many factors affecting this pandemic, including but not limited to government "recommendations" versus "orders" and the timing of when the outbreak affected various regions. Supply chain disruptions in East Asia began weeks before governmental action in the United States began to impact daily life. Although Texas courts do not imply a diligence requirement in the scope of force majeure clauses, the parties may have contracted otherwise. *Sun Operating Ltd. Partnership v. Holt*, 984 S.W.2d 277, 284 (Tex. App.—Amarillo 1988, pet. denied). Acting diligently may mark the difference between incurring and avoiding liability because failure to provide proper notice according to contract terms precludes reliance on the force majeure clause. *See id.* ("[W]hen 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. What are the alternatives to force majeure?

If your contract does not include a force majeure provision, or if your force majeure provision is inapplicable under present circumstances, there may yet be relief available under common law contractual concepts that excuse performance. For example, COVID-19 may make performance impossible or commercially impracticable, which are more likely to lead to termination of the contract that would force majeure, which typically only delays performance.

Impossibility of performance is an affirmative defense that can excuse contractual ?performance. *See, e.g., FP Stores v. Tramontina US, Inc*., 513 S.W.3d 684, 693 (Tex. App.—?Houston [1st Dist.] 2016, pet. denied). The impossibility defense "has been referred to by ?Texas courts as impossibility of performance, commercial impracticability, and frustration of ?purpose," but there is no functional distinction between these doctrines. *Key Energy Services, ?Inc. v. Eustace*, 290 S.W.3d 332, 339-40 (Tex. App.—Eastland 2009, no pet.) (citing *Tractebel ?Energy Mktg., Inc. v. E.I. Du Pont de Nemours & Co.*, 118 S.W.3d 60, 64 n. 6 (Tex. App.—?Houston [14th Dist.] 2003, pet. denied). For clarity, these will universally be referred to as ??"impossibility," which appears to be the most common approach. *See id.?*

Impossibility applies when both parties held a basic (but unstated) assumption about the ?contract that proves untrue. *Tractebel Energy Mktg., Inc.*, 118 S.W.3d 60, 66. After ?performance is underway, supervening circumstances that make it impossible or impracticable ?to perform can excuse all remaining obligations, but only if the impediment was: (a) ?unforeseeable and, therefore, could not have been anticipated when the contract was executed, ?and (b) not created by that party's voluntary act. *See, e.g., Centex Corp. v. Dalton*, 840 S.W.2d ??952, 954 (Tex. 1992) (not reasonably anticipated by parties); *Stafford v. Southern Vanity Mag., ?Inc.*, 231 S.W.3d 530, 537 (Tex. App.—Dallas 2007, pet. denied) ("Impossibility of ?performance is not available as a defense to a party by which its voluntary act created the ?impossibility."). ?

Two inquiries will drive the applicability of this doctrine in the context of ? COVID-19: (1) whether a pandemic of

this sort was “reasonably foreseeable” to the parties ?when they executed the contract, and (2) whether any voluntary actions by a party contributed ?to the impossibility. *See id.* The highly factual nature of these issues creates some obvious ?uncertainty, as is evident from conflicting holdings regarding what circumstances are ?sufficiently foreseeable. *Compare, e.g., Centex Corp*., 840 S.W.2d at 953-54 (corporation ?excused from performance because federal bank regulations that could not have been ?anticipated by the parties prohibited paying finder’s fees) *with Houston Ice & Brewing Co. v. ?Keenan*, 88 S.W. 197, 198 (Tex. 1905) (performance on saloon contract not excused by ?supervening change in law, which should have been anticipated). ?

It is also important to note the recent expansion of the impossibility doctrine. Over the past ?several decades, Texas courts have repeatedly diminished the import of the foreseeability ?analysis, suggesting instead a willingness to expand the doctrine’s applicability to a broader array of ?circumstances. *See Centex Corp.*, 840 S.W.2d at 954 (recognizing that, although foreseeability ?is one factor used to decide which party assumed risk of supervening impossibility or ?impracticability, this factor has decreased in importance). Such an expansion has already been ?recognized in several other jurisdictions. *See, e.g., Cape-France Enterprises v. Estate of Peed*, ??29 P.3d 1011, 1017 (Mont. 2001) (“[W]hile impossibility or impracticability is a high standard, ?the application of this doctrine is not limited to cases of literal impossibility, but also ?encompasses impracticability.”). Well-respected legal commentators have noted the ?broadening scope, as well. *See* 6 Corbin, Contracts § 1331, p. 360 (observing that the modern ?doctrine of impossibility of performance is one “invented by the court in order to supplement ?the defects of the actual contract,” in the interest of reason, justice, and fairness); 18 Williston, ?Contracts § 1931, p. 6 (characterizing recent expansion of the doctrine as making it “essentially ?an equitable defense, [which could] . . . be asserted in an action at law”). This trend seemingly ?invites creative claims.?

In conclusion, the novel virus, COVID-19, will require courts to review novel force majeure issues applying decades of precedent and common law doctrines. In contrast, the oil and gas price collapse is a phenomenon that we have all seen before and there ?is developed law addressing these issues. But in either case, you ?should read your contracts, study the enumerated and catchall language, note any? notice requirements, and abide by those requirements.

Visit our COVID-19 Resource Center often for up-to-date information to help you stay informed of the legal issues related to COVID-19.

1. https://www.cnbc.com/2020/01/31/california-and-cdc-officials-confirm-7th-case-of-coronavirus-in-the-us.html.

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