

## FORCE MAJEURE: WHAT IT IS AND WHAT YOU NEED TO KNOW

With the advent of COVID-19, many different types of contracts and business relationships are being impacted. The phrase “force majeure,” which is French for “superior force,” is often discussed as a potential basis for tenants, borrowers, and other parties to a contract to avoid their contractual obligations and provide a potential defense to breach of contract claims. The doctrine is little used and often misunderstood. The following provides a brief outline of issues to consider if force majeure clauses exist in your business relationships.

Force majeure is a contractual clause designed to excuse a party from performance when extraordinary events occur that prevent a party from performing under the contract. Parties are protected for events actually listed in the clause; however, if an event **is not specifically listed**, then it is unlikely that the occurrence of that event will constitute force majeure.

### SAMPLE CLAUSES

#### **No. 1**

“Force Majeure shall include, but not be limited to physical events such as acts of God, landslides, lightning, earthquakes, fires, storms or storm warnings, such as hurricanes, which result in evacuation of the affected area, floods, washouts, explosions, breakage or accident or necessity of repairs to machinery or equipment or lines of pipe.”

#### **No. 2**

“Neither Party A nor Party B shall be liable for any failure or delay in performance of its obligations under this Agreement arising out of or caused, directly or indirectly, by circumstances beyond its reasonable control, including, without limitation, acts of God; earthquakes; fires; floods; wars; civil or military disturbances; acts of terrorism; sabotage; strikes; epidemics; riots; power failures; computer failure and any such circumstances beyond its reasonable control as may cause interruption, loss or malfunction of utility, transportation, computer (hardware or software) or telephone communication service; accidents; labor disputes; acts of civil or military authority; governmental actions; or inability to obtain labor, material, equipment or transportation; provided, however, that in the event of a failure or delay, Party A (i) shall not discriminate against Party B in favor of any other customer of Party B in making computer time and personnel available to input or process the transactions contemplated by this Agreement, and (ii) shall use its best efforts to ameliorate the effects of any such failure or delay.”

### HOW TEXAS COURTS ANALYZE FORCE MAJEURE

Texas courts strictly construe force majeure language and will not imply terms or expand what the parties agreed to. Analysis of force majeure provisions is always a fact specific inquiry, and often turns on how the

particular provision was drafted, the industry in question, and the type of extraordinary event that has occurred.<sup>12</sup>

Force majeure events typically enumerated in contracts include:

- Acts of God<sup>3</sup>, such as severe acts of nature or weather events including floods, droughts, fires, earthquakes, hurricanes, or explosions
- War
- Riots
- Acts of terrorism
- Epidemics or pandemics<sup>4</sup>
- Acts of governmental authorities such as expropriation, condemnation, and changes in laws and regulations
- Strikes and labor disputes
- Certain accidents

Because force majeure analysis is pure contractual interpretation the actual language in the clause controls whether it is triggered by the event. There are therefore no uniform examples of force majeure clauses or elements to a force majeure defense, and courts do not look to common law to define force majeure unless there is an ambiguity in the contract.<sup>5</sup>

“Catch-all” language designed to cover unnamed events in a force majeure clause may also require that the event was still unforeseeable, and the scope of the clause will also be impacted by its location in the contract pursuant to the *Ejusdem Generis* rule.<sup>6</sup>

Texas law does not require reasonable diligence to perform or overcome the event unless the force majeure clause expressly requires such effort.

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<sup>1</sup> “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.)

<sup>2</sup> Clauses excuse non-performance of obligations in cases of circumstances beyond reasonable control of a party or by event which is “unforeseeable at the time the parties entered into the contract.” *Hydrocarbon Mgmt., Inc. v. Tracker Exploration Inc.*, 861 S.W.2d 427,435-36 (Tex. App.—Amarillo 1993, no writ).

<sup>3</sup> However, “[A]n act of God does not relieve the parties of their contractual obligations unless the parties expressly provide otherwise.” *GT & MC, Inc. v. Texas City Ref., Inc.*, 822 S.W.2d 252, 259 (Tex.App.—Houston [1st Dist.] 1991, writ denied).

<sup>4</sup> A pandemic is “prevalent throughout an entire country, continent, or the whole world; epidemic over a large area.” “pandemic.” *Dictionary.com*. 2020. <https://www.dictionary.com/browse/pandemic> (22 April 2020)

<sup>5</sup> Only when the terms are vague do courts look to the common-law. *Zurich Am. Ins. Co. v. Hunt Petroleum (AEC), Inc.*, 157 S.W.3d 462, 466 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

<sup>6</sup> One Texas court 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). That court also held that “[a]pplying the doctrine of ejusdem generis, the general phrase “any other cause not enumerated herein” must be limited to the types of events specified before, i.e., “fire, flood, storm, act of God, governmental authority, labor disputes, [&] war.” *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 186 (Tex. App. 2018), review denied (Aug. 30, 2019) (emphasis added).

## QUESTIONS TO CONSIDER AND ADDRESS WITH YOUR LEGAL COUNSEL

- Is there a force majeure provision in the agreement?
- If so, what types of events does it address?
  - Review the agreement to determine what rights, obligations and remedies exist if extraordinary events occur.
    - Is the force majeure provision applicable to these COVID-19 events? Does it specifically reference diseases, epidemics or quarantines?
    - If not, does the agreement include other events that might apply to the current COVID-19 events, such as acts of God?
  - Does the agreement cover governmental actions related to COVID-19, such as the orders issued by the State of Texas and local governments?
  - Does the agreement include a “catch-all” provision for events beyond the parties’ control and, if so, does this provision follow or precede specifically enumerated force majeure events in the clause?
- Was the event foreseeable?

Contacting your attorney to review the entire contract, including any force majeure language, is the best step anytime you are facing any type of breach issues, including a breach caused by COVID-19.