Parties in oil and gas, oilfield service, and energy infrastructure contracts often utilize Texas law in their contracts. During this time of pandemic and sharp decline in commodity prices, parties might wonder whether the pandemic, government orders, or shortages or interruptions in supply chains will be sufficient to excuse a delay or failure to perform. The answer will depend in large part on the circumstances of the delay or failure to perform, the industry, the contents of the contract, whether the contract contains a force majeure clause, and the particular language used in the force majeure clause.

**Force Majeure Language Is Key**

Texas courts do not apply a common law doctrine of force majeure in the absence of
a force majeure provision in a contract. If there is no force majeure clause, there is no force majeure defense to non-performance. There may be an impossibility of performance (sometimes called frustration of purposes or impracticability of performance) defense available, but that is a separate analysis and is not synonymous with force majeure.

**Review Wording Carefully**

Texas courts will respect the intent of the parties and rely on the language of the force majeure provision.

Most force majeure provisions contain a definition and an enumerated list that the parties agree are force majeure events. Parties may have included limitations on force majeure events such as (1) it must be beyond the reasonable control of the affected party, or (2) an event that is not foreseeable at the time of execution of the contract. However, a court will not imply those limitations if they are not included in the particular force majeure provision.

Force majeure clauses across the industry contain varying degrees of specificity in the enumerated list. Some that are based on international or maritime language where entry into a port is critical may contain language that includes pandemics or quarantines, but many do not. If pandemic or similar language is not included in the listing of particular events, a party may have to rely on “act of God” or “act of a government authority” to claim force majeure as a defense in the face of a pandemic. Under Texas law, an “act of God” must not be caused or contributed to by human intervention. It is difficult to predict whether COVID-19 would be considered an act of God under Texas law, considering the human element involved in the transmission of the virus and, more particularly, the human element (e.g., governmental order) requiring certain closures and supply chain variations that might have contributed to the delay or failure in performance.

Instead, a party may have to rely on “act of a government authority,” although this enumerated event may not apply to work that is considered “essential critical infrastructure” under the advisory list guidance issued by the Cybersecurity and Infrastructure Security Agency or other list of essential businesses exempt from various stay-home orders. And, again, the specific language of the force majeure provision will be important. For instance, is a mere delay in performance excusable but non-performance is not? Does performance have to be literally impossible, or can the government order simply make it impracticable to perform and thus provide an excuse?

**Does a “Catch-All” Phrase Help You?**

Many force majeure provisions include a “catch-all” phrase that defines a force majeure event as “any event beyond the reasonable control of the affected party.” Where this clause is placed in a force majeure provision could affect whether a court will limit its application only to events similar to those in the enumerated list. Texas courts tend to limit the catch-all clauses to “catch” only causes or acts that are similar in kind to those listed before the catch-all phrase. However, the exact wording of your clause, where it is placed in the force majeure provision, and what
types of items are in the list preceding a catch-all phrase will guide the court’s analysis of what the parties intended at the time of contracting.

**Pay Attention to Notice Provisions**

Any notice provisions of the contract may be vital. Care should be taken to observe the notice provisions required to trigger application of a force majeure provision.

**Consider a Change in Law Provision**

Some force majeure provisions include a right to terminate if a force majeure event extends beyond a specified time period. If a force majeure provision contains such a clause, a party may, by asserting a defense to non-performance, provide the other party a right to terminate. Instead, the party should consider whether the contract contains a change in law provision that provides the relief necessary without a risk of termination. Change in law provisions typically provide for compensation for increased costs due to a change in law or an excuse for performance if a change in law prevents performance. These clauses do not typically include a right to terminate except by the party whose performance is prevented by the change in law. A change in law provision could be particularly helpful to critical infrastructure businesses and international companies facing increased costs for crew changes or moving personnel to worksites.

**No Force Majeure Provision Applicable — Consider Impossibility of Performance**

If a party cannot rely on a force majeure provision, all is not lost. A party may still be able to rely on the defense of “impossibility of performance” or “frustration of purpose,” which is recognized in Texas for both goods and services contracts.

In Texas, we are familiar with unprecedented events. With each event, the industries learn — and force majeure provisions are subsequently adjusted to include new terms from these events. We should expect force majeure provisions being negotiated now and in the future to contain “pandemic,” “quarantine,” and similar terms in any enumerated list.

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