

Insights: Alerts

Does the COVID-19 Pandemic Qualify as a Force Majeure Event Under Contracts Governed by Texas Law?

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Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main [COVID-19 Task Force page](#) and/or your email for updates.

Given the recent COVID-19 pandemic and corresponding restrictions to reduce its spread, it is likely that force majeure clauses will play a large role in contract disputes over the coming years. This article is meant to provide a general framework for conducting a force majeure analysis of contracts governed by Texas law. The following key questions will be addressed:

- What qualifies as a force majeure event?
- What are a party's obligations once force majeure is invoked?
- Does the doctrine of impossibility excuse performance if the agreement does not contain a force majeure clause?

The bottom line is that the terms of the agreement and the particular underlying circumstances will dictate whether force majeure may be invoked. Once force majeure is invoked, the agreement and facts of each case will also dictate a non-performing party's obligations, if any, to overcome/mitigate the force majeure event. Further, even if the agreement does not contain a force majeure provision (or if there is no written agreement between the parties), the doctrine of impossibility of performance may provide the non-performing party with a defense to non-performance.

Question 1: What Qualifies as a Force Majeure Event?

Step 1: Does the contract contain a force majeure clause?

A force majeure clause is generally easy to spot. It will typically contain reference to the terms "force majeure" or "act(s) of God." An example of a standard force majeure clause is below:

Force Majeure. Any delay in or failure of performance by either party under this Agreement will not be considered a breach of this Agreement and will be excused to the extent caused by any occurrence beyond the reasonable control of such party including, but not limited to, acts of God such as fires,

hurricanes, floods, or tornadoes or any other cause not enumerated herein but which is beyond the reasonable control of the Party whose performance is affected.

If the contract contains a force majeure clause, proceed to Step 2. If not, then determine whether the doctrine of impossibility of performance is applicable. See Question 3, herein.

Step 2: Does the force majeure clause specifically list the force majeure event?

If a force majeure clause is present, the next step is to determine whether the clause specifically identifies the force majeure event at issue. If so, courts will generally consider the event to be a force majeure event without any additional showing by the non-performing party.

For example, a force majeure clause could list several events that may encompass COVID-19 and its corresponding effects. If the clause specifically lists epidemics, pandemics, quarantines, and/or national or global health emergencies, COVID-19 would almost certainly qualify as a force majeure event. Furthermore, listing “rules and regulations promulgated by a governmental body” may also be sufficient to consider restrictions on travel and large gatherings (all of which were a result of COVID-19) to be a force majeure event.

If the event is specifically listed in the force majeure clause, skip to Question 2. If the event is not specifically listed, proceed to Step 3.

Step 3: Does the force majeure provision contain a “catch-all” clause?

When an event is not specifically listed, force majeure may only be invoked if: (1) the force majeure clause contains a “catch-all” provision and (2) the event was unforeseeable. An example of catch-all language is highlighted below.

Force Majeure. Any delay in or failure of performance by either party under this Agreement will not be considered a breach of this Agreement and will be excused to the extent caused by any occurrence beyond the reasonable control of such party including, but not limited to, acts of God such as fires, hurricanes, floods, or tornadoes or **any other cause not enumerated herein but which is beyond the reasonable control of the Party whose performance is affected.**

If the force majeure clause contains catch-all language such as this, the non-performing party must then show that the event was unforeseeable at the time the parties made the contract. *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 183 (Tex. App.—Houston [1st Dist.] 2018, pet. denied). Texas courts have not expressed a simple rule of law for determining whether an event was unforeseeable, but a review of numerous opinions reveals that certain events will not qualify. For instance, sudden or significant changes in price or fluctuations in the market are generally considered to be foreseeable as a matter of law. *But see, e.g., Kodiak 1981 Drilling P'ship v. Delhi Gas Pipeline Corp.*, 736 S.W.2d 715, 721-22 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.) (holding that a market shift invoked force majeure because the clause specifically listed “partial or entire failure to gas supply or market” as a force majeure event). Conversely, the most common example of an “unforeseeable” event is a weather event. *See, e.g., TEJAS Power Corp. v. Amerada Hess Corp.*, 14-98-00346-CV, 1999 WL 605550 (Tex. App.—Houston [14th Dist.] Aug. 12, 1999, no pet.) (finding that abnormally cold weather invoked force majeure under the clause's catch-all provision, thereby indicating that the event was unforeseeable).

Texas courts have not expressly considered whether a pandemic, such as COVID-19, is considered an unforeseeable event. Opinions from other jurisdictions appear to suggest that COVID-19 would be considered unforeseeable. However, this view may evolve as knowledge of the virus and its potential for long-lasting effects becomes better understood. Given this, parties executing contracts in the coming months should take extra precaution to address the ongoing impacts of COVID-19 and the potential for a recurrence.

If both of the aforementioned requirements have been satisfied, proceed to Question 2. If not, proceed to Question 3.

Question 2: What are a Party's Obligations Once Force Majeure is Invoked?

Step 1: Does the clause expressly list any due diligence/mitigation or notice requirements?

Under Texas law, a party seeking to invoke a force majeure clause is not required to exercise due diligence to avoid, remove, and overcome the effects of force majeure once it occurs. See *Sun Operating Ltd. P'ship v. Holt*, 984 S.W.2d 277, 284 (Tex. App.—Amarillo 1998, pet. denied). As such, a non-performing party has no common law duty of diligence/mitigation absent express language stating otherwise. Even so, the party invoking force majeure should determine whether the contract requires any specific notifications and, if so, provide timely notices.

Step 2: What is required when due diligence/mitigation requirements are imposed?

Because Texas does not have a common law duty of diligence/mitigation, it has become more prevalent to include “reasonable diligence” requirements in force majeure provisions. Such a requirement obligates parties to exercise reasonable diligence to avoid, remove, and/or overcome the effect of the force majeure event. The Texas Supreme Court defined reasonable diligence as “such diligence that an ordinarily prudent and diligent person would exercise under similar circumstances.” *El Paso Field Servs., L.P. v. Mastec N. Am., Inc.*, 389 S.W.3d 802, 808-09 (Tex. 2012). The Court noted, however, that this term is highly subjective and incapable of exact definition. As such, its meaning must be determined by the circumstances of each case.

Texas courts have not established a universal method of determining whether a party's diligence efforts are reasonable because the contract language and surrounding circumstances can vary drastically from case-to-case. However, Texas courts apply one key principle when conducting their analysis: they will not construe a diligence/mitigation obligation in a manner that would alter the terms of the contract or render the force majeure clause meaningless.

Question 3: Does the Doctrine of Impossibility Excuse Performance if the Agreement does not Contain a Force Majeure Clause?

Even if the agreement does not contain a force majeure clause, impossibility of performance may also excuse performance under circumstances such as the COVID-19 pandemic. Texas courts may excuse a party's performance due to supervening circumstances that made performance impracticable or impossible. *Centex Corp. v. Dalton*, 840 S.W.2d 952 (Tex. 1992).

Impossibility, also referred to as commercial impracticability, applies when a party's performance is made impracticable by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made. Texas courts have held that impossibility is not an excuse for nonperformance if the

supervening event might have been reasonably anticipated and guarded against in the contract. In order to discharge performance, the supervening event must develop sometime after the inception of the contract. Examples of such occurrences are governmental orders or regulations. Under these circumstances, impossibility is only a defense as long as the occurrence is actively preventing performance. Impossibility will not excuse performance if the supervening event has terminated. *Walden v. Affiliated Computer Services, Inc.*, 97 S.W.3d 303, 325 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

Texas courts have not expressly considered whether shelter-at-home orders, travel restrictions and construction bans such as those enacted in response to COVID-19 are considered supervening events which can discharge the duty to perform as contracted. Nevertheless, impossibility may be a defense worth pursuing if a contracting party finds itself unable to fulfill its obligations due to emergency local ordinances or statewide orders.

As the unprecedented economic fallout of the COVID-19 pandemic runs its course, the legal impact of force majeure clauses and the impossibility doctrine are certain to play a major role in the outcomes of many and varied contract disputes. Texas courts will face novel legal questions which will flesh out Texas law, and the above framework is likely to evolve in ways that may not yet be foreseeable. In the meantime, we anticipate the above framework will be the likely starting point for the analysis under Texas law of particular contracts and their specific fact patterns.

Our [COVID-19 Task Force](#) stands ready to help you navigate the unique business challenges posed by the pandemic and shelter-in-place orders. If you are interested in discussing a specific area of interest for your business, we recommend you reach out to your primary Kilpatrick Townsend point of contact. General questions may also be submitted via email to #COVID19TaskForce@kilpatricktownsend.com. For Texas-specific questions, you may also contact the attorneys listed below.

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